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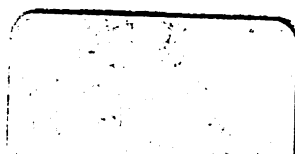
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REPORTS

OF

All the Cases decided by all the Superior Courts

RELATING TO

MAGISTRATES, MUNICIPAL,

AND

PAROCHIAL LAW.

(REPRINTED FROM THE "LAW TIMES" REPORTS.)

EDITED BY

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AND TO

PAROCHIAL AND MUNICIPAL LAW.

ROLLS.]

Re THE PLANET BENEFIT BUILDING AND INVESTMENT SOCIETY.

[ROLLS.]

ROLLS COURT.

Reported by G. WELBY KING, and H. GODEFROI, Esqrs.,
Barristers-at-Law.

July 29 and 30, 1872.

Re THE PLANET BENEFIT BUILDING AND INVESTMENT
SOCIETY.

*Benefit building society — Petition to wind-up —
Withdrawing member — Discretion of the court.*

By the rules of a benefit building society it was provided that any member holding investment shares who should be desirous of withdrawing his investment should be allowed to do so upon giving a month's notice in writing, and that if several members should give notice at one time they should be paid in rotation according to priority of notice. Provisions were also made for the reference of disputes to arbitration.

A., the holder of five investment shares representing 250l., gave the notice of withdrawal. The society had previously received notices from a large number of members of their desire to withdraw their investment shares to the amount of about 350,000l., which sum then remained to be paid.

Subsequently, alterations were made in the rules, and it was provided that payment to withdrawing members of their shares should be made by instalments.

A., not having been paid, at the expiration of the month gave the statutory notice under the 199th section of the Companies Act 1862, and subsequently presented a petition for winding-up the society.

It appeared that the society was perfectly solvent, but that time was required to realise the assets:

Held, that the petitioner as a withdrawing member was in a different position to an outside creditor, and was not entitled ex debito justitiæ to an order for winding-up the society; and the court, in the exercise of its discretion, dismissed the petition with costs.

This was a petition by Mary Emerson, alleging herself to be a creditor and contributory of the

Planet Benefit Building and Investment Society, praying for an order for the winding-up thereof.

The society was established in 1848, and was duly enrolled under the provisions of the Benefit Societies Act (6 & 7 Will. 4, c. 32). The petitioner was the holder of five fully paid-up shares of 50l. each, which she had acquired at various times previously to the year 1860.

The rules of the society, prior to the alterations hereinafter stated, so far as material to the case, were as follows:

XII. Investment shares.—Investment shares shall be of two classes, viz., paid-up or part paid-up shares and subscription shares. Any member may, with the consent of the directors, have allotted to him one paid-up share for every sum of 50l. paid by him, with entrance fee, and shall receive scrips for the same signed by two of the directors and the secretary. Any member may, with the consent of the directors, have allotted to him one part paid-up share by payment of 10l. or more, with entrance fee, to which additions may be made of not less than 5l. from time to time until it shall become of the value of 50l., when it shall be a paid-up share. All investments afterwards made by such member shall be first applied towards making his share a completed or paid-up share, and no member shall hereafter be registered as the proprietor of more than one part paid-up share, except such as have been already issued. As to the latter class, every member shall pay on each subscription share the sum of 5s. per month until such share, with interest and profits, shall be of the value of 50l., when it shall become a paid-up share, and the member's book may be exchanged for scrip accordingly.

XIII. Withdrawals.—Any member desirous of withdrawing his investment shall be allowed to do so on giving one month's notice thereof in writing to the secretary. Any member desirous of discontinuing his subscriptions altogether without withdrawing his investments shall be permitted to do so, provided the same amount to at least £10, on giving one month's notice thereof in writing to the secretary, the investments previously paid, if amounting to £50 and upwards, being allowed to remain as a paid-up share, or as many paid-up shares as shall be equivalent, or, if under £50, as a single part paid-up share of equivalent value, and scrip given in exchange for the subscription book accordingly, subject nevertheless to the provisions of rule 12 as to part paid-up shares. If several members shall give notice to withdraw at one time, they shall be paid in rotation, according to the priority of notice, provided always that the widows

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Re THE PLANET BENEFIT BUILDING AND INVESTMENT SOCIETY.

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and children of deceased members shall have precedence, and after them the holders of paid-up shares. All fines incurred previously to the notice of withdrawal shall be deducted from the amount which the member may be entitled to receive.

XIV. *Interest and profit.*—Interest at the rate of .25 per cent. per annum shall be added to all subscription shares of twelve months' standing, and to all paid-up and part paid-up shares of three months' standing. Shares withdrawn within the above periods shall not be entitled to any interest. All shares of five years' standing (except as next hereinafter mentioned) shall be entitled to an equable proportion of nine-tenths of the profits, which, as to subscription shares, shall be annually added to their value; but no profits shall be allowed on any fractional part of a year. The remaining tenth shall be carried to the credit of a fund to be called the "Reserve Fund," which shall accumulate and be appropriated as the directors may from time to time determine, subject nevertheless to the approval of the ensuing annual meeting.

No profit shall be allowed to any paid-up or part paid-up shareholder in respect of money which has not been invested in the society for at least twelve months.

XVI. *The directors may borrow money.*—As often as it shall be deemed advisable to allot any building share or shares, when there shall not be sufficient moneys in the hands of the bankers to the credit of the society, it shall be lawful for the board to obtain from the bankers or any other person or persons such sum or sums of money as shall be necessary to provide for such share or shares, or fractional parts of shares, and they shall make such application accordingly.

XXIV. *Balloting for shares. Paying off borrowed money.*—Whenever there shall be no application for building shares, the directors shall, in the first place, pay off by ballot all the paid-up shares or fractional parts of paid-up shares granted for borrowed money, and then the board shall determine upon a ballot taking place of all the investment shares; and the board shall pay to such person or persons whom the ballot shall determine liable to receive the share, or shares so to be balloted for, the full value of such share or shares, according to rule 14, and the member shall receive such value accordingly; but in no case shall any person be compelled to take at one ballot more than one quarter of a share for each share that he may hold. The ballot to be taken on the number of the share, and not on the name of the member. Any person having taken the one-fourth part of a share, in pursuance of the ballot, shall not be liable to the ballot for or in respect of such share, until every share liable as aforesaid shall have been balloted for. Previous to such ballot a notice thereof shall be given at the meeting next preceding the monthly meeting at which it shall have been resolved that such ballot shall take place.

XXVI. *New rules, and alterations of rules.*—No rule herein contained, nor any rule hereafter to be made, shall be altered, rescinded, or repealed, unless at a general meeting of the society convened by circular sent to each member, signed by the secretary, stating the object of the meeting, and in pursuance of a requisition addressed to the directors by seven or more of the members of the society, which said requisition and notice shall be publicly read at the two usual meetings of the society to be held next before such general meeting for the purpose of such alteration or repeal; and unless such alteration or repeal shall be made with the concurrence of three-fourths of the members of the society then and there present, no such proposed alterations shall be made.

XXIX. *Reference of disputes to arbitration.*—The board for the time being, or the major part of them, shall determine all disputes which may arise respecting the construction of these rules, or any of the clauses, matters, or things herein contained, and also of any by-laws, additions, alterations, or amendments, which shall or may hereafter arise between the trustees, officers, or other members of the society; and the decision of the board, if satisfactory, shall be conclusive; but if not satisfactory, references shall be made to arbitration pursuant to the 10 Geo. 4, c. 56, s. 27, and at the first meeting of the society after the enrolment of these rules five arbitrators shall be elected, none of the said arbitrators being beneficially interested, directly or indirectly, in the funds of the society. And in each case of dispute the names of the arbitrators shall be written on pieces of

paper and placed in a box, and the three whose names are first drawn by the complaining party or some one appointed by him shall be arbitrators to decide the matters in difference, whose decision shall be final and binding on all parties; and each of the three arbitrators so drawn and attending shall receive 5s. remuneration. The costs of the reference shall be paid by such party as the arbitrators shall direct.

The society carried on a very extensive business. On the 12th July 1872 there were 4028 investing members, whose investments amounted to 832,000l.

The balance-sheet for the year ending the 31st Aug. 1871 showed assets amounting to 1,041,744l. 6s. 11d., and liabilities, including the value of the investment shares, amounting to 1,040,501l. 13s. 7d., leaving a balance of 1242l. 13s. 4d. in favour of the society. After the publication of this balance-sheet, doubts arose as to the solvency of the society, and on the 26th April 1872 the petitioner gave the society notice of withdrawal of her investments, and on the 27th April her solicitors wrote to the society threatening legal proceedings in default of payment. Previously to the 26th April 1872 notices of withdrawal were given by holders of shares to the amount of upwards of 350,000l. At a meeting held on the 2nd May, which had been convened pursuant to Rule 26, a committee was appointed to make alterations in the rules, and certain alterations were accordingly made and certified on the 28th May. They provided that no investment shares should thereafter be issued, and that Rules 13, 14, and 24 should be repealed, and the following rules substituted:

XIII. Any member holding an investment share or shares may give one month's notice in writing to the secretary of his desire to withdraw from the society, and on the expiration of such notice he shall cease to be a member thereof, but he shall be entitled to receive dividends in respect of his investment shares, pursuant to Rule 14, and to be paid the balance of the principal of his investment shares or shares, when the funds of the society will admit of it, in such instalments as the directors may determine.

XIV. Until the income of the society shall be available for the purpose, no payment shall hereafter be made on account of interests or profits, but in the mean time the holders of investment shares shall receive such dividends, according to the amount of their respective investments, and in part payment thereof, as the directors shall from time to time declare; the first of such dividends to be declared on the first Wednesday in August 1872; the second on the first Wednesday in October 1872; and thereafter half-yearly on the first Wednesday in April and October respectively. At least one-half of the annual cash receipts of the society (after deducting all expenses) shall be applied to the payment of such dividends.

XXIV. If any member shall purchase from the society any property in mortgage to the society, the directors shall, if required by him, accept the surrender of his investment shares or any part thereof in satisfaction or discharge, or in part satisfaction or discharge of his purchase money; but no member shall be entitled to any interest on his investment shares so surrendered as aforesaid from the 31st Aug. 1871. If a member shall redeem any property in mortgage to the society, the directors may in their discretion accept the surrender of his investment shares or any part thereof in satisfaction or discharge, or in part satisfaction or discharge, of his mortgage money.

On the 30th May 1872, the petitioner caused a demand in writing, under her hand, to be served on the society, pursuant to the 199th section of the Companies Act 1862, which demand was not complied with; and on the 24th June 1872 this petition was presented, which alleged that the society had practically ceased to carry on its business, or was only carrying it on for the purpose of winding-up, and that it was insolvent and unable to pay its debts, and prayed for a compulsory winding-up.

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Re THE PLANET BENEFIT BUILDING AND INVESTMENT SOCIETY.

[ROLLS.]

There was a considerable mass of conflicting evidence as to whether the society was solvent or insolvent.

It appeared that a large number of the members who had given notices to withdraw their investments had cancelled or withdrawn such notices; on behalf of the society it was alleged that only about one-third of the notices originally given had been withdrawn, whilst on behalf of the petitioner it was alleged that less than twenty who had priority to her insisted on withdrawing, and that the society had assets available for the immediate payment of her claim.

It appeared, from the cross-examination of the persons who had made affidavits on behalf of the society, that the society had received large sums on deposit from the public, which the petitioner alleged that the directors had no authority to do, and that about 120,000*l.* of the available assets of the society had been applied in paying off the depositors before the presentation of the petition.

The society did not owe more than about 1000*l.* to outside creditors, exclusive of costs due to their solicitors; and those debts were for salaries and the current expenses of carrying on the business of the society.

The *Solicitor-General* (Sir G. Jessel), *Fry*, Q.C., and *Whitehorn*, for the petitioner.—The petitioner is a creditor of the society, which is unable to pay its debts. She is not bound by the rules made since the notice of withdrawal was given: *Armitage v. Walker* (2 K. & J. 211). The society is insolvent, as it is unable to pay all the withdrawing members, and that has arisen in consequence of the directors applying 120,000*l.* of the assets of the society in payment to persons who had lent moneys on deposit, for which the directors were personally liable, but for which the society was not liable: (*Richardson v. Williamson* L. Rep. 6 Q.B. 276; *Davis's Case*, L. Rep. 12 Eq. 516; 25 L. T. Rep. N.S. 83). When the petitioner gave the notice of withdrawal the society had sufficient funds to satisfy her demand. It is said that withdrawing members are only entitled to be paid in rotation, according to priority of notice; but that only applies where several persons give notice at the same time. Besides, when the society stopped making payments to withdrawing members they had more than 20,000*l.* stock available. It is also said that the question between the petitioner and the society ought to have been referred to arbitration under Rule 29; but such a rule does not oust the jurisdiction of this court: (*Smith v. Lloyd*, 26 Beav. 507.) The petitioner is a creditor, and the society is unable to pay its debts, which is the only criterion of insolvency, as is shown by the society not complying with the statutory demand: (*Re Queen's Benefit Building Society*, L. Rep. 6 Ch. 815; 24 L. T. Rep. N. S. 346.) The petitioner is entitled to a winding-up order *ex debito justitiae*.

Higgins, Q.C. *Waddy* (of the Common Law Bar) and *Ingle Joyce* (Sir E. Palmer, Q.C. with them), for the society.—The society is perfectly solvent, and will pay twenty shillings in the pound if its assets be judiciously realised; but not if the society is wound-up, and its assets realised under the direction of the court. The petitioner, who is in a humble position in life, has received 168*l.* in bonuses on the 250*l.* which she has subscribed, as well as interest thereon at five per cent. The petitioner is not a creditor, and has no right to give the statutory notice; she is not entitled to be treated

otherwise than as a withdrawing member; her only right is to have the matter referred to arbitration. The 27th section of the Friendly Societies Act (10 Geo. 4, c. 56) is incorporated in the Benefit Building Societies Act (6 & 7 Will. 4, c. 32), and requires that the rules of every society shall provide that every matter in dispute between any society and any individual member shall be referred to arbitration, and the 29th rule of this society was framed in accordance with this enactment. The courts of law and equity have held that the question whether a rule applies, or how a rule is to be construed, is to be dealt with by arbitration, and not dragged into courts of law:

Armitage v. Walker, 2 K. & J. 211;

Wright v. Deeley, 4 H. & C. 209;

Swarbrick v. Williams, Weekly Notes, 1886, p. 70;

Trott v. Hughes, 16 L. T. O. S. 260.

[Lord ROMILLY referred to *The Midland Counties Benefit Building Society* (33 L. J. 739, Ch.)]

That case only decided that a creditor who is not a member of the society may give the statutory notice and wind-up the company. In *Armitage v. Walker* (*sup.*), Wood, V.C. said that a withdrawing member is *pro tanto* a member for the purpose of having his claim allowed, and he is therefore bound by the rules as to arbitration. Even supposing the petitioner were a creditor, the court would not, in the face of the enormous opposition, and having regard to the smallness of the claim, make a winding-up order.

London and Suburban Bank, L. Rep. 6 Ch. 641; 25 L. T. Rep. N. S. 23;

Re The Queen's Benefit Building Society (*sup.*)

The 26th section of the Friendly Societies Act provides that the society is not to be dissolved without the consent of five-sixths of its members. There being a *bonâ fide* dispute as to whether the petitioner is entitled to be paid, the court will not make a winding-up order, and thus allow itself to be used for the purpose of extorting that to which the petitioner is not entitled.

The London Wharfing and Warehousing Company 35 Beav. 37;

The Catholic Publishing Company, 2 De G. J. & S. 116;

The Brighton Club and Hotel Company, 1 W. N. 162;

The Brighton Hotel Company, L. Rep. 6 Eq. 339;

The great majority of the members being adverse, the court will not direct the winding-up of the society, but will dismiss this petition with costs.

Oriental and Commercial Bank, 1 W. N. 289;

Imperial Mercantile Association, 1 W. N. 257.

Roeburgh, Q. C. and *Wellington Cooper*, for 3576 holders of investment shares, on which 809,187*l.* had been paid, opposed the petition.

E. B. Cooper, for 367 members of the society holding building shares, also opposed the petition.

Fry, Q.C. in reply.—The cases of *Kelsall v. Tyler* (11 Ex. 513) and *Fleming v. Self* (Kay 518; 3 De G. M. & G. 997) show that arbitration is only to be resorted to where it is a simple question of construction of the rules, and when full justice can be done between the parties. There is here no dispute as to the construction of a rule; the relief asked for is that which arbitrators could not give. There is no dispute as to the debt being due, and the argument that the machinery of the court is not to be used to enforce a disputed claim has no bearing on this case. All that the society say is that they are entitled to take their own time to pay it, and the court will not refuse to order the winding-up on such a ground.

King's Cross Industrial Dwellings Company, L. Rep. 11 Eq. 149; 23 L. T. Rep. N. S. 585.

ROLLS.]

Re THE PLANET BENEFIT BUILDING AND INVESTMENT SOCIETY.

[ROLLS.]

Rosburgh, Q. C. in reply as to Kelsall v. Tyler.

LORD ROMILLY.—This is a petition presented by a member of a benefit building society praying the benefit of the 13th rule of the society, which entitles any person who retires to be repaid what he has paid towards the society in a certain rotation. The application is made under a sub-section of the 199th section of the Companies' Act 1862. In considering that Act, I make a great distinction between what I call an outside creditor and a creditor who is a shareholder in the company; and I do not think that the 199th section of the Act, when it gave a power to a creditor to call upon a company to pay him, or if not, to admit that they were insolvent, was intended to apply to any case where one member of the company called upon the directors to pay him in respect of some rule of the society itself. Such a demand necessarily involves the functions not only of directors, but of all the officers of the company, and, in point of fact, opens all the management and the rules of the company; and those are the very things which let in the operation of the arbitration clauses. If this application had been made by an outside creditor of the company—if the company, for instance, had applied to A. B., a cabinet maker, holding no shares in the company, to make a certain number of tables and chairs for the company, and had refused to pay him—then unquestionably, in my opinion, he might come under the 199th clause, and serve the company with a notice to pay him the amount they owed him, and that if they did not pay it he should present a petition against them. But I do not think this applies to the case of a person who is a shareholder of the company, and who therefore applies under the 13th section, which only enables those persons to be paid who have applied, and to be paid in rotation. I think, also, it is very important in dealing with this case to consider what the effect of a winding-up order would be; for there is no right which I consider more clear than that which the court has of exercising its discretion and judgment with respect to the effect of winding-up a company. If it had been a question solely about the arbitration clause—if it had been a question solely about the shareholder being a creditor or not—I probably should have required some little more time to consider it; but I am clearly of opinion that the facts are unfavourable to the petitioner's claim upon this occasion, and that the court, upon the evidence before it, ought not to make the order which is prayed for. I will state a little more fully why I have come to that conclusion. In the first place, it was strongly urged that, though there were many persons who were prior to the petitioner, yet that those persons had all withdrawn, and that by so doing they had put the petitioner in the situation of being one of twenty persons only who sought to retire, and that the company had ample assets to meet their claims. I think that it is not reasonable or fair to say that these persons, who had withdrawn their notices upon the footing of an arrangement, were to be bound by that arrangement, though the terms of it were that the company should be carried on amongst them in a manner approved of by the directors, which was totally inconsistent with the winding-up of the company. If so, it would be difficult to say that the petitioner is entitled to be paid in priority to all those members who had only retired in consequence of an

arrangement which they believed would be binding upon everybody, but which was not entered into with the petitioner herself. But the thing which has struck me most is, that I am satisfied that the company is perfectly solvent. About that I entertain no doubt whatever, and I believe the statements made in the affidavits of the solicitor and the chairman alike, that if time is given to the company to realise its assets, it will be found that the assets of the company amount to a million, or something like that. But the assets of the company consist of property which is of a nature almost necessarily belonging to a building society, that is to say, unfinished houses, and house property more or less finished, mortgaged to the building society. It is, no doubt, justly observed that a person cannot say to a creditor, "I shall be perfectly solvent if you give me time to realise all the assets, but I cannot pay you now." That is a just observation if it is applied to an outside creditor—if I may use that expression with respect to a person not being a shareholder, but a simple creditor of the company—because you ought not to have embarked in such speculations or entered into such contracts unless you can pay the person with whom you dealt. But that is not this case. This is the case of one of the shareholders of the company who tries to convert herself into a creditor by giving notice of withdrawal, and, in fact, does by that means attempt to gain a priority over a great many other persons who had previously given notice to retire from the company. I doubt very much whether it is a reasonable or fair thing to use the power of this court for the purpose of carrying such a project into execution. Then it is stated that the petitioner did not forcibly bring this matter before the court until she had given the society notice by her solicitors, that if they could come to some amicable arrangement there was no need of bringing it forward, and if not a petition would be presented. That is true, but that suggestion simply amounts to this: "If you choose to pay me my claim, the petition will be dropped." But the court ought not to be made the instrument of one of the shareholders of a company, whether a benefit building society or any other, for the purpose of gaining a priority over the other shareholders, by means of putting in force certain rules of the Companies Act or the rules of the society intended for a different purpose; and the court will then consider what it can do which will produce the greatest fairness and equity to the whole. One of the leading principles of equity is equality, to treat all persons alike, and that they should all, as nearly as possible, be put in the same situation. But what would be the effect if I made this winding-up order? I suppose the effect would be that the respondents would go to the petitioner and say, "Here is your money—withdraw the whole matter; it will be much better for us to pay your claim and the costs of the petition than allow the winding-up order to go." I feel satisfied of this without considering the circumstance, which is a very pregnant one, that there are upwards of 3000 members of the society, with about 800,000*l.* of capital, who appear and resist any order being made upon the petition; and though it is quite clear that this matter has been made very public, and is very well known to all the world who have an interest in the society, there is not one who appears to

support the petition. It happens very rarely indeed that the petitioner is not able to get some persons to support his view of the case; but there is not one shareholder—nay, more, there is not a single creditor of the company—who comes forward to support this petition, though it appears from the affidavits that they owe about 1,000,000*l*. I am not at all pleased with this view of the case. I am satisfied that the petition is only presented by this lady, in order to enforce the payment of what in fact is due to her, and which she desires to have paid to her at once, contrary to the rules, under which she would not be paid for some time. I do not think the rules are illegal. That being the case, if she adopted the course I supposed I must look at what the consequence would be of winding-up this company. If I made the order, the wisest thing, as I have already said, would be to buy her off, and to pay whatever would be necessary for that purpose; but it would be a very unwise thing for the Court of Chancery to allow itself to be made, to use a vulgar expression, a species of cat's-paw for persons to use for the purpose of getting something that they are not fairly entitled to. Unfortunately, my experience of winding-up companies is very great, and I find that in many of these companies, after they have got into chambers, it has been said: "Well, the assets are nothing, or so small that the official liquidator and the solicitor cannot be paid in full; so they had better divide what property there is between them, and put an end to the whole matter." That is an exceedingly unsatisfactory state of things, and it is very unwillingly that this court would lend itself to such a result, even though it might be done perfectly fairly and honestly. That would not be the result here, for we have got, as I think, property of very nearly the value of a million, which would have to be realised. But in such cases the litigation and costs are enormous. In the first place, I should have to appoint a liquidator. Then I should have at least two, probably three or more, suggested as official liquidators. A prize of this magnitude would not be allowed to go uncontested; and after that had been settled, I should have to get a list of all this property, which would have to be gradually realised. And in the meantime all the persons who are shareholders in this society—all the persons who have been receiving dividends—all the persons who have been receiving bonuses—all those persons to whom they now propose to pay an instalment upon their shares from time to time—would not get a single penny; and probably there would be a large balance or dividend to be paid to them after five or six years of winding-up at an enormous expense. The Lords Justices have said it is the duty of the court in these cases to consider what is for the benefit of the large classes of persons with whom we have to deal in matters of this description. I feel it is incumbent upon me to do so, and I feel a strong repugnance to these cases where I am obliged to allow an enormous distribution of costs out of property which ought to be divided between the shareholders or creditors. I think the petition is ill-advised, and was presented for the purpose of obtaining an undue advantage, and I think it my duty to dismiss it with costs.

Solicitors, *Lewis, Munns, and Longden, for Oliver and Botterell, Sunderland; Ingle, Cooper, and Holmes.*

V.C. MALINS' COURT.

Reported by G. I. F. COOKE, T. H. CARSON, and F. GOULD, Esqrs., Barristers-at-Law.

Friday, Nov. 22, 1872.

YOUNGE v. SHAPER.

Ancient lights—Purposes of user—Interlocutory application—Mandatory injunction.

The right conferred or recognised by 2 & 3 Will. 4, c. 71, is an absolute indefeasible right to the enjoyment of the light without reference to the purpose for which it is used.

Mandatory injunction granted on an interlocutory application, the defendant against whom it was sought failing to show that the buildings he was erecting would not materially interfere with the plaintiff's ancient lights.

Yates v. Jack (L. Rep. 1 Ch. 295; 14 L. T. Rep. N. S. 151) followed.

THE plaintiff was the owner of three messuages on the west side of Water-lane, in Sheffield, the first of such messuages having its larger frontage in Water-lane, the second and third having their only frontages in Water-lane. In each messuage were one or more ancient lights. The defendant was the owner of property on the other side of Water-lane, immediately opposite to that of the plaintiff. The width of Water-lane in this part was 13 or 14 feet. The defendant's property consisted of a house and shop, and (adjoining the rear of the house and shop lower down Water-lane) two low buildings. The height of the house and shop on the Water-lane frontage was from 40 to 45 feet, and the height of the adjoining low buildings reckoning to the eaves was from 19 to 24 feet.

Towards the close of the year 1871 the defendant pulled down the house, shop, and low buildings, and early in the year 1872 began to erect a new building on the site, which was intended to be a large hotel. The plaintiff discovered that the new building which would be immediately opposite his premises would be of a height varying from 76 to 65 feet, and would seriously diminish the light and air which he had formerly enjoyed; and accordingly, on the 14th Oct. 1872, filed a bill against the defendant praying that he might be restrained from erecting or suffering to remain erected upon his land any wall, erection, or building of greater height than the former building. At the time of filing the bill the defendant had already erected a wall which was in some parts several feet higher than the old buildings had been.

An interim injunction having been already granted, the plaintiff now moved to continue it.

It was evident from the model produced that there would be a material diminution of light if the defendant's proposed buildings were erected, but evidence was produced on the defendant's part to show that for the purposes for which the plaintiff was using his property no great amount of light was required.

Glasse, Q.C. and Ince for the motion, as to the question of light, referred to *Yates v. Jack* (L. Rep. 1 Ch. 295; 14 L. T. Rep. N. S. 151), and, as to granting a mandatory injunction to *Durell v. Pritchard* (L. Rep. 1 Ch. 244; 13 L. T. Rep. N. S. 545.)

[*Higgins, Q.C., amicus curiæ*, mentioned *Beadell v. Perry* (L. Rep. 3 Eq. 465; 15 L. T. Rep. N. S. 345).]

V.C. W.]

ROBINSON v. GRAVE.

[V.C. W.]

Cotton, Q.C. and W. S. Owen for the defendant, submitted that, although the plaintiff's light would be to some extent interfered with, there was still light enough for the use to which he put the premises, and that it was not a case for injunction, but for damages. They also submitted that a mandatory injunction would not be granted upon the interlocutory application.

The VICE-CHANCELLOR, without calling for a reply, said: My opinion is that the plaintiff is entitled to the injunction which he asks. Lord Cranworth, in his judgment in *Yates v. Jack*, says, "I desire, however, not to be understood as saying that the plaintiffs would have no right to an injunction unless the obstruction of light were such as to be injurious to them in the trade in which they are now engaged." This is applicable to the argument I have heard to-day, because it is said the plaintiff is using his ancient lights for purposes not very important at present, and therefore the defendant has a right to darken them. Then Lord Cranworth continues: "The right conferred or recognised by the statute 2 & 3 Will. 4, c. 71, is an absolute indefeasible right to the enjoyment of the light, without reference to the purpose for which it has been used. Therefore, even if the evidence satisfied me, which it does not, that for the purpose of this present business a strong light is not necessary, and that the plaintiff would still have sufficient light remaining, I should not think the defendant established his defence unless he had shown there would be no material interference with it." His Honour then continued: His lights are indisputably ancient lights; and, although it does appear that he is not turning the rooms to much account at present, I am bound to assume that he has a right to use those rooms at any time, and that his right is not limited because he does not use them for any particular purpose at present.

His Honour then granted a mandatory injunction.

Solicitor for the plaintiff, *E. H. De Rhee Philipe*, for *Wilson, Younge, and Nixon*, Sheffield.

Solicitor for the defendant, *Dobinson and Geare*, for *W. and B. Wake*, Sheffield.

V.C. WICKENS' COURT.

Reported by EDWARD WINSLOW and HENRY GODEFROI, Esqrs
Barriers-at-Law.

Dec. 17 and 18, 1872.

ROBINSON v. GRAVE.

Light and air—Derogation from grant—Grant of easement by implication.

A general grant of land, with an intimation by the purchaser of an intention to build, creates a legal easement of light and air, and gives the right to prevent the subsequent obstruction of light by subsequent purchasers of neighbouring land of the same grantor.

In 1854 a conveyance was executed of land contracted to be sold in 1852; between those dates houses were erected:

Held, that the conveyance conferred on the purchaser the right to light sufficient for the windows in the houses so erected, and to an injunction to restrain interference with it by purchasers, subsequent to the contract, of neighbouring land.

The object of this suit was to prevent the defendant from obstructing, by the erection of any temporary

means, or of buildings or works, in such a manner as to darken, injure, or obstruct windows in a block of buildings belonging to the plaintiffs, and from interfering with the free access of light and air to such windows as the same had been enjoyed previously to the purchase by the defendant of the land on which he had so intended to make the erections complained of.

The facts, as stated by the bill, were as follows:

Richard Knubley in 1850, became entitled in fee to certain hereditaments situate in Portinscale, in the county of Cumberland, consisting of a smithy, a cottage attached to a joiner's shop and ware rooms, and another cottage. These premises were bounded on the north by a close of land, then belonging to a Mrs. Turner, called "The Parrock," on the south by the turnpike-road, on the east by a road or path leading into "the Parrock," and on the west by a dwelling-house.

The premises so conveyed to Knubley were lighted on the north and east by some ancient windows overlooking the "Parrock" and the path leading into it.

In 1852, Knubley, who intended to build some new houses and to pull down the joiner's shop and ware rooms and one of the cottages, was requested by the road trustees to set the line of his buildings some feet back to the north so as to enable them to widen the road to that extent. Knubley then for this purpose entered into a verbal agreement with Mrs. Turner for the purchase for 22l. of an additional strip of land, part of "the Parrock," running along the south side of it, and thus forming the northern boundary to the whole of the premises purchased by Knubley in 1850.

In 1853 Knubley had erected a block of four houses in a row, three stories high, having given up a piece of land on the south side of his property, of the depth of 6ft., to the road trustees. The houses stand upon part of the strip of land purchased of Mrs. Turner in such a manner that the north or back wall stands altogether upon it, and the eaves on the north side project beyond it about 12in., extending to the extreme northern boundary of the strip of land. The northern windows, eighteen in number, thus overlook the "Parrock." The eastern windows, five in number, overlook the pathway leading into the "Parrock." These windows have not been altered since 1853, nor, except by the defendant, has the enjoyment of light and air through them been interrupted since that time.

The bill then contained an allegation that Mrs. Turner was fully aware of the object and intentions of Knubley in purchasing the strip of land, and of the kind and forms of the houses to be erected upon it, as well as of the windows to be made in them. Her son, who had been brought up to the legal profession, had in fact watched the progress of the buildings and had given instructions to Mr. Ansell, Mrs. Turner's solicitor, for the preparation of a conveyance of the strip of land. This conveyance was dated the 20th April 1854.

In Oct. 1867 Knubley mortgaged the premises (*inter alia*) to one Amos Robinson for 1500l.; and in May 1869 the mortgagee entered into possession.

Amos Robinson died in 1870, having devised his trust and mortgage estates to the plaintiffs, the executors of his will, who at the time of the filing of the bill were in possession of the premises as mortgagees.

V. C. W.]

ROBINSON v. GRAVE.

[V. C. W.]

In 1867 the defendant Grave purchased from Mrs. Turner the remainder of the "Parrock" in fee simple.

In the spring of 1869 Grave proceeded to build on "the Parrock," and finished some houses on the north side of it, which did not interfere with the plaintiff's light and air; but he further intended to erect some houses on the south side in such close proximity with the plaintiff's block that the back walls of such houses would stand at a distance of 24 in. from the back of the plaintiff's houses; and the plaintiff alleged that such buildings would almost entirely block out the light and air of the eighteen north windows, and render the houses uninhabitable.

In March 1869, Grave also built a shed so near the plaintiff's north wall as to enclose two of the windows, and placed heaps of stones, which interfered with the light of some of the other windows; but the shed and the stones were in December of the same year removed under a threat of proceedings.

In Oct. 1870, Grave began to make a flower border against the plaintiff's north wall, with the soil resting against the wall, and he laid planks and stone slabs across the five basement windows to keep the soil from the window frames.

At the end of the year 1870, Grave, in order to try the right as to the obstructions, completely blocked out the light from all the eighteen north windows and the five east windows.

The present suit was authorised to be instituted by an order in a suit to administer the estate of Amos Robinson. The plaintiffs contended that Mrs. Turner had granted either expressly or by implication to Knubley, his heirs and assigns, the easement of light and air through the twenty windows in the walls erected on the land conveyed to Knubley by the deed of the 20th April 1854; and that, as to the remaining three windows, Mrs. Turner and every one claiming the "Parrock" through her had, by her acquiescence in the erection of the buildings and opening of the windows entered into an implied covenant, which equity would enforce, not to interfere with the passage of light and air through such windows.

The plaintiffs further prayed for damages in consequence of the loss which would accrue to them by the act of the defendant in making the houses unfit for the use of tourists who occupied them when visiting the lake district.

Grave's answer stated that the whole extent of the strip of land bought of Mrs. Turner was 110 yds.; that Grave had married Mrs. Turner in 1857, she having in 1852 conveyed the remainder of the "Parrock" to a trustee for a term of ninety-nine years to secure an annuity of 250*l.* for the daughter-in-law of Mrs. Turner; that the owners of the block of houses had never acquired a legal right to light and air through the windows; that Mrs. Turner did not know of Knubley's intention to build; that the conveyance of the 20th April 1854 did not confer any easement of light and air, and was simply for the performance of the contract of 1852 and to clothe the equitable interest under that contract with the legal title; and the defendant claimed to obstruct the light and air in any manner he pleased.

Greene, Q.C. and Plummer for the plaintiffs.—We claim the right to enjoy the buildings and easements now to the same degree as when we obtained the grant from Mrs. Turner; and we

contend that she cannot derogate from her grant after she has stood by and allowed us to build, though the act is by subsequent grantees from her of neighbouring land:

Crossley v. Lightowler, L. Rep. 2 Ch. 478;
Pyer v. Carter, 1 H. & N. 916.

Here the case is stronger, since our right is prior to Grave's acquired title:

Ewart v. Cochrane, 4 Macq. 117;
Canham v. Fisk, 2 C. & J. 126;
Swansborough v. Coventry, 9 Bing. 305.

But even where purchases are made at the same time that will not prevent the right from accruing:

Coutts v. Gorham, Moo. & Malk. 396;
Palmer v. Fletcher, 1 Levinz. 123;
Glave v. Harding, 27 L. J. 293, Ex.;
Crompton v. Richards, 1 Pries, 27;
Hall v. Lund, 1 H. & C. 676;
Cotching v. Bassett, 32 Beav. 101.

[The VICE-CHANCELLOR referred to *Tapling v. Jones* 11 H. L. Cas. 296.] We also rely, as to the right accruing by acquiescence, upon *Powell v. Thomas* (6 Hare 300), but that was an interlocutory application; and on

Davies v. Marshall, 10 C. B., N. S., 697;
Davis v. Sears, L. Rep. 7 Eq. 427;
Bankart v. Tennant, L. Rep. 10 Eq. 141.

The annuity deed of 1852 does not affect Mrs. Turner's title, since it is voluntary and contingent, and in the deed itself our property is excepted. They also cited

Gale on Easements, p. 106 *et seq.*;
Goddard on Easements, p. 76;
Watts v. Kelsey, L. Rep. 6 Ch. 166;
Ramsden v. Dyson, L. Rep. 1 H. L. Cas. 129.

Dickinson, Q.C. and *Fischer*, Q.C. for the defendant Grave.—The plaintiff's claim is to an easement over the defendant's property, and all we say that they can claim is a right to get lateral and perpendicular light, but not the right of access of light from their neighbour's premises:

Harbidge v. Warwick, 3 Ex. 552;
Blanshard v. Bridges, 4 A. & E. 176.

Primâ facie an easement must be by grant, unless there is a clear intention to create one by agreement between the parties. Even if Mrs. Turner knew that Knubley was going to build, she was ignorant that he intended to build right up to his boundary. There cannot be an implied intention to create a dominant tenement. What was done could not be prevented by Mrs. Turner, and *Cotching v. Bassett* does not go so far as to say in such a case the right may arise. The conveyance is only to clothe the purchaser with the legal title. [The VICE-CHANCELLOR asked for an authority deciding how far the proximity of a house to the boundary affects the question of support. His Honour referred to *Caledonian Railway Company v. Sprot* (2 Macq. 449)]. That was not a case of light and air. An easement must be created by express grant or re-established after suspension by unity of possession:

Langley v. Hammond, L. Rep. 3 Ex. 168;
Thompson v. Waterlow, L. Rep. 6 Eq. 36;
Elliott v. North-Eastern Railway Company, 10 H. of L. Cas. 383.

Arthur Dixon, for the remaining defendants, the representatives of the mortgagor, Richard Knubley, asked for their costs, but His Honour refused to make any order as to such costs.

The VICE-CHANCELLOR (without calling for a reply) said, it seemed to him that on general principles a grant made expressly to a grantee who declares his intention to build a house creates a legal easement, or a right to enjoy the light neces-

Q. B.]

SWINDON CENTRAL MARKET COMPANY (LIMITED) v. PANTING.

[Q. B.]

sary to the house. Where there is no notice of the intention an equitable right co-extensive with the legal right would arise. The rights were in fact the same; the remedies are obtainable in different courts. In this case His Honour thought that he must take it that Mrs. Turner knew that Knubley was going to build six feet further back than the original northern boundary. It seemed to him that when in 1852 Mrs. Turner contracted to sell to Knubley the land upon which he was about to place the houses, she made a grant of as much light as was necessary for the enjoyment of the house, i.e., in their new position, 6ft. north of Knubley's original boundary. This affected Mrs. Turner's rights over the rest of the "Parrock" retained, over which a servitude was thus created. She could not, therefore, afterwards block up all the light to the north. Knubley then having built much further to the north than he originally intended, but without any warning from Mrs. Turner, her right to interfere with his lights subsequently, was destroyed. In 1854, the conveyance to Knubley was executed, and it has been argued that no easement was granted by it. But His Honour could not doubt that if there had been no obligation on Mrs. Turner to execute that deed, the grant of the land would have conferred on Knubley the right to light sufficient for the existing windows on the plaintiff's land. This was decided in *Palmer v. Fletcher* (1 Levinz, 122), and in a long series of subsequent cases. In point of fact, Mrs. Turner was not bound to execute any deed that conferred any rights she had not contracted to confer. On the face of it the deed of 1854 was a grant for value of the land with the buildings upon it. It was difficult to see why the deed should not operate in the way in which it purported to do. That being so, the plaintiffs were entitled to the decree they asked, and His Honour gave a perpetual injunction against causing any obstruction of the free access of light and air to the plaintiff's windows as the same were enjoyed in April 1852, with an inquiry as to damages.

Solicitors for the plaintiffs, *Thomas Speechly*, for *Hayton and Simpson*, *Cockermouth*.

Solicitors for the defendants, *Chester and Urquhart*, for *Waugh*, *Cockermouth*.

COURT OF QUEEN'S BENCH.

Reported by J. SHORTT and M. W. McKELLAR, Esqrs.
Barristers-at-Law.

Tuesday, Nov. 12, 1872.

SWINDON CENTRAL MARKET COMPANY (LIMITED)
v. PANTING.

Market—Open street—Stallage for cattle—Claim upon vendor.

Charles I. granted by letters patent to the lord of the manor of Swindon, his heirs and assigns, full and absolute licence and authority to hold a market within the town of Swindon, with all liberties and free customs, tolls, stallage, picage, fines, and all other profits, commodities, and emoluments, whatsoever to such market appertaining. In 1866 the then lord of the manor of Swindon, being seised of and entitled to the rights granted by Charles I., demised to the plaintiffs for twenty-one years all the tolls, rates, dues, and duties arising and to be collected and received at the said Swindon market. The market is held

in the public street, and no stalls or pens have ever been erected for the standing or separation of the cattle. Up to the time that plaintiffs acquired their rights in 1866 no payment was ever demanded except upon the sale of cattle, when a small sum was paid per head either by the buyer or the seller. The plaintiffs made a charge upon the vendors for stallage upon all cattle brought to the market in lieu of the tolls charged on the sale thereof.

Held, in an action against a vendor of cattle to recover this stallage, that the plaintiffs had no right to make such charge.

THIS was an action brought by the plaintiffs against the defendant to recover certain sums of money, alleged by the plaintiffs to be due to them as farmers and proprietors of a certain market from the defendant as and for stallage or other market tolls in respect of certain cattle brought by the defendant into and exposed by him for sale at the said market. By consent of the parties, and by order, there had been stated without pleadings for the opinion of the court the following case:

King Charles I., on the 20th July, in the second year of his reign, by his letters patent, granted to one, Thos. Goddard, his heirs and assigns, full and absolute licence, liberty, power, faculty, and authority to have, hold, and keep within the town of Swindon, in the county of Wilts, and the liberties and precincts thereof, a market on the Monday in every week for ever, and also two fairs or feasts yearly for ever, the first of such fairs or feasts to be held on the second Monday in May, and the second on the second Monday in December, and to continue throughout the whole of such two days together, with a court of pie-powder there to be held during the times of the said market and fairs or feasts, and with all liberties and free customs, tolls, stallage, picage, fines, amerancements, and all other profits, commodities, and emoluments whatsoever to such market and fairs or feasts and court of pie-powder appertaining, arising, happening, contingent or in any manner belonging, provided always that the inhabitants of the said town and parish of Swindon should be for ever quit, acquitted, and discharged from all stallage, picage, and tolls whatsoever.

On the 7th Aug. 1866, Ambrose Leatheridge Goddard being then Lord of the Manor of Swindon (within which the town of Swindon, its liberties, and precincts lie), and seised of the soil on which the said market always has been held, and possessed of and entitled to all the rights granted as hereinbefore mentioned, by King Charles I., demised to the plaintiffs for twenty-one years all the tolls, rates, dues, and duties arising and to be collected and received at the said Swindon market.

The said market has always, within the memory of living witnesses, been and still is held in and upon the public street of the town of Swindon, and in a place adjoining thereto known as the Square or Market-place, and during the same period no stalls, pens, or other erections have ever been erected or provided by the Lord of the Manor or his lessees for the standing, securing, or separation from each other of the cattle brought into such market; but the same stand on the public street as they are driven upon it, until driven away.

It may be assumed that the market has been held continuously from the time of the said grant to the present time, and that prior to the month of September 1866, within the memory of living witnesses, no toll, rate, rent, due, or duty has ever

Q. B.] SALISBURY v. BONTEMS, &c.; BEAUCHAMP v. THE OVERSEERS OF MADRESFIELD. [C. P.]

been demanded from or paid by any person bringing cattle into the said market for sale or selling the same there; but upon a sale of such cattle in the said market, and not otherwise, a certain sum per head of such cattle as may be sold has been demanded from and paid, sometimes by the vendor but generally by the buyer of the said cattle, to the Lord of the Market or his lessees.

In the month of September 1866, the directors of the market company determined to charge stallage in lieu of the tolls charged on a sale thereof, and they posted throughout the said market lists of tolls for cattle brought to or exposed for sale at the said fairs and markets. No one objected to pay such tolls mentioned in such lists until the defendant refused payment,

On Monday, the 8th April 1867, the defendant (not being an inhabitant of the said town or parish) brought into and exposed for sale in the said market, so held as aforesaid, nineteen oxen, cows, and heifers, one bull, and six calves, whereupon the plaintiffs demanded, as and for stallage or tolls for the same, according to the said printed list, 2d. per head for the said oxen, cows, heifers and bull, and 1d. per head for the said calves, a sum in the whole amounting to 3s. 10d.; and the defendant refused, and still refuses, to pay the said sum, or any part thereof. On the same day the defendant sold in the said market, fourteen of the said oxen, cows, and heifers, the said bull, and the said calves, but neither the defendant nor the buyers of any of them paid any tolls in respect of such cattle or the sale thereof; and the defendant, though repeatedly applied to for the said tolls, alleged to be due and payable in respect of such said cattle, after the sale thereof, both on the said market day and on a subsequent market day, refused to pay any tolls in respect of such cattle, or the sale thereof; nor did the buyers of such cattle pay, or offer to pay to the said collector, any tolls in respect of such cattle sold by the defendant; and the collector, being unable to ascertain who such buyers were, could not make any demand on them in respect of such tolls.

On Monday, the 13th May 1867, the defendant brought into and exposed for sale in the said market so held as aforesaid twenty cows and heifers and four calves, whereupon the plaintiffs demanded as and for tolls for the same according to the said printed list 2d. per head for the said cows and heifers, and 1d. per head for the said calves, a sum in the whole amounting to 3s. 8d., and the defendant refused and still refuses to pay the said sum or any part thereof. On the same day the defendant sold the said cows and heifers and calves in the said market, but neither the defendant nor the buyers, or any of them, paid any tolls whatever in respect of such cattle or the sale thereof. And the defendant, though applied to for the tolls claimed to be due and payable in respect of such cattle after the sale thereof, refused to pay any tolls in respect of such cattle or the sale thereof.

The plaintiffs contend that they are entitled to claim the said stallage or tolls from the defendant in respect of and upon his bringing the said cattle into the said market, or, at all events, in respect of such cattle as were sold by the defendant in the said market; the defendant contends that he is not liable to pay any sum as and by way of stallage at all.

The question for the opinion of the court is

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whether the plaintiffs are right in their contention or the defendant is right in his contention.

If the court should be of opinion that the plaintiffs are right, judgment is to be entered for the plaintiffs for 7s. 6d., or such other sum as the court may direct, with their costs of suit; if the court should be of opinion that the defendant is right, then judgment is to be entered for the defendant with his costs of defence.

Pollock, Q.C. (with him *Griffiths*), argued for the plaintiff.—At common law, tolls are payable by the buyer (2 Co. Inst. 58), so the question here is whether the plaintiffs can recover for stallage against the seller of cattle. They should be entitled, because they provide a place for defendant's cattle to stand upon. A man may be entitled to have toll by prescription or grant; and if the king grants a fair or market, he may also grant to the grantee to take a reasonable sum for toll; and the grant will be good, though the charter does not express the sum in certain: (Com. Dig. tit. "Toll" E.) The duties usually paid at a fair or market are toll, stallage, picage, &c.; stallage being a duty for the liberty of having stalls in a fair or market, or for removing them from one place to another; picage being a duty for picking holes in the lord's ground for the posts of the stalls: (Com. Dig. tit. "Market" F. 3.) In *Brooke's Abridgment*, tit. "Toll" pl. 2, it is stated that although the vendor does not pay toll, he must pay "*pur son lieu et son standing*." [*BLACKBURN, J.*—That is for a special place for his own standing. Here there appears to be no specific place for any particular person.] There is a marked distinction between tolls and stallage:

Rees v. Bell, 5 M. & S. 221;

Roberts v. Overseers of Aylesbury, 1 E. & B. 423;

Bosworth's Anglo Saxon Dictionary, "Stall;"

Spelman's Glossary, "Stallangiator."

[*COCKBURN, C.J.*—The case of *The Mayor of Northampton v. Ward* (2 Stra. 1238) is against you. There the court were all of opinion that the placing a stall in a market was a right to be acquired by compensation, but that every person had of common right a liberty of coming into a public market for the purpose of buying and selling.]

Lopes, Q.C. for the defendant was not heard.

The COURT (*Cockburn, C.J. Blackburn and Quain, JJ.*)—We have no doubt this is not stallage.

Judgment for defendant.

Attorney for plaintiff, *Jas. Crowdy*, for *Townsend and Ormond*, Swindon.

Attorneys for defendant, *Few and Co.*, for *Bradford and Foote*, Swindon.

COURT OF COMMON PLEAS.

Reported by H. H. HOCKING and H. F. POOLEY, Esqrs.,
Barristers-at-Law.

Wednesday, Nov. 13, 1872.

REGISTRATION APPEALS.

THE MARQUIS OF SALISBURY (app.) v. BONTEMS (resp.); THE SAME (app.) v. THE OVERSEERS OF SOUTH MIMS (resps.); THE SAME (app.) v. BULWER (resp.).

EARL BEAUCHAMP (app.) v. THE OVERSEERS OF MADRESFIELD (resps.).

Peer of the realm—Incapacity to vote.

A peer of the realm is, in respect of his peerage, subject to a legal incapacity to be registered as an elector to vote at the election of members of Parliament.

C. P.] SALISBURY v. BONTOMS, &c.; BEAUCHAMP v. THE OVERSEERS OF MADRESFIELD. [C. P.]

ON appeal from the revising barrister for the county of Hertford, the following case was stated :

At a court for the revision of the list of voters for the parish of Bishop's Hatfield, in the county of Hertford, holden, &c., before, &c., appeared the Most Honourable Robert Arthur Talbot Gascoyne, Marquis of Salisbury, by attorney, and claimed to be inserted in the register of persons entitled to vote in the election of a knight or knights of the shire for the said county of Hertford, in respect of property situate within the said parish of Bishop's Hatfield.

The following is a copy of the claim sent to the overseers of the said parish of Bishop's Hatfield by the said Marquis of Salisbury : "I hereby give you notice that I claim to be inserted on the list of voters for the county of Hertford, and that the particulars of my place of abode and qualification are stated in the columns below. Dated 17th July, 1872."

Christian name and surname of the claimant in full length.	Place of abode.	Nature of Qualification.	Street, lane, or other like place, &c., and name of the property, &c.
The Most Honourable Robert Arthur Talbot Gascoyne, Marquis of Salisbury.	Hatfield House, Hatfield, Herts.	Freehold house and park, in my own occupation.	Hatfield House, Hatfield, Herts.

(Signed) SALISBURY.

Notice of objection to the said claim was duly given to the overseers of the said parish of Bishop's Hatfield and to the claimant. At the hearing it was admitted by the objector that the name of the claimant and his description, his place of abode, the nature of his property qualification, and the situation of the qualifying property were correctly set forth in the claim. But it was objected that the claimant appearing to be on the face of the claim a peer of the realm and a lord of Parliament, was legally incapacitated for being a voter for a knight or knights of the shire to represent the commons of the county of Hertford in the Commons House of Parliament, and was therefore not entitled to be placed on the register of voters for the said county.

For the claimant it was contended that he was only prohibited from voting by force of resolutions of the House of Commons, which had not the force of law, and that he was not therefore under any legal incapacity to be registered as a voter for the county.

After hearing the arguments for and against the said claim I decided that the said claimant, being a peer of the realm and a lord of Parliament, was thereby by the *lex parliamenti* the subject of a legal incapacity to vote at the election of a knight or knights of the shire of the county of Hertford, and therefore was not entitled to have his name inserted in the register of voters for that county, and accordingly I rejected the claim, and refused to admit the name of the said Marquis of Salisbury upon the said list of voters. The question for the court is whether I was right in the above decision. If the court should be of opinion that I was right the register is to remain as it is. If the court should be of opinion that I was wrong the register is to be altered by inserting the name of the claimant in that part of the register which relates to the parish of Bishop's Hatfield, with the descrip-

tion of person, abode, and property qualification as given in the claim.

The other appeals (that of Earl Beauchamp being from the western division of the county of Worcester, and the other two of Lord Salisbury being from the counties of Middlesex and Essex respectively) were, *mutatis mutandis*, to the same effect, and raised precisely the same question.

All the appeals were taken and argued together.

Wills, Q.C., for Earl Beauchamp.—I feel bound to admit that the House of Commons has power in certain cases to act judicially and to declare the law, and I am further bound to admit that the resolution of 1699, that no peer hath a right to vote at the election of any member to serve in Parliament, was made by the House in its judicial capacity. Further, it appears to me that the resolution was declaratory of the common law. In 4 Co. Inst., p. 28 it is laid down that "the House of Commons is to many purposes a distinct court," and at page 50, "all the justices of England and barons of the Exchequer are assistants to the lords to inform them of the common law, and thereunto are called severally by writ. Neither doth it belong to them (as hath been said) to judge of any lawe, custome, or priviledge of Parliament. And, to say the truth, the lawes, customes, liberties and priviledges of Parliament are better to be learned out of the rolls of Parliament and other records, and by presidents and continuall experience than can be expressed by any one man's pen." Chief Baron Comyn also, in his Digest (Com. Dig., tit. "Parliament," D.10), says: "No peer hath a right to vote at elections," citing the resolution of 1699. This resolution has been renewed every year since. In a debate in the House of Lords, 27th June 1853, it was laid down that peers were restrained from voting by immemorial usage, irrespectively of these resolutions: (128 Hans. Deb., 3rd ser., 791.) Again, on the 5th July 1858, Lord Campbell said: "A peer has no right to vote by the common law of England for the election of members of the House of Commons. . . . The resolution of the Commons only declares the common law. . . . Since the Reform Bill, peers had frequently sought to register their votes for the election of members of the House of Commons, but the revising barristers had invariably and most properly refused to allow them." (151 Han. Deb., 3rd ser., 926, 927.) Lord Lyndhurst spoke on that occasion, and expressed no dissent from Lord Campbell's judgment. [BOVILL C.J.—We find, too, that when peers have voted, their votes on a scrutiny have always been struck off by the court whose province it has been to declare the law upon the subject.] Yes; in Heywood on Elections, p. 316, it is said: "When the members of the House of Peers were first excluded from voting at the elections of members of Parliament does not exactly appear. The returns preserved by Prynne show that in the earlier periods of our history they exercised that privilege, and even after their personal attendance at the County Court had fallen into disuse we find instances in which their attorneys returned the knights of the shire. On the 14th Dec. 1699, however, in consequence of the Earl of Manchester having voted at an election for Malden, the House of Commons resolved, *nem. con.*, "That no peer of this kingdom hath any right to give his vote at the election for any member to serve in Parliament;" and this resolution was repeated at the beginning of every

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session until the union of Great Britain with Ireland, but has never been recognised by the House of Peers. Since the union with Ireland, a similar resolution adapted to the altered circumstances of the case has been repeated every session." [BOVILL, C.J.—The fact mentioned by Heywood, of the names of several peers appearing on the old returns, does not strike me as of much importance. It is now well settled that women are incapable of being registered. Still, a few years ago a revising barrister inserted the names of all women householders on the register and no appeal was made. Supposing a man a hundred years hence were looking into old registers and found this one with the names of women upon it, he might conclude, though erroneously, that women had at one time possessed the franchise. The passage from Heywood carries the matter no further. BRETT, J.—If the House of Commons has, acting in its judicial capacity, meant to strike off the names of peers who have voted at elections, because by the common law peers have no right to vote, such decisions are of great force; but if the House has meant to say that peers have no right to vote because of the resolution of 1699, that is a very different thing. KEATING, J.—Can you find any authority for saying that a peer can vote? None. I have felt the greatest difficulty and embarrassment in having to argue this case, as I find nothing in my favour and everything against me.

Manisty, Q.C., for the Marquis of Salisbury, confessed to feeling himself in the same embarrassing and difficult position, especially as by the 26th section of the Parliamentary Elections Act 1868 (31 & 32 Vict. c. 125), the election judges are bound to act upon the "principles, practice and rules on which committees of the House of Commons have heretofore acted in dealing with election petitions," so far as the new rules to be made do not extend. One of the best settled principles on which committees have acted in such cases is that peers have no right to vote. If they have no right to vote, they have no right to be registered, and so this court is bound under sect. 26 of 31 & 32 Vict. c. 125 to decide against the appellant. [BRETT, J.—Do you think that if it appeared that the House of Commons had disallowed the votes of peers simply because of their own resolution, this court would be bound by the 26th section to disallow them? I think so. If peers have no right to vote, they have no right to be registered.

Geo. Browne for the overseers of Madresfield was not called upon.

H. James, Q.C., for the other respondents was not called upon. He called attention to the language of 8 Hen. 6. c. 7.

BOVILL, C. J.—From the course which the case has taken, it seems scarcely necessary for us to give any further judgment. The court might act upon the statements of the counsel who have appeared for the appellants, both of whom think that the case is concluded by authority. As, however, the matter has been brought before us, I think we ought to express an opinion upon it. The House of Commons, sitting as a court and acting judicially, and in later times committees of the House acting in the same capacity, have expressed opinions from time to time as to the validity of elections. That power has by a recent Act been given to the election judges, but until that Act

passed the House of Commons exercised the jurisdiction itself. In 1699, when the House exercised the jurisdiction itself, the question now raised came before it in the case of the Malden election, and the House then thought right to pass a resolution on the subject. The resolution, then, that has been cited was then passed, that no peer hath a right to vote at an election. That resolution, therefore, was one which not merely expressed the will of the House of Commons, but it was made with respect to the right of peers to vote when that question came judicially before the House. The resolution has been re-affirmed at the beginning of every session since, coupled with a resolution that it is a high infringement of the privileges of the Commons for a peer to take any part in a parliamentary election. It is not now necessary to say why peers are thus excluded. Constitutional reasons may no doubt be adduced for their exclusion. But, the resolution having been passed, it was passed not only for the purpose of determining who should vote, but also for the purpose of declaring the law, and the resolution is framed in these words, that a peer has "no right." No doubt the House of Commons has no power without the assent of the sovereign and the House of Peers to make any alteration in the constitution of the country; but if the House of Commons was a court, and the committees were a court, as they were, exercising judicial functions, the House and the committees were bound to declare the law. From time to time the resolution adverted to has been acted on by the House and its committees, and case after case has been decided in pursuance of it. A uniform course of authorities shows that peers have no right to vote at Parliamentary elections. In effect, these resolutions and decisions of the House of Commons amount to a positive exclusion of the peers. Has the House of Lords submitted to the exclusion? For 170 years no instance can be found in which the votes of peers have been allowed when their right to vote has been contested. How does the case stand on the authorities? Every text book clearly lays down the law that "no peer has any right to vote at Parliamentary elections." There has been an universal practice for 170 years for peers not to vote, or to strike off their names if they have voted. Is there any other authority on the subject? We have the authority of Lord Coke, of Comyn, of Blackstone, of Lord Campbell, and of Lord Brougham. Therefore, in whichever way we regard the question, there is not only an absence of authority in favour of the peers, but conclusive authority against them. Moreover, this law has been acquiesced in and acted upon for 170 years. Independently, therefore, of the 26th section of the Parliamentary Elections Act 1868, I have no hesitation in saying that in point of law peers have no right to vote at Parliamentary elections. If before that Act a peer voted and the matter came before the House of Commons, and the vote was challenged, the House would have struck it off. The same would have been done by an election committee. What could be done now by the election judge? With all the authorities against him, he would have no resource but to strike off such a vote. The 26th section of the Act has been referred to, and if there were any doubt in this case as to the right or as to the practice, it might be said that the section had great bearing on the question. I will, however, not go into that now, as nice distinc-

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tions might arise on the peculiar language of the section. I am, however, satisfied independently of any argument founded on the language of that section that the vote would be bad, and, indeed, that a peer has no right to vote. I do not wish to be understood as dissenting from the view taken by Mr. Manisty as to the effect of the 26th section. I am only desirous that my language should not convey any impression which might affect the construction to be put upon that section in other cases that may arise. In conclusion I think that, though the House of Commons by itself could never alter the law, it was bound, sitting judicially, to declare it. This court has now to determine the question, and my opinion is clear that the right of the peers to vote cannot be maintained. The decisions of the revising barristers were therefore right, and the appeals must be dismissed.

KEATING, J.—I am of the same opinion. There seems to be no doubt that the authorities are all one way. We have the authority of the House of Commons dealing with the law upon this point, as it had a right to do. No one has suggested that the House of Commons has power to make law. But, looking at the resolution as a declaration of what the law then was, it certainly is deserving of great respect. This resolution is corroborated by the state of things that existed before it was passed, and which has since existed. No authority prior to 1699 has been adduced in favour of the right of the peers. On the other hand, we were referred by Mr. James to an authority against it—the statute 8 Hen. 6, c. 7, intitled, “What sort of men shall be choosers, and who shall be chosen knights of the Parliament.” That Act clearly contemplates that the knights, esquires, and smaller landholders shall be the choosers, and as clearly as possible excludes the notion of the peers having any right to vote. Prior therefore to the passing of the resolution in 1699, there is abundance of authority, including that of Lord Coke, to justify the resolution, apart even from the weight and authority which the resolution would carry with it, not as making but as declaring the law. That resolution has been stamped with the authority of Chief Baron Comyn. We have not only Comyn, but Lords Campbell and Brougham and an uninterrupted course of authorities on the same side. The whole has been sealed and confirmed by the strongest authority, viz., uninterrupted user. It has been uninterrupted for centuries, and as far as the researches of counsel have extended, no authority has been found to the contrary. Heywood in truth is no authority at all, as the isolated instances cited by him in which peers have voted are not deserving of consideration. In the course of the argument I threw out a reference to the 26th section of the Parliamentary Elections Act 1868. I would not, however, be understood as basing my judgment on that section, as though the word “principles” is a large word, and I was for the moment under the impression that the court had given an extensive meaning to it, yet on further consideration I find it has not been extended to the case of a question as to a man’s right to vote. In cases that have been decided on the point, there is nothing to preclude us from saying that the word “principles” in that section means nothing more than practice and procedure. I wish to state this particularly, as it might be thought from what fell from me in the course of the argument that I thought that

the word “principles” might apply to a case like the present. I do not wish to say that, or to say anything upon the point at present; if ever the question should arise, I should like to consider how far the word “principles” in that section might be said to apply to a question like that raised in the present case. I think the revising barrister was quite right. I wish further to express my approval of the course that has been taken by the counsel for the appellants. I have yet to learn that it is other than the duty of counsel, when they discover that a point is not arguable, to say so at once, or that any duty towards their client ought to interfere with their doing that, which is the highest function of the Bar, viz., to assist the court.

BRETT, J.—I am very reluctant to express any judgment in this case. I think the court is placed in a position of great difficulty. I had great doubts, when I came down here this morning, whether the claim could be supported. In the course of the argument I did what I conceive to be the duty of a judge, viz., where a proposition is stated, to take objections to it for the purpose of ventilating it as far as possible, and ascertaining its true meaning. The court is, however, in this difficulty:—propositions have been stated by counsel against themselves, and that for the purpose not of contesting, but of admitting their truth. I quite agree that it is the duty of counsel, when they know that there is no argument to be used in their own favour, to say so. But I think it would be better, when they have come to the conclusion that they have no case, to withdraw from it. It may be said that counsel have no authority to take such a course. I must say, however, that I take a much higher view of the power of counsel. I think a counsel is master of the case, and that, unless he has precise instructions to the contrary, he has power to give it up. In saying this, I am sure no one knows better than the counsel who have appeared for the appellants, that I do not mean to express any disrespect to them. Two statements have been made in the course of the argument: First, that by the common law, as shown by immemorial user, the peers have not the right now claimed; and secondly, that though it may be shown that by the common law peers are not incapacitated from voting, yet the House of Commons has held as a matter of “principle” that peers cannot vote, and therefore this court is prohibited by the 26th section of the Parliamentary Elections Act 1868, from holding otherwise. If the decision of this case depended on the last contention, I should feel inclined to refuse to deliver any judgment on the case. But I doubt if that is the meaning of the 26th section. I doubt if the words there refer to anything more than rules of procedure. The 26th section refers to rules to be made by the judges, and says that until such rules are made, and so far as they do not extend, “the principles, practice, and rules on which committees of the House of Commons have heretofore acted in dealing with election petitions shall be observed.” Thus the “principles, practice, and rules” may be altered by the rules to be made by the judges; and if the word “principles” includes the right of a man to the franchise, the judges may affect that right by rules of procedure. But it is obvious that the judges have no such power. I need not, however, say more on this point, as the principal question has risen on the first point, viz.,

C. P.]

OVERSEERS OF ASHTON-UNDER-LYNE v. WEBSTER (ORME'S CASE).

[C. P.]

that at the common law a peer has no right. How is it sought to prove that proposition? By immemorial usage. It is further said that the judicial decisions of the House of Commons are strong evidence of the state of the law, and I feel bound to assume that the resolution of 1699, which has been referred to, must be regarded as a judicial decision, as, so far from its having been argued to the contrary, it has been admitted by the counsel for the appellants that it is. I certainly approach the decision of the House of Commons with the highest respect, and as almost binding on us in the absence of other authority. There is, however, one observation to be made, which I ventured to make in the course of the argument. That is, that the resolution might have been intended to be declaratory of the common law, or it might have been intended as a mere protest. If the decision in 1699 and the subsequent decisions of the House and its committees were made to depend on the resolution of 1699, I should protest against the idea of our being bound by it. The resolution as a resolution is not binding. It seems to me that there is some colour for doubting whether we ought to regard the resolution as part of a judicial decision, because, if it were so, it seems difficult to see why it should have been repeated every session since. If the House of Commons had come to a clear judicial conclusion that peers have no right to vote, one might think they might have been content with that expression of opinion. But we find that the resolution has been repeated every session, and even since 1868, when the House of Commons gave up that part of its judicial power to the judges. That circumstance seems to afford us strong colour for saying that it has not been intended to affirm this proposition as a judicial declaration of the common law, but to rest it on an extra-judicial resolution as a resolution. If that were clearly the case, it would be our duty to say that the resolution was not binding. But in the present instance it has been admitted that the resolution was judicial, and after the statement of counsel, who have employed great research on the question, that they can find no authority prior to the resolution in their favour, I think that that want of authority is strong evidence of the immemorial usage relied on, and therefore I am prepared to say, on the argument addressed to us, that irrespectively of the resolution, the decision of the House of Commons was right, and as far as we can see, that it was and is the law, independently of the resolution, both before and since 1699, that peers have no right to vote. For that reason and for that only, I concur in the judgment. I quite agree with Mr. Manisty in thinking that if they have no right to vote, they have no right to be registered.

GROVE, J.—I am of the same opinion. I abstain from going into the reasons for my decision, as I think it is extremely difficult to express an opinion on a question when only one side of it has been argued. It may be, no doubt, that only one side is arguable; but when one has heard both sides of a question argued, the decision is comparatively easy; when one has heard only one, one runs the risk of expressing reasons which may admit of an answer. I should have preferred that the counsel for the respondent should begin, as they might have given us strong reasons for our decision in their favour. Not only might much historical matter have been brought forward by them, but constitutional reasons might be adduced. I abstain from stating

what strikes me as grave constitutional reasons, as they might admit of an answer. I will only say that I think there may be strong reasons, which from the course which the case has taken cannot well be expressed.

Decisions affirmed.

Attorneys for Earl Beauchamp, *Young, Maples, and Co.*

Attorneys for the Overseers of Madresfield, *Young, Maples, and Co.*

Attorneys for Marquis Salisbury, *Nicholson and Herbert.*

Attorneys for Overseers of South Mims, Bon-tem, and Bulwer, *Wyatt and Hoskins.*

Tuesday, Nov. 19, 1872.

OVERSEERS OF ASHTON-UNDER-LYNE (apps.) v.
WEBSTER (resp.) (ORME'S CASE).

Right to vote—"Actual possession" of rentcharge—2 Will. 4, c. 45, s. 26—*Statute of Uses* (27 Hen. 8, c. 10.)

By indenture dated the 13th Oct. 1871 A. granted to B., C., and D. one perpetual yearly rentcharge of 9l. to hold unto the said B., C., and D., their heirs and assigns, to the use of the said B., C., and D., their heirs and assigns for ever as tenants in common and in equal shares.

Held, that this was a conveyance operating at common law, and not under the Statute of Uses.

Heelis v. Blain (11 L. T. Rep. N. S. 480; 34 L. J. 88 C. P.) *commented upon.*

THIS was an appeal from the revising barrister for the South-Eastern division of the County of Lancaster.

CASE.

At a court held at Ashton-under-Lyne for the purpose of revising the list of voters for the Ashton-under-Lyne polling district before me, John Hargrave Hodson, Esquire, the barrister appointed to revise the lists of voters for the South-Eastern division of the county of Lancaster, Thomas Webster duly objected to the name of Robert Byron Orme being inserted in the list of voters for the said division of the said county.

The claim of the said Robert Byron Orme was as follows:—

Orme, Robert Byron.	Stamford-street, Ashton-under- Lyne.	One third share of rentcharge issuing from freehold land and buildings.	Fleet-street, William Orme owner.
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The following facts were established by the evidence.

By an indenture made and dated the 13th Oct. 1871, and made between the said William Orme of the one part and the said Robert Byron Orme, Enoch Lawton, and James Kerfoot of the other part, the said William Orme being seised in fee simple in possession of certain lands, messuages, and hereditaments in Ashton-under-Lyne aforesaid, granted unto the said Robert Byron Orme, Enoch Lawton, and James Kerfoot, one perpetual yearly rentcharge of 9l. to be payable clear of all deductions (except property or income tax) by equal half-yearly payments on the 5th April and the 5th Oct. in each year, and the first payment to be due on the 5th April then next, and to be issuing from and out of, and charged and charge-

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able upon, the said lands, messuages, and hereditaments to hold the said rentcharge unto the said Robert Byron Orme, Enoch Lawton, and James Kerfoot, their heirs and assigns to the use of the said Robert Byron Orme, Enoch Lawton, and James Kerfoot their heirs and assigns for ever as tenants in common and in equal shares.

A copy of the said indenture accompanies, and is to be taken as part of, this case.

There is a covenant by the said William Orme with the said Robert Byron Orme, Enoch Lawton, and James Kerfoot to pay the said rentcharge at the times and in manner appointed for payment thereof, and a power of distress over of the said lands, messuages, and hereditaments in case of nonpayment.

The moiety of the said rentcharge of 9l. due on the 5th April 1872 was paid by the said William Orme to, and equally divided between, the said Robert Byron Orme, Enoch Lawton, and James Kerfoot.

It was contended by the objector that the said Robert Byron Orme was not in the actual possession of the said rentcharge for six calendar months previous to the last day of July 1872 as required by the 2 Will. 4, c. 45, s. 26.

It was contended by the party objected to, upon the authority of *Heelis v. Blain* (34 L. J. 88, C. P.), that the Statute of Uses (27 Hen. 8, c. 10) operated to give to the said party objected to and the said Enoch Lawton and James Kerfoot the actual possession of the said rentcharge on the execution of the said indenture.

I held upon the authority of that case that the claim was good.

If the court be of opinion that my decision was wrong, the register is to be amended by erasing the name of the said Robert Byron Orme from the said list.

J. H. HODGSON,

Revising Barrister for the South-Eastern Division of the County of Lancaster.

I appeal from this decision.

Rob. Evans, for Thomas Webster, appellant.

I appoint the overseers of Ashton-under-Lyne to be respondents.

J. H. HODGSON,

21st Oct. 1872.

Revising Barrister.

The persons named in the schedule hereunder written, and being the other persons parties to the said indenture, also claimed to be inserted in the said list of voters, and I also held that their claims were good.

Notice of appeal from my decision being given, and as the point of law therein involved and the facts are the same as those stated in the case, I ordered their cases to be consolidated with this appeal.

SCHEDULE.

Kerfoot, James	Chatham-hill, Dukensfield.	One third share of rentcharge issuing from freehold land and buildings.	Fleet-street, William Orme owner.
Lawton, Enoch	Stamford-st., Ashton-under-Lyne.	One third share of rentcharge issuing from freehold land and buildings.	Fleet-street, William Orme owner.

J. H. HODGSON,

Revising barrister.

This appeal came on for argument on a previous day, but was adjourned in order that counsel might have further time for consulting authorities.

Mellor (Digby with him), for the respondent, cited:

Jenkins v. Young, Cro. Car. 230;
Meredith v. Jones, Id. 244;
Bacon's Law Tracts, p. 352;
Sanders on Uses and Trusts, 5th edit. 91;
 2 Black. Com. 15th edit. 192;
Coke's Inst. by Hargrave and Butler, note 231;
Doe v. Prestwidge, 4 M. & S. 178;
Watkins on Conveyancing, 245;
Herschell, Q. C. for the appellants, cited
Gilbert on Uses, 128.

He was prepared to contend, if necessary, that the decision in *Heelis v. Blain* was wrong.

BOVILL, C.J.—In this case the claimant asks to be placed on the list of voters for the South-Eastern division of the county of Lancaster in respect of his interest in a rentcharge. It is objected that he is not entitled to be so registered because he had not been in actual possession of the rentcharge for six months previously to the 31st July 1872, as required by 2 Will. 4, c. 45, s. 26. It is clear upon the facts that there was no actual possession of the rentcharge, and no receipt in the sense of possession until after the commencement of the period of six months. This court has decided in two cases that there must be actual possession in a case of this kind to entitle to the franchise. The first was that of *Murray v. Thorniley* (2 C. B. 217) in which it was held that the grantee of a rentcharge is not entitled to be registered unless he has been in the actual receipt of it for six months before the last day of July. The court took time to consider their judgment, and were unanimous. The same point arose in *Hayden v. The Overseers of Tiverton* (4 C. B. 1) where the person claiming to be registered was assignee of a rentcharge. In that case also the court gave a considered judgment, and were unanimous. It is true that Maule, J. (at p. 6) made an observation upon *Murray v. Thorniley*, but he did not dissent from that case in his judgment, and the decision of the court proceeded on the same grounds as in the former case. After these two cases it would be impossible for the respondent to contend that we ought not to be governed by them. They have been law since 1846. Some time afterwards, the point arose in a different form in *Heelis v. Blain* in this court. A new view was then taken that the grant of the rentcharge did not take effect at common law but under the Statute of Uses, and that the Statute of Uses executed the use in possession, so that the person entitled to the use was to be deemed in possession. The case was argued on that point, and the whole question turned on the words "deemed in possession." The conveyance of the rentcharge undeniably operated under the Statute of Uses, and the court concluded that the true construction of that statute was that "possession" meant actual possession. Under those circumstances the court, adopting its previous decisions, concluded that by the Statute of Uses the claimant was entitled to be deemed in actual possession. There are therefore two classes of decisions; first, where the conveyance operates at common law, there must be actual possession by receipt of the rentcharge; and, secondly, where the conveyance operates under the Statute of Uses, the statute executes the use, and the grantee is deemed to be in actual possession. Whether the grant here operates at common law or by statute is a difficult question, which has been ably argued on both sides. It is

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the only question remaining for our consideration, and is a matter so interesting and important to conveyancers that we thought it desirable, when the case first came before us, to have it adjourned in order that the learned counsel might have further time to prepare their arguments and to obtain assistance by consulting eminent conveyancers. Our first duty then, as it seems to me, is to ascertain and determine the effects of the limitations in this deed. The deed begins with a grant as follows: "grant unto the said Orme, Lawton, and Kerfoot one perpetual yearly rentcharge." If the matter had stood there, it would be a grant to them as joint tenants. Then the *habendum* is "to hold unto the said Orme, Lawton, and Kerfoot, their heirs and assigns, to the use of the said Orme, Lawton, and Kerfoot, their heirs and assigns for ever as tenants in common and in equal shares." If we divide the terms of the *habendum*, we find an estate granted to the three as joint tenants, and afterwards a use limited to them as tenants in common. But the question is, whether it is necessary so to read the deed. The *habendum* is, of course, an important part; its office is to determine the effect of the deed, and the rule, as laid down in *Sheppard's Touchstone*, 101, is that it should be construed "as near the intent of the parties as may be." To ascertain that intent we must look to the whole deed. In the present case the whole *habendum* shows that the intent of the deed was to pass the rentcharge to the three grantees as tenants in common, and this is made manifest by express words at the end of the *habendum*. Not only is the rule so, but there are many instances in the books where an effect has been given to the *habendum* different from that of the premises (Co. Litt. 103 b.; *Viner's Abridgment*, Tit. "Grants," L. a.; *Shep. Touch.* 101, 106). It is not necessary to go minutely into these instances. In determining the true effect of a deed of this description, there are several authorities to guide us. An important one is the case of *Jenkins v. Young* (Cro. Car. 230). Here lands were given to E. R. and his wife, *habendum* to the said husband and wife to the use of them and the heirs of their two bodies; and in default of such issue to the use of E. M. and his heirs. The question was whether the husband and wife had an estate tail or for their lives. Littleton argued that the estate out of which the use should rise was an estate for their lives, and the use could not make the estate larger than the limitations of the seisin: but the judges conceived that there was a difference where an estate was limited to one and the use to a stranger, for then the use should not be more than the estate out of which it was derived; but not where the limitation was to two, *habendum* to them to the use of them and the heirs of their bodies, for this was no limitation of the use, nor was it executed by the statute; but it was a limitation of the estate to them and the heirs of their bodies by the course of the common law: (See *Sanders on Uses*, i. 91.) That case is also important as showing that we must look to the limitations to ascertain the intention of the parties; the limitation of the *habendum* was held a good limitation not of the use but of the estate at common law, and the whole operation was said to be at common law. I find it extremely difficult to distinguish this case from the present. A similar case is *Meredith v. Jones* (Cro. Car. 244). The

same view has been adopted in an opinion of Mr. Booth (Collection of Cases and Opinions, ii. 291), where the author shows that the statutory use must be derived out of the seisin of the same three persons. The case of *Jenkins v. Young* is cited in *Sanders on Uses*, i. 91, and not questioned, and also in Co. Litt. 271 b., and *Watkins on Conveyancing*, 245. There is therefore strong confirmation of the propriety of the decision. I see nothing to show that we ought not to adopt the same view here, especially as if we did not there would be a repugnancy, because the first part of the *habendum* would be a limitation to the three as joint tenants, and the latter part as tenants in common. The rule laid down by Lord Bacon is as follows: "The whole scope of the statute was to remit the common law, and never to intermeddle where the common law executed an estate; therefore the statute ought to be expounded that where the party seised to the use and the *cestui que use* is one person, he never taketh by the statute except there be a direct impossibility or impertinency for the use to take effect by the common law" (*Bacon's Law Tracts*, 352; *Reading on the Statute of Uses*). Another case which has an important bearing on the present is that of *Doe v. Prestwidge* (4 M. & S. 178). There there was a limitation to T. and H. and their heirs, *habendum* to them their heirs and assigns as tenants in common and not as joint tenants, to the use of them their heirs and assigns. There was a difference between the two parts of the *habendum*, the first being to them as tenants in common, and the second "to the use of them their heirs and assigns," which would create a joint tenancy. A point similar to the present having thus arisen, the matter was argued, and further time allowed to counsel to consider, after which Mr. Reader "admitted that T. and H. took as tenants in common, for the *habendum* was to them their heirs and assigns as tenants in common and not as joint tenants, to the use of them their heirs and assigns, and although if this had been a use executed by the statute the consequence would be that they were joint tenants, yet he admitted that where the person seised to the use and *cestui que use* is the same, the statute does not operate." This case has been cited in various text-books, and has not, so far as I am aware, been questioned by Mr. *Sanders*, or by any other writer. The only passage I have been able to find containing anything in the nature of adverse comment upon it is in *Bythewood and Jarman's Conveyancing* (3rd edit. by Sweet, 224), where the learned editor, after referring to the admission made by counsel, remarks "This was certainly admitting the principle to a great extent, and it seems that there was ample room for argument." The matter has been fully argued in the present case, and it has been shown that there is no principle of law which interferes with that decision. It seems to me to be clear that these three persons are to take as tenants in common, that the deed gives them a legal right in the rentcharge, and they have the use of it as tenants in common. I think there is nothing for the Statute of Uses to operate upon, and that the parties take by force of the common law and not of the statute. Neither the use nor the possession are executed. The decision of the revising barrister must therefore be reversed on the ground that the person claiming to vote was not in the actual possession of the rentcharge.

BRETT, J.—In this case Orme claimed to be registered as a voter in respect of his share in a rentcharge. It was necessary therefore, in order to support his claim, that he should have been in actual possession of the rentcharge for six calendar months previously to the last day of July 1872, as required by 2 Will. 4, cap. 45, s. 26. In fact the first receipt of the rentcharge by him was less than six months previously to the above date. Now there are two kinds of conduct which this court should observe; first, to construe the words of a statute as nearly as may be in their ordinary and literal sense; and, secondly, to adhere with loyalty to former decisions, unless they are clearly made out to be wrong. The first case applicable is that of *Murray v. Thorniley*, and there the words "actual possession" are stated to mean a possession in fact, as contra-distinguished from a possession at law, and the application is that the grantee of a rentcharge is not entitled to be registered, unless he has been in the actual receipt of it for six months before the last day of July. Next is the case of *Heelis v. Blain* where the decision was that though the grantee of a rentcharge under a grant at common law is not entitled to be registered before he has been in the actual receipt of the rent, it is otherwise where the rentcharge is by a conveyance operating under the Statute of Uses. Now it is obvious that if the present rentcharge was granted to the claimant by a conveyance operating at common law, it falls within the first case, but if under the Statute of Uses, we should be bound by the second case. The question therefore is whether this is a conveyance operating at common law, or by the Statute of Uses. I think that the result of the authorities is this, that before determining whether the Statute of Uses is to be applied we must construe the deed, and that where it is in the ordinary form of a grant, *habendum*, and declaration of uses, if all three are to the same person, and in one part the description of the right is general and in another specific, the specific is to overrule the general, and the general is to be read as if it were the specific. As I read the present deed, it is a common law conveyance, and there is no declaration of use at all. In *Jenkins v. Young* although in form there was a *habendum* with a declaration of uses, yet it was held that the conveyance operated at common law; and so it was in the case mentioned in *Sanders on Uses and Trusts*, vol. 1, p. 91. In *Hutchinson v. Prestwidge* the limitation was "to T. and H. and their heirs, *habendum* to them, their heirs and assigns as tenants in common and not as joint tenants, to the use of them, their heirs and assigns." The declaration of uses was general, but the *habendum* was specific, and, according to the decision, the deed was to be read as if the declaration of uses had been as specific as the *habendum*. In the present case the words purporting to be a declaration of uses are specific, but the *habendum* is general, and therefore I think it must be read as a common law conveyance, and not as a declaration of uses. I should be prepared to go the length of Mr. Herschell's contention, but it is unnecessary to do so on the present occasion. I think this case falls within the authority of *Murray v. Thorniley*, and is not within that of *Heelis v. Blain*.

GROVE, J.—I am of the same opinion. The question arises upon the 25th section of 2 Will. 4, cap. 45. The *prima facie* meaning of that section

is simple—that actual possession does not mean constructive possession, and this is shown by the proviso referring to certain cases where there is no actual possession. This view was acted upon in *Murray v. Thorniley*, and there would be no difficulty in the present case but for *Heelis v. Blain*, where it was held that the conveyance operated by the Statute of Uses, and that by force of that statute the grantee was put in actual possession of the rentcharge. The main arguments have therefore been addressed to the question whether this conveyance operates at common law or under the Statute of Uses. It is clear from the express words of that statute that it was meant to apply to persons seised of lands or hereditaments to the use of any other persons, not of the same persons; and the reason was that conveyances might not be made to one person while another person had the use. The preamble of the statute is not immaterial, "Where by the common laws of this realm lands, tenements, and hereditaments be not devisable by testament, nor ought to be transferred from one to another, but by solemn livery and seisin, matter of record, writing sufficient made *bonâ fide* without covin or fraud, yet nevertheless divers and sundry imaginations, subtle inventions and practices have been used, whereby the hereditaments of this realm have been conveyed from one to another by fraudulent feoffments, fines, recoveries, and other assurances craftily made to secret uses, intents, and trusts." The main object was to make conveyances plain, *bonâ fide*, and public matters; not to make some fiction of the law, but that the ostensible and real ownership of property should be coincident. We all know how the effect of the statute was got rid of by repeating the word "use." In the present case we have to decide whether, where the same three persons are grantees of a rentcharge, and also persons to whom the use is attached, the use is executed by the Statute of Uses in legal possession. There is a difference between the form of the grant and the form of the *habendum*, and it was argued by Mr. Mellor that that changed the character of the estate and made it different, and that it must be read that the first grant gave a joint tenancy, and therefore the use, which was different, did not attach. *Doe v. Prestwidge* is the converse of the present case, but the reason of the decision applies. Admitting that the construction which Mr. Mellor sought to put upon the deed is not an unfair one, still there is no impossibility or impertinency in holding that the latter words vary the estate from the unnamed estate first limited, which might be a joint tenancy. If so, it is clear upon the authorities that the Statute of Uses does not apply. The other difficulty does not arise. We do not overrule *Heelis v. Blain*, but we confirm *Murray v. Thorniley*.

DENMAN, J.—I am of the same opinion. The only question raised by the revising barrister seems to be whether the present case is within *Heelis v. Blain*, and I am of opinion that it is not. That case might be called a refined decision in favour of the franchise. The point we have to decide is whether the conveyance operated under the Statute of Uses or not. I think it did not, because the grantees do not come within the words of that statute, "persons seised to the use of other persons," but are seised to the use of themselves. It was argued that it was not so, because they are to be held in the first instance as joint tenants,

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and this is not an absurd contention when we look at the refinements that have been introduced into these cases. But the current of authorities and reasoning is against such a contention. Therefore I think that our judgment must be for the appellants.

Judgment for the appellants.

Attorney for the appellants, *J. Elliott Fox*, 65, Chancery Lane.

Attorneys for the respondent, *Richards and Walker*, 29, Lincoln's-inn Fields.

Wednesday, Nov. 30, 1872.

REGISTRATION APPEAL.

BROWN (app.) v. TAMPLIN (resp.)

Registration—Respondent not appearing—Ten days' notice of intention to prosecute appeal—Reasonable time—Sect. 64 of 6 Vict. c. 18.

In this registration appeal the respondent did not appear, and application was made to the court to hear the case, although ten days' notice of his intention to prosecute the appeal had not been given by the appellant to the respondent, pursuant to the provisions of sect. 64 of 6 Vict. c. 18, on the ground that there had not been reasonable time for giving such notice. The appellant's attorney swore that the case was not settled by the revising barrister, nor was T. made respondent till the 31st Oct. That T. then objected to being made respondent, and the revising barrister wanted to have the case back to satisfy himself as to its correctness. That under these circumstances he (the deponent) promised not to deposit the case before 4th Nov., before which day the revising barrister had satisfied himself as to the correctness of the case, and no person having then agreed to become respondent in the place of T., no alteration was made in the appointment of T. as respondent. But that he did not know till the 4th Nov. whether some other person might not have been willing to become respondent in place of T., in which last-mentioned case such person would have been appointed respondent in the appeal. The first day fixed for hearing the appeals was 13th Nov., and notice of intention to prosecute the appeal was not given till the 4th.

Held, that it did not appear that there had not been reasonable time for giving the notice, so as to bring the case within the proviso at the end of sect. 64 of 6 Vict. c. 18, and that, consequently, as no notice had been given, the court could not hear the appeal.

This was a consolidated registration appeal.

Sect. 63 of 6 Vict. c. 18 provides that the Court of Common Pleas are to appoint days for hearing the registration appeals.

Sect. 64 provides that no appeal shall be heard by the said court in any case where the respondent does not appear, unless the appellant shall prove that due notice of his intention to prosecute such appeal was given or sent to the respondent ten days at least before the day appointed for the hearing of such appeal; provided always that, if it shall appear to the said court that there has not been reasonable time to give or send such notice in any case, it shall be lawful for the said court to postpone the hearing of the appeal in such case as to the said court shall seem meet.

The respondent did not appear.

The first day fixed by the court for hearing the appeals was 13th Nov., and the appellant did not

give notice to the respondent, under sect. 64, until 4th Nov. Application was now made to hear the appeal, although due notice had not been given.

The affidavit of Augustus Beddall, the attorney for the appellant, stated as follows: that this case was not settled by the revising barrister, nor was the respondent appointed until the 31st Oct. last. The above-named Tamplin then objected to be appointed respondent, and after the case was settled a discussion arose with the revising barrister as to the right of the latter to appoint the said Tamplin to be respondent against his will. The revising barrister also desired to compare the schedule with his lists. Under these circumstances, I promised not to deposit the said case till the 4th Nov., before which day the revising barrister had satisfied himself as to the correctness of the schedule, and no person having then agreed to become respondent in place of Tamplin, no alteration was made in the appointment of the said Tamplin as respondent. But I did not know until the 4th Nov. whether some other person might not have agreed to become respondent, in which last-mentioned case such person would have been appointed respondent in the appeal.

It was incidentally mentioned in the course of the argument that Tamplin, the respondent, was town-clerk of the borough from which the appeal came.

Sir John Karslake, Q.C. (*H. T. Atkinson* with him) in support of the application.—The question raised here is whether there was reasonable time for the appellant to have given the notice; if the court thinks there was not, then under the proviso at the end of the 64th section of 6 Vict. c. 18 the court may hear the appeal, although ten days' notice was not given. It appears from the affidavit of the appellant's attorney that he was, until 4th Nov., under the reasonable expectation that another respondent would be appointed. The case may, therefore, be said not to have left the hands of the revising barrister until that day. There was no wilful delay. [BOVILL, C.J.—That makes no difference. KEATING, J.—You should have given Tamplin notice. I think it a question whether the revising barrister could have appointed another person respondent after he had already appointed a public officer.] In *Luckett v. Vollar* (K. & G. 871; 31 L. J. 43, O. P.) the appeal was not consolidated. This is a consolidated appeal, and in such a case notice cannot be given till the case is stated. [KEATING, J.—The difficulty I feel is that you were placed in no jeopardy. You had a respondent to whom you might have given notice. You cannot show that you were prejudiced by what took place. BOVILL, C.J.—It is of no consequence that this was a consolidated appeal, for the case was complete on the 31st Oct.] The notice was given more than ten days before the day actually appointed for the hearing. [BOVILL, C.J.—That makes no difference, as it might have come on the first day, viz., 13th Nov.] The following cases were cited:

Luckett v. Glider, 11 C. B. N. S. 5;

Newton v. Overseers of Moberley, 2 C. B. 205; 1 Lutw. 335.

BOVILL, C.J.—If it were open to us to allow this appeal to be heard, I, for one, should be very glad to have it argued. But this court exercises in these matters a particular jurisdiction which has been minutely defined by statute. If the question were now raised for the first time, I should be inclined to accede to the application; but not

only the Act of Parliament, but the decisions throughout a great number of years are against the application. In all cases it has been considered that the court must strictly follow the Act, and that no discretion is left us. In *Aldworth v. Dore* (2 Lutw. 67; 5 C. B. 87), Wilde, C.J., expresses a strong opinion as to the necessity of strictly following the Act, and as to the obligation on the court not to allow the proviso to sect. 64 to apply except on very substantial grounds. In *Palmer v. Allen* (5 C. B. 5), the same Chief Justice says, "The jurisdiction created by the Act of Parliament has been long enough in existence to enable the parties interested to become acquainted with the procedure. This case might have been arrived at on the first day appointed for hearing these appeals, and in that case it would have been manifestly inconvenient to have allowed it to go over. Some excuse is clearly necessary." There the excuse was allowed. Now, to deal with the proviso to the 64th section, which says that "if it shall appear to the said court that there has not been reasonable time to give or send such notice in any case, it shall be lawful for the said court to postpone the hearing of the appeal in such case as to the said court shall seem meet." The notice spoken of there is the ten days' notice. This year the 13th Nov. was the first day appointed for taking these appeals. The court is always anxious to allow a fair space of time so as to give parties an opportunity of complying with the requirements of the Act, though in my experience very early days have been appointed when there have been very many appeals to be heard. No question arises in this case as to whether reasonable time was or was not allowed for giving or sending notice. Of course, if there is no respondent no notice can be given. The Act contemplates that some person will be willing to become respondent, but here, though there were 110 appellants, no person was willing to become respondent. The case occupied some time in preparation, and ample opportunity was given for anyone to offer to become respondent; but no person was willing to do so, and pursuant to the provisions of the Act, the revising barrister, to give the appellant the opportunity of appealing, appointed Tamplin respondent. He had appointed him on the 31st Oct. On that day the appeals had all been consolidated, and Tamplin had been named respondent, and the case had been signed by the revising barrister. The moment that was done, and the case given to the appellant, he was bound to act upon it. He could have lodged the case with the masters of the court, have given notice to them, and have given notice to the respondent. There was a respondent—Tamplin—and no other. There was no difficulty at all in complying with the provisions of the Act and the decisions upon it. On the 1st Nov. the appellant could have given notice. There was thus a reasonable time for giving notice. It was known that there was to be an appeal, that there must be a respondent, and that there was a respondent, and yet no notice was given. There is no ground for saying that there was not a reasonable time. The court has no power to postpone the hearing of a case, simply because the appellant has overlooked the provisions of the Act, but only when there has not been a reasonable time for giving the notice. The only question for the court is, whether there was such reasonable time, and I think there was.

After the decisions that have been given upon the Act, I think the hands of the court are tied, and that we cannot feel ourselves at liberty to hear this appeal.

KEATING, J.—I am entirely of the same opinion, though I give my decision with great reluctance. The simple question for our decision is, whether or no there was reasonable time for giving the notice. No doubt there was. That being so, the court has no discretion in the matter.

BRETT, J.—The day appointed by the court for hearing the appeals was the 13th Nov., and ten days' notice of intention to prosecute the appeal was not given. The case, therefore, falls within the prohibitory words of the 64th section, which says that no appeal shall be heard by the court in cases where the respondent does not appear, unless ten days' notice be given. But then the question arises, whether this case falls within the proviso. On this point, though I do not feel quite so clear as the Chief Justice, I am yet of opinion that it has not been made to appear to the court that there was no reasonable time for giving notice. A respondent was appointed on the 31st Oct., and appellant knew it. He had thus thirteen days for giving notice, and it is not made clear that he could not, in that time, have given the ten days' notice.

DENMAN, J.—I am of the same opinion. I think we are bound by the decisions.

Application refused.

Attorney for the appellant, *Augustus Beddall.*

COURT OF EXCHEQUER.

Reported by T. W. SAUNDERS and H. LEIGH, Esqrs.,
Barristers-at-Law.

Monday, Nov. 11, 1872.

THE PLUMSTEAD DISTRICT BOARD OF WORKS v. THE PLANET BUILDING SOCIETY.

The Metropolis Local Management Acts 1855 and 1862 (18 & 19 Vict. c. 120, ss. 105-250, and 25 & 26 Vict. c. 102, s. 77)—Paving new streets—Apportionment of expense of between owners—Present and future owners—Liability of—Power of board to sue future owners—Construction.

Under sect. 77 of the 25 & 26 Vict. c. 102, the amount apportioned by the vestry or district board of a parish, to be paid by the owners of houses or land towards the expense of paving new streets under sect. 105 of the 18 & 19 Vict. c. 120, may be recovered by the vestry or board, in an action against either the person who is owner of the premises at the time when the apportionment is made, and the right to recover first accrues, or against any future or subsequent owner of the premises; and that, whether such amount is made payable at once in one sum, or at intervals by instalments, the effect of the above-mentioned two Acts, taken together, being to impose the liability upon the land.

So held by the Court of Exchequer, Kelly, C. B., and Bramwell, Channell, and Pigott, BB.

The Vestry of Bermondsey v. Ramsey (24 L. T. Rep. N. S. 429; L. Rep. 6 C. P. 247; 40 L. J. 206, C. P.), approved and followed.

THIS was an action brought to recover 37l. 10s. under the circumstances hereunder set forth, and by consent of the parties and the master's order under the Common Law Procedure Act 1852, the

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following case was stated without pleadings for the opinion of the court,

SPECIAL CASE.

1. The plaintiffs are the Board of Works for the Plumstead district, deriving their authority from and acting under the jurisdiction of the Metropolis Local Management Acts 1855 and 1862 (18 & 19 Vict. c. 120, and 25 & 26 Vict. c. 102).

In pursuance of the powers vested in them by the 105th section of the former of the said Acts, the plaintiffs, as such board, at a meeting duly held on the 25th March 1868, resolved that a certain new street within their district, called Granville-mews North, in the parish of Lee, was not paved

to their satisfaction, and that it was expedient that the same should be paved throughout the whole of the breadth of the carriage way and footpaths thereof, in accordance with a certain plan and estimate of their surveyor, Mr. F. F. Thorne; and they further resolved that the owners of the several houses forming the said street, and the owners of land bounding and abutting on the said street, should pay to the said board the sum of 170*l.* 13*s.* 4*d.*, being the amount of the estimated expenses of the said paving; and they further apportioned the said amount of 170*l.* 13*s.* 4*d.* between the said houses, according to a certain schedule appended to the said resolution, from which the following is an extract :

No. on Plan.	Description of Property.	Name of Occupier.	Name of Owner.	Address of Owner.	Net rateable value.	Sum charged upon.	Amount of Contributions.
10	Stable, &c.	John Wilson.	John Wilson.	Dartmouth-grove, Lewisham-hill, Blackheath.	15	5	6 13 4
12	House and Garden.	Thos. Clarke.	W. C. Banks, Sen.	Granville-street, Lee-bridge, Lee.	30	10	13 6 8

2. At the same meeting of the said board, the plaintiffs, at such board, passed a further resolution of a similar character with regard to another new street, called Middle Granville-mews, and apportioned the expense of paving the same among

the owners of houses forming, and of land bounding and abutting upon the same, in a similar way. The following is an extract from the schedule appended to the last-mentioned resolution:—

No. on Plan.	Description of Property.	Name of Occupier.	Name of Owner.	Address of Owner.	Net rateable value.	Sum charged upon.	Amount of Contributions.
5	Stable, &c.	John Wilson.	John Wilson.	Dartmouth-grove, Lewisham-hill, Blackheath.	15	15	37 10 0

3. The house, stable, and land in respect of which the said apportionments were respectively made, and which were described in the plan referred to in the schedule to the first resolution by the Nos. 10 and 12; and in the plan referred to in the schedule to the last-mentioned resolution by the No. 5 were the property of one Wm. C. Banks, now deceased, as owner thereof.

4. The name of John Wilson was erroneously inserted in the said plan, as owner of the said property, instead of the name of Wm. C. Banks.

5. No separate apportionment was made in respect of the said land, but the same was included in that made in respect of the said houses and stables.

6. No notice was given to the said Wm. C. Banks of the intention of the plaintiffs to pave the said street in pursuance of the said Acts.

7. No part of the amounts mentioned in the said apportionments, and now sought to be recovered, has ever been paid by the said Wm. C. Banks, or by anyone else.

8. By two several indentures, dated respectively the 3rd Dec. 1868, and made between the said William C. Banks of the one part, and the then trustees of the said society of the other part, the said house, stables, and land were assigned to the said trustees by way of mortgage, for securing the repayment of divers moneys to the said society according to the rules thereof, as in such indenture are particularly expressed. The said William C. Banks made default in payment of the moneys secured by the said several indentures, and the defendants, as the then and present trustees of the

said society, under the powers and provisions therein contained, entered into and took possession of the said house, stables, and land, on the 25th Dec. 1869, and now receive, or are entitled as mortgagees in possession to receive, the rack rents and profits of the said house, stables, and land, in respect of which the said apportionments were made.

9. Until the 3rd Dec. 1868 the said trustees had no interest or estate whatever in the said house, stables, and land, and they received no notice of, or information respecting the said apportionments until the 15th Nov. 1870.

The question for the opinion of the court is, whether this action is maintainable against the defendants as owners in respect of all or any of the said apportionments? If the court should be of opinion that the question should be answered in the affirmative, then judgment shall be entered up for the plaintiffs, and for such sum as the court may direct, with costs of suit. If the court shall be of opinion that the question should be answered in the negative, then judgment shall be entered for the defendants, with costs of suit.

Points for argument on the part of the plaintiffs. That under the provisions of the Metropolis Local Management Acts 1855 and 1862, and especially sect. 105 of the former Act, and sect. 77 of the latter Act, the defendants are liable to the payment sought to be recovered, as owners of the premises in question.

Points for argument on the part of the defendants. First, that this action is not maintainable against the defendants; secondly, that the defen-

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dants were not the owners of all or any of the property, in respect of which the several apportionments were made at the time when the sums so apportioned became due and payable.

The following sections of the Metropolis Local Management Act 1855 (18 & 19 Vict. c. 120), and The Metropolis Local Management Acts Amendment Act (25 & 26 Vict. c. 102), are material as being those on the construction of which the questions in the cases mainly depended. (a)

(a) By the first mentioned Act (18 & 19 Vict. c. 120), it is enacted as follows: Sect. 105. "In case the owners of the houses forming the greater part of any new street laid out or made or hereafter to be laid out or made, which is not paved to the satisfaction of the vestry or district board of the parish or district in which such street is situate, be desirous of having the same paved as hereinafter mentioned; or if such vestry or board deem it necessary or expedient that the same should be so paved, then, and in either of such cases, such vestry or board shall well and sufficiently pave the same, either throughout the whole breadth of the carriage-way and footpath thereof, or any part of such breadth, and from time to time keep such pavement in good and sufficient repair; and the owners of such houses forming such street shall, on demand, pay to such vestry or board the amount of the estimated expenses of providing and laying such pavement (such amount to be determined by the surveyor for the time being of the vestry or board); and in case such estimated expenses exceed the actual expenses of such paving, then the difference between such estimated expenses and such actual expenses shall be repaid by the said vestry or board to the owners of houses by whom the said sum of money has been paid; and in case the said estimated expenses be less than the actual expenses of such paving, then the owners of the said houses shall, on demand, pay to the vestry or board such further sum of money as, together with the sum already paid, amounts to such actual expenses."

Sect. 250 (the interpretation clause). "That the word 'owner' shall (except for the purpose of the provision of this Act, requiring notice to be served on owners, or reputed owners of land, before application to one of her Majesty's principal secretaries of State for his consent to exercise the power of taking land, or any right or easement, in or over land compulsorily) mean 'the person for the time being receiving the rack rent of the lands or premises in connection with which the said word is used, whether on his own account or as agent or trustee for any other person, or who would so receive the same if such lands or premises were let at a rack rent.'"

The 25 & 26 Vict. c. 102, enacts as follows: Sect. 53 (providing for the expense of constructing sewers), that "Where any sewer shall be constructed by any vestry or district board in a street in which, previously to such construction there had been no sewer, or only an open sewer, but where sewers rates have been levied previously to such construction, the expense of constructing such sewer, and the works appertaining thereto, including the cost of gullies, side entrances, lengths of sewer at the intersections of streets, and other incidental charges and expenses, shall be borne and defrayed in part only by the owners of the houses situate in, and of the land bounding and abutting on, such street respectively; and the amount to be borne by such owners shall be determined by the vestry or district board in each particular case, and the residue of such expenses shall be defrayed by the vestry or district board out of the sewers rates levied in that parish or district; and the amount so charged by the vestry or district board upon or in respect of such house or premises shall be payable either before the works shall be commenced, during their progress, or after their completion, as the vestry or board shall in each case determine, either in one sum or by instalments within such period not exceeding twenty years, as the vestry or board, shall direct; and any such sum or instalment shall be recoverable from the present or any future owner of such house or premises, either by action at law or in a summary manner before a justice of the peace, at the option of the vestry or board."

Sect. 77. "Where any party or district board shall, under the powers given by sect. 105 of the 18 & 19 Vict. c. 120, have paved, or be about to pave any new street, the owners

Barrow for the plaintiffs: The apportionment, to recover which the action was brought, was made on the 25th March 1868, and on the 3rd Dec. following the property on which it was made was assigned by way of mortgage by Banks, the owner, to the defendants in the names of their trustees, and default being subsequently made in payment of the mortgage moneys, the defendants, on the 25th Dec. 1869, and before any payment had been made under the apportionment, entered into possession and into the receipt of the rents and profits of the premises in respect of which such apportionment was made. The land having thus changed owners before any payment under the apportionment, the question is whether the plaintiffs can maintain their action against the defendants as "owners" in respect of such apportionment? whether, in fact, they can sue the present "owners" in respect of an apportionment made while a previous owner was in possession? Undoubtedly they could have proceeded against the owner in possession at the time of the apportionment. The interpretation clause (sect. 250) of the 18 & 19 Vict. c. 120, enacts that the word "owner" shall (except for certain purposes which do not concern the present case) mean "the person for the time being receiving the rack rent of the lands or premises in connection with which the said word is used, whether on his own account, or as agent or trustee for any other person, or who would so receive the same if such premises were

of the land bounding or abutting on such street shall be liable to contribute to the expenses, and estimated expenses of paving the same, as well as the owner of houses therein; provided that it shall be lawful for the vestry or district board to charge the owners of land in a less proportion than the owners of house property, should they deem it just and expedient so to do; and any such costs or expenses, including the costs of paving at the points of intersection of streets, and all other incidental costs and charges shall be apportioned by the vestry or board, and shall be recoverable either before the work shall be commenced or during its progress, or after its completion; and it shall be lawful for the vestry or district board, at their discretion, to accept payment of the amount apportioned or charged in respect of each house or premises by instalments spread over a period not exceeding twenty years, and any such amount shall be recoverable from the present or any future owners of the premises, either by action at law, or in a summary manner before a justice of the peace, at the option of the vestry or board."

Sect. 96. "It shall be lawful for any vestry or district board at their discretion to require the payment of any costs or expenses which the owner of any premises may be liable to pay under the said 18 & 19 Vict. c. 120 or this Act, either from the owner or from any person who then or at any time thereafter, occupies such premises; and such owner or occupier shall be liable to pay the same, and the same shall be recovered in manner authorised by the said 18 & 19 Vict. and this Act; and the owner shall allow such occupier to deduct the sum of money which he so pays out of the rent from time to time becoming due in respect of the said premises, as if the same had been actually paid to such owner as part of such rent; provided always that no such occupier shall be required to pay any further sum than the amount of rent for the time being due from him, or which, after such demand of such costs or expenses from such occupier, and after notice not to pay his landlord any rent without first deducting the amount of such costs or expenses becoming payable by such occupier, unless he refuse, on application being made to him for that purpose by or on behalf of the vestry or district board, truly to disclose the amount of the rent, and the name and address of the person to whom such rent is payable; but the burden of proof that the sum demanded from any such occupier is greater than the rent due by him at the time of such notice, or which has since accrued, shall be upon such occupier."

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let at a rack rent." [CHANNELL, B.—The interpretation clause says, "for the time being." Is that at the time of the apportionment made?] Yes. Banks was then the owner; but it is contended that the board can sue the parties in possession at a subsequent period. Although the apportionment was made, it does not follow that the works would be immediately pushed forward, or that the board, a public body, would press for payment until the money had been actually expended. The question depends on the statutes. By sect. 105 of the 18 & 19 Vict. c. 120, power is given to the vestry or board to pave new streets, and to keep the same in repair, and "the owners of the houses forming such street" are to pay the "amount of the estimated expenses thereof," &c. (He here reads sect. 105.) [BRAMWELL, B.—That would look as if the demand was to be made before the work was done, and you remarked just now that probably the board would not make a claim until the work was finished.] No doubt it would seem as if the board had under that section to get in the money before the work was done; and there was no power for them to obtain payment by instalments of sums which often were very large. But that was rectified by sect. 77 of the 25 & 26 Vict. c. 102, upon the words of which section this question arises. (He reads sect. 77.) That section for the first time made owners of land, though there were no houses on it, liable to contribute to the expenses, and such expenses are to be recoverable either "before the work shall be commenced," or "during its progress," or "after its completion." And the board have power to accept "payment of the amount apportioned, &c., by instalments, spread over a period not exceeding 20 years," and "any such amount shall be recoverable from the present or any future owner of the premises." Now the words "any such amount" mean either the whole amount or the instalment. If the word "amount," where it first occurs in the section, means the whole sum to be paid, and the word "instalment" be used in its ordinary sense as a portion of such amount, if payable by instalments, it would be a new interpretation of a section to say that the word "amount" is used in the second instance in the sense of instalment and not in the sense of the whole sum. It must be taken to be used in the same sense, viz., as meaning the whole sum apportioned, throughout the section, and that sum may be recovered against "the present or any future owner." At any rate, it was enough if that sense was not excluded. The owner of the estate benefited has to pay. On a change of owner before payment, the new owner, it must be assumed, will ascertain if any such charges are open and unsatisfied, and will calculate the purchase money accordingly. [BRAMWELL, B.—You say that the land is debtor, and may be got at not by entry or distress, but by action against the owner at any time?] Yes; and there is authority for saying that an action might be brought against one owner who did not pay, and then against another afterwards: (*The Vestry of Bermondsey v. Ramsay*, in the Common Pleas, 24 L. T. Rep. N. S. 429; L. Rep. 6 C. P. 247; 40 L. J. 206, C. P.) Sect. 53 of the later Act (25 & 26 Vict. c. 102) contains a parallel provision with respect to "sewers," though in somewhat different language (he reads sect. 53); *Any such sum or instalment* in that section is what in the subsequent section (77) is called *amount*. Sect. 53 does for

sewage precisely what sect. 77 does for paving. In both cases the expenses are recoverable from the owner, and may be recovered before the commencement, or during the progress, or after the completion of the work; and, in both, may be recovered by instalments, and from the present or any future owner. There is no real difference in principle in the cases, and the statute meant the same in both, and at all events that construction is not excluded. The plaintiffs have nothing to do with the change of owners. They could clearly recover under sect. 53 against present or future owners, and sect. 77 meant to give them the same powers with respect to paving. The case in the Common Pleas was under sect. 96, and shows that the machinery, given by that section, of attacking the occupier first, was only a means of enabling the plaintiffs to get at the real owner, for whose benefit the work had been done. [BRAMWELL, B.—That case shows that succeeding owners are each liable, and that the fact of there having been a liable owner at one time is no bar to the liability of a subsequent owner.] That is so. The sum there was one which, beyond question, the first owner would have been liable to pay, and that is the pith of the case.

Wilberforce, for the defendants, *contra*.—It is submitted that sect. 77 of the 25 & 26 Vict. c. 102, which has been relied on by the plaintiffs, applies solely to the case of *instalments*. It is clear from sect. 105 of the first Act (18 & 19 Vict. c. 120) that the board are only entitled to charge the owner *before the work is done*, at the time the apportionment is made; because throughout the section the words used are the *estimated expenses*, and the provision that if such estimated expenses exceed the *actual expense*, the difference is to be repaid and not to be allowed, clearly implies, not only that the *estimate* is to be that which is to govern, but also that payment is to be made in advance. If so, then it is clear that the owner who is owner *before the work is done*, viz., at the time the apportionment is made, is to be the person liable, because, if otherwise, the definition in sect. 250 (the interpretation clause) of "owner" as "the person for the time being," would have no meaning, and that section is only varied by sect. 77 so far as that section takes anything out of the operation of the first. Sect. 77 gives the board three periods, viz., before the work is begun, during its progress, or after its completion, at which the apportionment may be made; instead of its being made in advance, as was necessary under the prior Act; and where it is so made, the owner *for the time being*, that is to say, the owner at that particular time, becomes liable. Again, if, as it has been contended *contra*, the last clause in sect. 77, "any such amount shall be recoverable from the present or any future owner," applies not only to the case of instalments, but also to the whole sum, then those words in the middle of the clause, which I have before referred to, have no meaning, because, if the board is entitled to recover from any future owner, it would be unnecessary to state that the expenses, &c., may be recovered at one of three particular times. [KELLY, C.B.—The earlier Act enabled them to recover only the estimated expenses which would presuppose the work not to have been completed; the latter Act extends their powers and enables them to bring an action for such estimated expenses before the beginning or during

the progress of the work; or without any estimate at all, when the whole is completed.] It would be of no effect if such a wide interpretation were given to the last part of the section, which says the amount shall be recoverable from any future owner. "The owner for the time being" means at the time the apportionment is made; but the board has a right under sect. 77 to make it at any one of three distinct periods; and upon its so making it, the owner at that time becomes liable. If then, by force of sect. 77, any one owner becomes liable at any time, there ought to be some other provision enabling the board to transfer that liability to some other person. The liability is *vested*, and the Act contains no power to transfer it from one vested owner to another. Now sect. 96 contains such a power with regard to "occupiers," and there is a strong distinction drawn in that section between an "owner" and an "occupier;" the words used being in the respective cases "the owner of any premises," and "any person who then or at any time thereafter occupies;" the word "then," it is submitted, referring to the time when the liability accrued. [BRAMWELL, B.—"At any time thereafter" must mean "at any time thereafter." No doubt; but the time must be fixed at some definite period. It does not say the "then or any future owner," but "the owner," that is, the owner for the time being, viz., the time of apportionment made. Sect. 96 imposes the liability on future occupiers, but not on future owners. [KELLY, C. B.—Yes; because that has already been fixed, defined, extended and enlarged by the 77th section.] No doubt, if "any such amount" refers not only to the amount agreed to be taken by instalments, but also to the whole apportioned sum; but I contend that it refers only to that which, in the immediately preceding words, the board is authorised to accept by instalments. Sect. 53 throws light upon that; there the words are different, viz., "sum or instalment;" here it is only "amount." This is merely a general provision, which, by the well known rule, does not, when following upon a particular provision, derogate from the particular provision, the subsequent general words being limited by reference to the preceding particular words. *Prima facie*, no doubt the word "amount" is large enough to include the "instalment," but here it must be limited by the particular provision, as in the case of a general provision for all persons, and a particular provision as to tenants at will, and it has been ruled that tenants at will were not included in the general provision (though large enough for the purpose) on the ground that they were specially provided for.

KELLY, C.B.—I think, Mr. Barrow, we may relieve you from any further argument. I am of opinion that the plaintiffs in this case are entitled to recover; and that, upon a proper construction of 18 & 19 Vict. c. 120, s. 105, and 25 & 26 Vict. c. 102, s. 77, those two statutes, taken together, entitle the plaintiffs to recover a sum of money of this nature, either from the owner for the time being, at the time the apportionment was made, or from any subsequent owner, at any time, until the whole of that money shall have been paid. Now, by the first-mentioned Act of Parliament, the power conferred on the vestry was merely, in case of their having resolved to pave a street and to incur the expense of that operation, to enable them to recover against the owner the estimated ex-

penses, and there the power conferred upon them stopped; and, in fact, there was no power then to recover by action at all; it was left to the inadequate and ineffective mode of proceeding before magistrates. The consequence of that was, that, in the first place, they could only recover the estimated expenses, and that made it incumbent upon them, at some time or other, and of course, therefore, *before* the operation should be complete, to cause the probable expenses to be estimated, and then to enforce payment by means of a proceeding before magistrates against the owner, and, possibly, under that section alone, against a future owner of the amount so estimated. But this inconvenience resulted. That operation necessarily, unless the estimate should correspond exactly and precisely with the entire expenses incurred, which, looking to the nature of the expenditure, was exceeding improbable, would be an inexact process. It required, however, first, that there should be an estimate made, that the vestry should demand and enforce the payment of the amount so estimated, and that, when the whole operation should be complete, and the entire expense ascertained, there should either be a return by the vestry of a portion of the money paid, or a further demand by the vestry against the owner for the surplus of the money actually expended; a very inconvenient proceeding in itself, and which might be attended with this further complication and additional inconvenience, that the amount might have been obtained from the owner at the time of the apportionment, and then, when the return of the money came to be made, or when an additional sum of money was required on the part of the vestry, a different owner would be in possession; and then they would have, in the one case, to return a portion of the money to the person who paid it, and in the other case to make a new demand, and institute a new proceeding before the magistrates to recover the sum, which would, perhaps, be a very trifling one. This altogether, was so complicated, so inadequate, and so inconvenient a proceeding, that the Legislature, when dealing with the subject a few years afterwards, in 25 & 26 Vict. c. 102, s. 77 (though certainly in terms, I must say, somewhat vague and ambiguous, and perhaps attended with some difficulty, at first sight, in the construction of the language used, but certainly very reasonable when we come to look at the whole of the section), conferred a power on the vestry to deal with the subject in a way strictly according to justice, with regard to all the parties who are or who may be concerned. Whereas, by the first Act of Parliament, there was no power to tax the owners of *land* bounding or abutting on the street, and although such owners might derive very great benefit, and the value of their property might be very considerably increased by the paving of the street, or by the operation of the vestry, whatever it may have been, there was no power to make them contribute to the expense. This section, in the first place, confers that power. It proved that where the vestry shall have determined to pave, or are about to pave a street, the owner of the land bounding or abutting on the street, shall be liable as well as the owner of the house. That, however, left the question now before the court entirely untouched. The section, however, goes on to say: "And provided that it shall be lawful for the vestry or district board to charge the owners of land in a less proportion than the

owners of house property." That again does not touch the present question. But then we find that this is the language of the section: "And any such costs or expenses, including the cost of paving at the points of intersection of streets, and all other incidental costs and charges" (now that is the entire costs and charges, the entire expenditure of the vestry, the beginning, continuing, and ending in any operation of this nature) "shall be apportioned by the vestry or board, and shall be recoverable either before the work shall be commenced or during the progress"—that would be where they would have an estimate made, because they would want funds perhaps to go on with, and, therefore, if they pleased, they might resort to an estimate before the work was begun, or when it was in progress—"or after its completion." Therefore they may, if they think fit (and that would be the more convenient course where they do not doubt the solvency of the different owners or occupiers, nor the means of payment, or recovering the money), leave it till the whole expenditure has been incurred, and there is one sum, and one sum only, to cause to be paid and to be levied on the different parties liable. That is, the costs, the whole costs, including the expenses of every description, "shall be recoverable, either before the work shall be commenced, or during its progress, or after its completion." And now comes the power in question: "And it shall be lawful for the vestry, or district board, at their discretion, to accept payment of the amount apportioned or charged in respect of each house or premises by instalments, spread over a period not exceeding twenty years; and any such amount"—here is the first time in which the word "amount" is mentioned with reference not merely to the entire expenditure of the vestry, but to the mode of recovery from the persons liable)—"shall be recoverable from the present or any future owner of the premises, either by action at law or in a summary manner before a justice of the peace, at the option of the vestry or board." That is, the entire amount of the expenditure; and it does not seem to make any difference, whether that amount shall have been agreed by the vestry to be accepted by instalments, or whether the whole amount shall have become payable at once by the owner or occupier, at the time the apportionment was made. In either case, such amount shall be recoverable from the present or any future owner of the premises, either by action at law or in a summary manner," and so on. Well, now, those words are amply sufficient, and they are quite large enough to entitle the vestry to proceed to recover that amount either against the owner or occupier for the time being, at the time of the apportionment being made; or, even at an earlier period, at the time of the estimate being made (if they should resort to an estimate), that amount is to be recoverable against the owner at the time the apportionment is made; or it may be recovered against any future owner of the houses or of the lands, as it may be. It would be very unreasonable if it were not so; because, of course, the individual who is owner at the time when an apportionment is made, and when the demand first accrues, if he be not compelled to pay the money almost on the very day when the rate accrues, might shortly afterwards convey away the property, and shortly after that, or at the very same time, become bankrupt. Here is a

public body who have, themselves laid out money with which they have been entrusted by the public, which is clearly a benefit to the class of persons referred to in these two sections, and, therefore, although the land has become the property of another owner, yet it has probably been considerably increased in value by means of the expenditure on the part of the vestry, and they have ample means of recovering against him; and it would be a very unreasonable construction of these Acts of Parliament if the words could, in any way, be made sufficient to disentitle the vestry to recover, either against the present or future owners, or the present or future occupiers. For that purpose, a sum of money which ought to be paid by the owner or occupier of the premises may be recovered, either against the owner at the time the amount is ascertained and the right to recover first accrues in the one case, or in the other case against the owner or the occupier at the time being. That is a construction put upon the Act of Parliament in strict conformity with the language used by the Legislature, and also in strict accordance with the reason and justice of the case. Moreover, if that were at all doubtful, we have the authority of the case in the Court of Common Pleas (*The Vestry of Bermondsey v. Ramsay (ubi sup.)*), in which the point, whether subsequent owners or occupiers were liable, does not appear to have been questioned. The only question in that case was, whether a judgment obtained against the first owner, at the time of the apportionment, would not be a bar to the demand: the liability of subsequent owners seems to have been assumed, and not to have been brought in question at all. Under these circumstances, authority, reason, common sense, and the justice of the case, are all in favour of the plaintiffs; the words are quite sufficient; and, therefore, I am of opinion that our judgment must be for the plaintiffs.

BRAMWELL, B.—I am of the same opinion.

CHANNELL, B.—I am of the same opinion. There is no point here made, that the apportionment was not proper. The question is, whether the defendants, under the circumstances stated in this case, are liable to pay. Now it appears to me, that the effect of the Acts, taking them together, is to impose a liability upon the land, and although provision is made for recovery through the occupier taking certain steps for that purpose, yet the liability may be taken to be imposed upon the land. That is the ground upon which I think the plaintiffs are entitled to our judgment.

FIGOTT, B.—I am of the same opinion. I think that whatever contention may have arisen, under the former statute, on the 105th section, if it stood alone, it is quite clear that the 77th section of the latter statute supplements the powers for recovering charges upon the land to the fullest extent, and enables them to be recovered at any time, and against one owner after another, until they are all paid. I cannot conceive that any question can arise, when that section is carefully read.

Judgment for the plaintiffs.

Attorney for the plaintiffs, *J. M. Dale (Newman, Stretton, and Dale)*, 75, Cornhill, E.C.

Attorneys for the defendants, *Ingle, Cooper, and Holmes*, 23, Threadneedle-street, E.C.

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THE GUARDIANS OF THE POOR OF THE WEST HAM UNION v. OVENS.

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Wednesday, Nov. 20, 1872.

THE GUARDIANS OF THE POOR OF THE WEST HAM UNION v. OVENS.

Poor law—Pauper in receipt of relief—"Valuable security" belonging to him at the same time—Judgment in an action for damages—Whether a "valuable security" within 12 & 13 Vict. c. 103, s. 16—Liability of pauper to reimburse guardians.

A judgment in an action for damages for personal injuries, signed in favour of the plaintiff in such action, whilst he is in the receipt of parochial relief, is a "valuable security for money belonging to him," within the meaning of sect. 16 of the 12 & 13 Vict. c. 103, so as to render him liable, in an action at the suit of the guardians of the poor under that section, to reimburse them the amount expended by them in his relief during the twelve months prior to their bringing such action.

So held by the Court of Exchequer, Kelly, C.B., and Channell, Pigott and Cleasby, B.B.

1. This is an action brought by the above-named guardians to recover the sum of 24l. 18s., but which was, on the part of the plaintiff, by consent, reduced to the sum of 19l. 19s., being the amount actually and properly expended by them during twelve months prior to the proceedings in this action, in the relief of the said defendant, a pauper, and his wife and family; and this action was commenced on the 1st Aug. 1872, and was brought under sect. 16 of 12 & 13 Vict. c. 103, which section is as follows: "And be it enacted that where any pauper shall have in his possession, or belonging to him, any money or valuable security for money, the guardians of the union or parish, within which such pauper is chargeable, may take and appropriate so much of such money, or the produce of such security, or recover the same as a debt before any local court, as will reimburse the said guardians for the amount expended by them, whether on behalf of the common fund, or of any parish, in the relief of such pauper during the period of twelve months prior to such taking and appropriation, or prior to such proceedings for the recovery thereof, as the case may be; and in the event of the death of any pauper having in his possession, or belonging to him, any money or property, the guardians of the union or parish wherein such pauper shall die may reimburse themselves the expenses incurred by them in and about the burial of such pauper, and in and about the maintenance of such pauper at any time during the twelve months previous to the decease."

2. The said James Ovens was a pauper chargeable by law to, and receiving relief for his wife and family from the said guardians, without intermission, from the month of Oct. in the year 1867 up to and including the 16th May in the year 1872, when he received the sum of 12s.

3. In the month of Oct. in the year 1867, before the said James Ovens became so chargeable to the said guardians, he was injured in an accident caused by the negligence of the St. Katherine Docks Company.

4. The said James Ovens afterwards, and while he was a pauper and so chargeable to the said guardians, sued the docks company in the Court of Exchequer of Pleas in respect of the said injury, and recovered in the action a verdict of 300l. damages, and costs as between attorney and client, at the sittings for Middlesex after Hilary Term

1872, leave being given to the docks company to move the court on a point reserved. Such proceedings were commenced and prosecuted with the knowledge of the plaintiffs.

5. The docks company moved the court accordingly within the first four days of Easter Term 1872; but the court refused the rule, and the verdict stood, and judgment was signed on the 13th May 1872.

6. The sum of 464l. 3s. (being 300l. for such damages as aforesaid, and 164l. 3s. for such costs as aforesaid) was, on the 18th May 1872, paid by or on behalf of the said docks company to the attorney of the said James Ovens.

7. The said attorney, on the 20th May 1872, being four days after the said James Ovens had ceased to be receiving relief from the said guardians, paid to the said James Ovens 290l., portion of the said 464l. 3s., being the amount due to the said James Ovens, after payment of the said attorney's costs in the said action. The said James Ovens immediately communicated this fact to the relieving officer of the plaintiffs, pursuant to an understanding between them to that effect.

8. The said guardians, soon after they knew that the said James Ovens had received the said sum, and while he had the same or enough thereof to satisfy the claim in this action in his possession or belonging to him, applied to him for payment of the claim in this action, and in default made in payment they brought this action on the 12th Aug. 1872, under the above mentioned section, to recover for the year's relief prior to the action.

9. On the hearing of this action the judge of the County Court of Middlesex sitting at Bow, gave judgment for the defendant.

The question for the opinion of this court is, first, whether the said judgment so recovered by the said James Ovens against the said docks company was, under the circumstances, "a valuable security for money, in the pauper's possession or belonging to him," within the meaning of the said section, so as to enable the guardians to sue for the sum of 19l. 19s., being the amount expended in the relief of the said James Ovens for the twelve months preceding the commencement of this action. Secondly, whether the said money, paid to the said pauper on the 16th May 1872, was money "in the pauper's possession or belonging to him," within the meaning of the said section, so as to enable the guardians to sue for a year's expenditure in the relief of the said James Ovens.

Philbrick appeared to argue the case on behalf of the appellants, the guardians of the West Ham Union, the plaintiffs in the action in the County Court, and contended that the decision of that court was erroneous and must be set aside. A "judgment" was the highest obligation known to the law, and it was almost idle to say that it was not a "valuable security," and that it did not come strictly and expressly within the very terms of the section in question. He could find no case precisely in point, and probably the matter had never before been questioned. Suppose it had been an ordinary mortgage debt, could there be a doubt about that being a "valuable security," and if that were so, on what possible ground could this judgment be said not to be one equally. [*Pigott, B.*, refers to the statute 1 & 2 Vict. c. 110.] Sects. 16 & 18 of that statute are material, as illustrating the meaning of the words here. Sect. 16 enacts that if any judgment-creditor having

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obtained "any charge, or being entitled to the benefit of any security whatever, shall, before the property charged or secured shall be realised, take the person of the judgment debtor in execution, such judgment creditor "shall be deemed to have relinquished all right and title to the benefit of such charge or security." And sect. 18 enacts, that all decrees, &c., of courts of equity, and all rules of courts of common law whereby any money shall be payable to any person, "shall have the effect of judgments in the superior courts of common law, and the persons to whom any such moneys, &c., shall be payable shall be deemed judgment creditors within the meaning of this Act." There is no case precisely in point; but in *Jones v. Thompson* (E. B. & E. 63; 27 L. J. 234, Q. B.), it was held that a verdict in an action of contract for unliquidated damages without judgment, was not "a debt owing or accruing," and could not be attached under sect. 61 of the Common Law Procedure Act 1854 (17 & 18 Vict. c. 125), clearly showing that after judgment it would be.

R. Griffiths, for the respondent, the defendant below, *contra*, urged that this case did not come within the Act of 12 & 13 Vict. c. 103, which was passed no doubt to prevent the commission of frauds upon the funds of the Poor Law Union. The question here was, is this judgment a "valuable security" within sect. 16 of that Act? He contended that it was not. A judgment did not become a valuable security until the value of the judgment had been clearly ascertained. It was not negotiable, nor could it be deposited with a banker as a security for a loan or advance of money. Suppose, as might have been the case, it had been a judgment against a pauper, could it then have been said to be "a valuable security?" Surely not. It is a mere *chose in action*, and if the amount be not paid the judgment-creditor would be driven to bring an action for its recovery. It is submitted, first, that this is not a valuable security within the statute; and, secondly, it may be questioned whether it was in the defendant's possession.

Philbrick, in reply, was stopped by the court.

KELLY, C.B.—We ought, I think, to put a large and liberal construction and interpretation upon this statute, which was passed in order expressly to protect the ratepayers of parishes, and to give the guardians of poor law unions a right of recovering against paupers, who happen to be really possessed of the means of paying, the moneys which the parish or the union may have expended in the relief of such paupers. What are the facts here? For some years previously to the 16th May in the present year the pauper, the defendant, with his wife and family, had been in the constant and regular receipt of relief from the plaintiffs, the guardians of the poor of the parish of West Ham. Fortunately, both for them and for him, some two or three days before the 16th May, when he was last relieved by them, namely, on the 13th May, the judgment mentioned in the case was signed. Certainly, then, on that day (the 13th) he became entitled to this judgment, which was then undoubtedly "belonging to him." The question then arises whether or not it is "a valuable security" within the meaning of those words in the 16th section of the Act of Parliament (12 & 13 Vict. c. 103), under which the plaintiffs are proceeding in the present case. It has been argued by *Mr. Griffiths* that a "valuable security" can

only be one that is "negotiable," and the question is whether we, putting a large and liberal interpretation upon the statute before us, can hold that this judgment is not "a valuable security for money" "belonging to" the pauper at the time he was chargeable to the guardians, as stated in the case. Now, undoubtedly, this judgment is *de facto* a "security," and a "valuable security" in every sense of the word. It is available against lands, and available by creditors, and is a chattel which the defendant might sell and dispose of, if he were minded so to do, before realising the fruits of it. The plaintiffs supported this man and his family for some three or four years while he was prosecuting his claim against the Docks Company, and now he has obtained this judgment for a very large sum of money, between 300*l.* and 400*l.*; and as a matter of fact the defendant, the pauper, has received its full value in money. What reason, then, can there be for doubt? We ought not, I think, to hesitate in declaring that this is a "valuable security" in the defendant's hands. The verdict for the defendant must be set aside, and a verdict be ordered to be entered for the plaintiffs for the sum claimed.

CHANNELL, B.—I am of the same opinion, and for the same reasons. I am not quite sure that the verdict itself in the defendant's action against the St. Katherine Docks Company was not a "security." At first, no doubt, it was subject to the leave to the defendants to move for a rule to show cause why it should not be set aside on the point reserved at the trial, but when that rule was refused by the court, it was no longer subject to any doubt, and the pauper, the defendant, was then in receipt of parochial relief from the plaintiffs.

PIGOTT, B.—I am also of the same opinion, and think that this judgment was "a valuable security" within the meaning of the Act of Parliament in question. We must look at the facts of the case which abundantly show that it was so. The right and justice of the case are with the parish officers.

CLEASBY, B.—I am of the same opinion. I cannot, for a moment, hesitate in holding that this judgment is a "valuable security," nor can I see any reason why it should not be dealt with as such. It would, I think, be very difficult to suggest why it should not be. The judgment below should be reversed.

Judgment for the plaintiffs (apps.), reversing the decision of the County Court.

Attorneys for the plaintiffs (apps.), *Hillearys and Tunstall*, 5, Fenchurch-buildings, Fenchurch-street, E.C.

Attorney for the defendant (resp.), *J. B. Smedley*, Lincoln's-inn Chambers, 40, Chancery-lane, W.C.

Monday, Jan. 20, 1873.

CLARK (app.), v. JOSLIN (resp.).

Poor law—Administration of relief in a case of urgent necessity—Refusal of the relieving officer—Conviction—4 & 5 Will. 4, c. 76, s. 98—Consolidated Orders of the Commissioners, sect. 215, rule 6.

*By sect. 98 of the 4 & 5 Will. 4, c. 76, any person who wilfully neglects or disobeys any rules, &c., of the commissioners, shall, upon conviction, forfeit any sum not exceeding 5*l.*; and by sect. 215 of the Consolidated Orders of the Poor Law Commissioners, rule 6, which describes the duties of*

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relieving officers, they are directed, "in every case of sudden or urgent necessity, to afford such relief to the destitute person as may be requisite, either giving such person an order for admission into the workhouse, and conveying him thereto if necessary, or by affording him relief out of the workhouse," &c.:

Held, that the relieving officer has no absolute discretion in deciding what is a case of urgent necessity; and a relieving officer having refused relief in an alleged case of urgent necessity, and being convicted for such refusal, this court, being of opinion that the convicting justice was right in his view of the facts, refused to quash the conviction.

THIS was a case stated by a metropolitan police magistrate, under the 20 & 21 Vict. c. 43, upon a conviction by him of the appellant, a relieving officer, for unlawfully neglecting and refusing to afford such relief as was requisite to one Millicent Joslin.

The case stated was as follows:—

1. The appellant, Henry Seymour Clarke, appeared before me, the undersigned, at the police court, Worship-street, within the Metropolitan Police District, on the 1st Oct. 1872, to answer to a summons founded upon the 98th section of the 4 & 5 Will. 4, c. 76, and upon the 215th article of the Consolidated Order (24th July 1847), of the Poor Law Commissioners, No. 6, which summons alleged that he, the said Henry Seymour Clarke, did, on the 13th Sept. 1872, in the parish of Whitechapel, and within the said district, being the relieving officer of the said parish, unlawfully neglect and refuse to afford such relief as was requisite to Millicent Joslin, hers being a case of sudden or urgent necessity, contrary to the Consolidated Order of the Poor Law Board, and contrary to the statute, &c.

2. The 98th section of the 4 & 5 Will. 4, c. 76, is as follows:—

And be it further enacted, that in case any person shall wilfully neglect or disobey any of the rules, orders, or regulations of the said commissioners or assistant commissioners, or be guilty of any contempt of the said commissioners sitting as a board, such person shall, upon conviction before any two justices, forfeit and pay for the first offence any sum not exceeding 5*l.*; for the second offence, any sum not exceeding 20*l.*, nor less than 5*l.*, and in the event of such person being convicted a third time, such third and every subsequent offence shall be deemed a misdemeanor, and such offender shall be liable to be indicted for the same offence, and shall on conviction pay such fine, not being less than 20*l.*, and suffer such imprisonment, with or without hard labour, as may be awarded against him by the court, by or before which he shall be tried and convicted.

The 215th section of the said Consolidated Order commences thus:—"The following shall be the duties of a relieving officer:" and proceeds to enumerate them. No. 2 relates to ordinary cases of application for relief. No. 3 to cases of sickness or accident; and No. 6, upon which the present case turns, is as follows: In every case of sudden or urgent necessity, to afford such relief to the destitute person as may be requisite, either by giving such person an order of admission into the workhouse, and conveying him thereto if necessary, or by affording him relief out of the workhouse, provided that the same be not given in money, whether such destitute person be settled in any parish comprised in the union or not. A similar provision, having reference to overseers of the poor, is to be found in 4 & 5 Will. 4, c. 67, s. 54.

The said Consolidated Order of the Poor Law Commissioners may be referred to as part of the case.

3. The appellant was, at the time when the offence was alleged to have been committed, the relieving officer of the Whitechapel Union, which is one of the unions included in the schedule to the said Consolidated Order of the Poor Law Commissioners.

4. In support of the summons it was proved that the respondent had, for upwards of two years, been deserted by her husband, who had been living about Whitechapel for some time. The respondent had lately been working as a charwoman at different places in the City of London, but had left her last place of work about three weeks before the 12th Sept. Just before that day she had been living with a Mrs. Bunch, a friend of hers in Westminster, whose house she quitted the day before applying for relief in Whitechapel. On the 12th Sept., about 4 p.m., she saw the appellant, and applied to him for an order of admission to the workhouse, telling him that she was without food or means. The appellant gave her no relief but told her to come next morning and he would see what he could do for her. On the next day, the 13th, she went to him again and applied for relief, and he asked her where she had slept during the past night; she said she had slept nowhere, but had walked up and down the streets. He replied that if a police constable had seen her he would have sent her to the casual ward. She said that a police constable had seen her but had taken no further notice of her. The respondent then again told appellant that she had no food or home or means, that she had previously been in the Whitechapel Workhouse, and that she wished to be admitted into the workhouse until she could get an order made on her husband for her maintenance.

The appellant did not question her upon her statement, and gave her no relief, telling her that he could do nothing for her until the following Tuesday, when the next meeting of the Board of Guardians was to be held, the 13th Sept. on which this second application for relief was made, being a Friday. Upon being refused relief a second time the respondent made no further application to the appellant, but obtained assistance from a charitable person, and was maintained for some time by him.

5. The facts set forth in the next preceding paragraph, constituted the case against the appellant, and it was contended that they showed a case of urgent necessity within the meaning of the 215th article of the Consolidated Order No. 6, such as to impose upon the appellant as relieving officer, the duty of relieving the woman, and that by his neglect and refusal to relieve her he had rendered himself liable to be convicted under the 98th section of the 4 & 5 Will. 4, c. 76.

6. The appellant produced no evidence, and it was admitted on his behalf that he did not give any relief to the respondent; but it was contended that the facts did not show such sudden or urgent necessity as was intended by the said order. That on the contrary, upon such an application being made to the appellant, it became his duty under No. 2 of the same 215th article to inquire into the truth of the applicant's statements, and to report thereon to the guardians, especially as the said Millicent Joslin came from Westminster, and avowed her motive to be to make the guardians

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proceed against her husband. That even if such evidence amounted to proof in the opinion of a magistrate of a case of sudden or urgent necessity, yet the appellant was not liable to be convicted, inasmuch as he in his character of relieving officer, was bound to exercise his own judgment upon the facts stated to him, and to consider whether to his mind they disclosed a case of sudden or urgent necessity, and that an error in forming such judgment would not render him liable to conviction under the statute and order. That sect. 98 of 4 & 5 Will. 4, c. 76, did not apply to such a case, especially as sect. 15 of the same Act precluded the Poor Law Commissioners from interfering in any individual case for the purpose of ordering relief, and sect. 98 applied only to wilful in the sense of intentional neglect or disobedience of the order, or to criminal neglect.

7. I considered that the evidence disclosed a case of urgent necessity. It seemed to me that, except a case of sickness or accident, which class of case is provided for by another clause, No. 3 of the same 215th article, no case could well be more urgent than that of the applicant on the 13th Sept., when, having passed the night in the streets, and being without food or home or means, she applied for relief. I was of opinion it was then the duty of the relieving officer to have afforded her relief under article 215, No. 6, and that by the wilful neglect of that duty as evidenced by his omission to question her, or otherwise to inquire into the case, so as to be in a position to form a correct judgment upon it, he had rendered himself liable to be convicted. With regard to the other points made for the appellant, I thought that it was not a necessary ingredient of the offence that it should be done *malo animo*; but that a mere wilful neglect to obey the order, whether proceeding from indifference or from a wish to save himself trouble, was sufficient to bring himself within sect. 98 of the Act of Will. 4, in which the word maliciously does not occur. I also thought that the 15th section of the said Act had no bearing upon the case.

8. Thereupon I convicted the appellant (whose general character was said to be that of a kind and humane man) in the mitigated penalty of 40s. and costs. The appellant being dissatisfied with my determination as being erroneous in point of law, applied to me to state and sign a case for the opinion of a Superior Court, which I agreed to do, as I could find no decision for my guidance with regard to the meaning of the word *urgent* occurring in connection with the word *sudden* in the Consolidated Order, Article No. 215, No. 6, and in the 54th section of the 4 & 5 Will. 4, c. 76.

9. The question upon which the opinion of the court is respectfully requested is whether under the circumstances above set forth, and having regard to the points raised on behalf of the appellant, he was rightly convicted. If the court should answer the question in the affirmative, the conviction is to stand. If otherwise it is to be quashed.

J. L. HANNAY.

SUMMONS.

Metropolitan Police District to wit: To Mr. Clarke, Believing Officer of Whitechapel Workhouse.—Whereas, complaint hath this day been made before the undersigned, one of the magistrates of the police courts of the Metropolis, and within the Metropolitan Police District, by Millicent Joslin, for that you on the 13th Sept. 1872, in the parish of Whitechapel, in the county of Middlesex, and within the said district, being relieving officer of such

parish, did unlawfully refuse and neglect to afford such relief as was requisite to the said Millicent Joslin, hers being a case of sudden and urgent necessity, contrary to the Consolidated Orders of the Poor Law Board, and contrary to the statute, &c. These are therefore to command you in Her Majesty's name to be and appear on Tuesday next, at three o'clock in the afternoon, at the police court aforesaid, before me or such other magistrate of the said police courts as may then be there, to answer to the said complaints and to be further dealt with according to law.

Given under my hand and seal this 24th Sept. 1872 at the police court aforesaid.

J. L. HANNAY.

Manisty Q. C. (*Metcalf* with him) appeared for the appellant.—The question is, what is the meaning of the words "urgent necessity," and what are the duties of the relieving officer? Since the 28 Vict. c. 35, there are wards open in all parts of the metropolis for the reception of the destitute poor, and any really destitute person can be received into them. The relieving officer must have some discretion in deciding whether or not a person is in a condition of urgent necessity. [MARTIN, B.—I can scarcely conceive a stronger case than this.] She may have been an impostor, and the relieving officer would properly make inquiries. [PIGOTT, B.—How long a time is he to be allowed in order to ascertain if she is an impostor?] The union would be constantly exposed to frauds if the relieving officer were to relieve at once any person who applied. He must be allowed some discretion. If a well-dressed person were to come for relief, he would be well justified in suspecting that it was not a case of urgent necessity. [PIGOTT, B.—The magistrate heard the case, and founded his opinion upon it.] If a mere assertion of destitution were sufficient, multitudes might apply who had no real claim. The relieving officer must not be assumed to have done wrong. [KELLY, C. B.—Why not, when the magistrate says that he has done wrong?] The guardians really desire to know if their relieving officer is to exercise any discretion.

Anderson, for the respondent, was not called upon.

KELLY, C. B.—The magistrate had the opportunity of hearing both the parties; we must therefore take the facts as stated as containing the truth. Now, what are these facts? It appears that on the 12th Sept., at about four in the afternoon, the woman applied to the relieving officer for an order of admission to the workhouse, telling him that she was without food or means; that he gave her no relief, but told her to come the next morning and he would see what he could do for her; that on the next day she went to him again and applied for relief, and he asked her where she had slept during the past night, and she said she had slept nowhere, but had walked up and down the streets. To this he replied that if a police constable had seen her he would have sent her to the casual ward. The woman then again told the relieving officer that she had no food or home or means, and that she wished to be admitted into the workhouse until she could get an order made upon her husband for her maintenance. The officer did not question her upon her statement, and gave her no relief, telling her that he could do nothing until the following Tuesday, when the next meeting of the board of guardians was to be held. Now, was this a case of urgent necessity? I think it was a case of very urgent necessity. I think when the woman said that she had slept nowhere, but had walked up and down the streets

all the night, it must be taken that she did so; at all events there was no proof that she did not. We must take the facts as we find them, and there is really no answer to them. I think the conviction is quite right.

MARTIN, B.—I am entirely of the same opinion. We must take the facts stated in the case to be true, and we have no right to look at the woman's conduct as a case of imposition. Here is a poor woman without a home. She is told, upon her application, to come the next day. She does so, and then she is told to come again the next Tuesday. Why she might have starved in the meantime. I think the decision of the magistrate was a very proper one.

PIGOTT, B.—I am of the same opinion. The relieving officer gave the woman no relief; he never questioned her as to her truthfulness, but told her to come again on the following Tuesday. The evidence clearly shows that the relieving officer neglected to do his duty.

POLLOCK, B.—I entirely agree with the rest of the court. The magistrate refers to the fact that the relieving officer never questioned the woman as to the truthfulness of her story. I think his decision was perfectly correct.

Judgment for the respondent.

Attorney for the appellant, H. S. Mitchell.

Attorney for the respondent, A. Leop.

CROWN CASES RESERVED.

Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

Friday, Nov. 22, 1872.

(Before KELLY, C.B., MARTIN, B., BRETT, GROVE, and QUAIN, JJ.)

REG. v. WILLIAM JONES.

Evidence—Confession—Admissibility—Inducement.

Prosecutrix lost her purse containing 11. 4s., in a market, and asked the prisoner, who had been standing near her, whether he had seen the purse or seen any one pick it up. He replied that he had not. She, however, suspecting that he had robbed her, gave information to the police. A policeman, a short time after, went in search of prisoner, and having found him, told him that the prosecutrix had lost her purse, and that it was supposed that he had picked it up, and added, "Now is the time for you to take it back to her." He denied having it, and went with the policeman. As they went along he commenced making a statement, but the policeman told him to say nothing until they saw the prosecutrix. Having met the prosecutrix after they had walked about 600 yards, some conversation took place, and the prisoner was searched, and on a half sovereign being found, the prisoner said to the prosecutrix that he would make it all up to her. Twenty minutes had elapsed between the time of the policeman's remark, "Now is the time to take it back to her" and the prisoner's, "that he would make it all up to her."

Held, that there was no inducement held out to the prisoner, and that his statement or confession (that he would make it all up to her) was admissible in evidence against him.

CASE reserved for the opinion of this Court at the Midsummer Quarter Sessions for the county of Cardigan, on the 3rd July 1872.

William Jones was tried upon an indictment

charging him with stealing moneys to the amount of 11. 4s., the property of one Edward Rees.

At the trial, it was proved that on the 22nd April 1872, Mrs. Jane Rees, the wife of the prosecutor, was with her mother in the market at Aberystwith. She there purchased some fowls, which she paid for with money which she took out of a purse, and after paying for them, she replaced the purse, containing 11. 4s., composed of two half sovereigns and 4s., in her pocket. At the time when she paid for the fowls, Mrs. Rees observed the prisoner, who she previously knew by sight, standing close by, and near enough to see her take the money out of the purse, and there was no one but the prisoner near her at the time. Mrs. Rees resided a few yards from the market, and as soon as she got home she searched her pocket, and found her purse and money gone. She immediately returned to the market, and found the prisoner still there. She asked if he had seen the purse or seen any one pick it up. He said he had not; but Mrs. Rees, suspecting from several circumstances that the prisoner was the person who had robbed her, gave information to Sergt. Evans, of the Aberystwith county police, who went in search of the prisoner, and found him between six and seven o'clock the same evening, in the Welsh Harp publichouse, Aberystwith.

The evidence of Sergt. Evans, who was called as a witness for the prosecution, was as follows:—

I found the prisoner at the Welsh Harp, and called him out; I said Mrs. Rees had lost her purse, and that it was supposed he had picked it up. I said, "Now is the time for you to take it back to her." He denied having it, and used very strong language. This took place outside the Welsh Harp, in the street. I asked him what money he had; he said, eighteen pence. I went with prisoner to Great Dark-street. He commenced making a statement. I said, "Say nothing now until we see Mrs. Rees." At the end of Market-street we met Mrs. Rees and Elizabeth James. When we got up to them the prisoner said, "Do you say I have got your money?" She replied, "No, I do not say so; but you were the only person who was near me at the time I had lost it." He then declared he had not seen it, and said, "Might God strike him dead if he had seen it." I then said to him, "William, what money do you say you have about you?" He replied, "Eighteen pence." Being close by the yard, I said to him, "Come in here; if you are honest you will be none the worse for being searched." He then walked into the yard, Mrs. Rees then being close behind us. I said to him again, "Now, eighteen pence, you say, is all you have about you." He put his hands in his pocket and pulled out half-a-crown, a shilling, sixpence, and three halfpence. I counted the money, and said to him, "William, there is more than 1s. 6d. here." He replied, "Oh yes, there is half-a-crown; I had forgotten about that." I then placed my hand in the prisoner's pocket, and found half a sovereign in gold. I said, "William, what is this?" He held down his hand, and in a few seconds went forward to Mrs. Rees, and crying, said, "Mrs. Jones (Mrs. Rees's name before her marriage), dear, I will make it all up to you." I had said to the prisoner, "Now is the time to take it back to her" twenty minutes before the time when the prisoner said to Mrs. Rees that he would make it all up to her. It is a distance of about 600 yards between the Welsh Harp and the place where prisoner made this remark to Mrs. Rees.

Upon this evidence it was objected by the advocate for the prisoner that the remark of Sergt. Evans to the prisoner, "Now is the time for you to take it back to her," amounted to an inducement, and was therefore inadmissible in evidence against him.

The court overruled these objections, and left the evidence of Sergt. Evans, with the rest of the case, to the jury, who found the prisoner guilty.

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[C. CAS. R.]

Upon the application of the advocate for the prisoner, the court decided to reserve the question of law for the consideration of the Court for Crown Cases Reserved, whether, upon the above facts, the statements made by the prisoner were admissible in evidence against him, and whether the prisoner was properly convicted; and, in the meantime, sentence was postponed, and the prisoner liberated on bail.

(Signed) C. MARSHALL GRIFFITH,

Chairman of Cardiganshire Quarter Sessions.

No counsel appeared for the prisoner.

Blofield, for the prosecution.—Two points arise. First, was there any inducement to confess by a promise or threat held out to the prisoner? Secondly, was the confession involved in the statement made by the prisoner, that he would make it all up to the prosecutrix, caused by the inducement, there being an interval of twenty minutes? As to the first point: the words of the policeman, "Now is the time for you to take the purse back to to her" (the prosecutrix), do not import any promise or threat to the prisoner to confess. [He was then stopped by the court.]

KELLY, C.B.—It is quite clear that these words import no promise or threat to the prisoner to confess.

The other Judges concurred.

Conviction affirmed.

Saturday, Nov. 23, 1872.

(Before KELLY, C.B., MARTIN, B., BRETT, GROVE, and QUAIN, JJ.)

REG. v. LOCK.

Indecent assault—Consent—Submission—Child of tender years.

Mere submission by a child of tender years to an indecent act without any active sign of dissent, the child being ignorant of the nature of the act, does not amount to consent so as to prevent the offence amounting to an assault.

At the General Session of the peace for the County of Middlesex, on the 4th June 1872, James Lock was tried before me upon an indictment which charged him with indecently assaulting Frederick William Sandell and George Goodge.

It was proved by three witnesses that they saw the defendant in a field by the Edgware Road take each of the boys in succession upon his legs, play with their private parts, unbutton his trousers and theirs, lie upon them, and move himself about as if in the act of having connection with a woman.

The two boys, each of whom was only eight years old, proved that the defendant met them in the Edgware Road, said he would take them to some fireworks, gave them biscuits and some beer, took them into the field, went up to a wall to which they followed him, there sat upon the grass, placed them successively upon his lap, laid his hand on their private parts, unbuttoned their trousers and his own, threw them down on their backs and lay upon them, moving himself in an indecent manner, which one of the boys described by a gesture. The defendant was interrupted by the coming up of the three witnesses, when he told the boys not to tell. The boys were not asked by the counsel on either side if it was done against their will or with their consent, but they stated that they did not know what the defendant

was going to do to them when he took them into the field and placed them on his lap and laid them on the ground.

On these facts it was contended by the counsel for the defendant that there was no case for the jury inasmuch as the filthy acts were not done against the will of the boys.

Having determined that it was a question for the jury, in summing up I stated to them that the law recognised a distinction between mere submission and positive consent. A person may submit to an act done to him from ignorance, or his consent may be obtained by fraud, and in neither case would it be such a consent as the law contemplates. Consent means an active will in the mind of the patient to permit the doing of the act complained of; and knowledge of what is to be done, or of the nature of the act that is being done, is essential to a consent to the act. It had been contended that inasmuch as an assault must be an act done against the will of the patient, and the boys did not expressly dissent, there was no assault. But this assumes a consenting will on their parts, and both stated that they did not know what the defendant intended to do, nor the meaning of what he was doing. The facts of the case were undisputed, and the question I left to the jury was whether, in their judgment, the boys merely submitted to the filthy acts ignorant of what was going to be done to them, or of the nature of what was being done, or if they exercised a positive will about it, and consented to what the defendant did. In the former case they would find the defendant *Guilty*. In the latter case they would acquit him.

The jury found the defendant *Guilty*, stating that they did so, being of opinion that the boys merely submitted to the act of the defendant not knowing the nature of such act.

The question being of frequent recurrence, and the law appearing to be unsettled, on the application of counsel for the defendant, I reserved for the opinion of this honourable court the question whether the definition of an assault "that it must be an act done against the will of the patient" extends to the case of submission to the act through ignorance of its nature and where there was no positive exercise of the will in the way of dissent, or if the actual exercise of an actual dissenting will is necessary to be proved in order to constitute an assault. If it should be the opinion of this honourable court that the direction to the jury was wrong, the conviction will be quashed. If right, it will be confirmed. The prisoner was admitted to bail.

(Signed) EDWD. WM. COX,

Deputy Assistant Judge of Middlesex.

No counsel was instructed for the prisoner.

Metcalfe for the prosecution.—There is a well established distinction between positive consent and mere submission to an indecent assault. In *Reg. v. Day* (9 Car. & P. 722) upon an indictment for attempting to abuse a female child under the age of ten, containing a count for a common assault, it appeared that the prisoner made an attempt upon her without any violence on his part or actual resistance on hers, and it was contended that as she offered no resistance it must be taken that she consented, but Coleridge, J. said "There is a difference between consent and submission: every consent involves a submission, but it by no means follows that a mere submission

involves consent. It would be too much to say that an adult submitting quietly to an outrage of this description was not consenting; on the other hand the mere submission of a child when in the power of a strong man, and most probably acted upon by fear, can by no means be taken to be such a consent as will justify the prisoner in point of law." So in *Reg. v. Nichol* (Rus. & Ry. 130) where a master took indecent liberties with a female scholar of the age of thirteen, and she did not resist, but it was against her will, the Judges on a case reserved were of opinion that the master was guilty of an assault. So where a medical man had connexion with a girl of fourteen years of age under the pretence that he was thereby treating her medically for the complaint for which he was attending her, and she made no resistance, this was held to amount to an assault, and *semble* also to a rape (*Reg. v. Case*, 5 Cox C. C. 222; 1 Den. C. C. 580). So where a man obtains carnal knowledge of a woman by a fraud which induces her to suppose it is her husband, although it is not a rape, yet it has been held to be an assault (*Reg. v. Williams*, 8 C. & P. 286). There cannot be consent to the act without some knowledge of what is about to be done. So in the case of an idiot girl incapable of giving consent from defect of understanding, if the act be found to have been done forcibly, although not against her will, it will amount to rape (*Reg. v. Fletcher*, 8 Cox C. C. 131; Bell's C. C. 63). The cases of *Reg. v. Bennett* (4 Fos. & Fin. 1105) and *Reg. v. Rosinski* (Mood. C. C. 19) were also referred to.

KELLY, C.B.—I am of opinion that the conviction should be confirmed. This is not an indictment for a rape; if it were, it might be that upon the facts the evidence would not amount to a rape. The question before us arises upon an indictment for an indecent assault, and it is whether mere submission to an indecent act without consent, the circumstances being such that the person assaulted was unable to exercise his will either one way or the other, relieves the other party from criminal liability; and whether the facts proved in this case, although done without fraud towards the patient, do not make out the charge of indecent assault, the patient being unable to exercise his will. There being no actual consent, and on the other hand no actual fraud to induce consent, I think that where a child submits to an act of this kind in ignorance, the offence is similar to that perpetrated by a man who has connection with a woman while asleep. If that were not an assault, our law would be very defective. In such a case consent is out of the question, for a woman whilst asleep is in such a state that she cannot consent, and the act of connexion with her under the circumstances is quite sufficient to constitute an assault. There has been no decided case like the present, but there are many cases which show that having connexion with a woman whilst asleep or by a fraud which induces the woman to suppose that it is her husband amounts to an assault. In the present case the acts were done to children, and they were unconscious of the nature of the acts which the prisoner did or was about to do, and were therefore not in a condition to exercise their wills one way or the other, and I think that the acts done by the prisoner amounted to an assault.

MARTIN, B.—I am of opinion that treating these children in the way in which the prisoner did

prima facie amounts to an assault. The case is analogous to *Reg. v. Nichol*, where a master took indecent liberties with a female scholar without her consent, and was held guilty of an assault although she did not resist.

BRETT, J.—The acts done by the prisoner were done to boys of a tender age, and are said to amount to an assault. I agree that to amount to an assault the acts must have been done against the wills of the boys. The question we have to decide is whether the learned deputy assistant judge gave a proper definition of what constituted an assault to the jury. If the boys had consented to the acts although ignorant of their nature, they would not have amounted to an assault, for it was necessary to show that the acts were against their consent. The jury were told substantially that if they in their judgments thought that the boys merely submitted to the filthy acts of the prisoner in ignorance of what was about to be done, or of the nature of them, and did not consent, the prisoner was guilty of an assault. It seems to me that mere submission under such circumstances is not consent, and that if a person of mature years does such acts to children of tender years, and knows that they do not consent, that is sufficient evidence that the acts are done against their will. I think therefore that the direction to the jury was right.

GROVE, J.—I am of the same opinion. I do not think that an exercise of an actual dissenting will is necessary to constitute an assault in a case like this. The acts done must be in some sense against the will of the patient. Dissent may be either positive or negative. If positive dissent is necessary, the direction to the jury was wrong; if an active dissent is not necessary, the direction was right. I think that negative dissent is enough, and that mere submission in ignorance of the nature of the act done does not differ from negative dissent.

QUAIN, J.—The finding of the jury that the boys did not know the nature of the acts done, clearly shows that they did not consent to the acts done. And all the cases decide that to exonerate the prisoner in such a case consent is necessary. I think therefore the direction was right.

Conviction affirmed.

REG. v. GUMBLE.

Indictment—Amendment—Description of thing stolen—14 & 15 Vict. c. 100, s. 1.

An indictment charged the prisoner with stealing nineteen shillings and sixpence in money of the prosecutor. At the trial it was objected that there was no case, for the evidence showed that if the prisoner was guilty of stealing anything, it was of stealing a sovereign. Thereupon the court amended the indictment by striking out the words "nineteen shillings and sixpence," and inserting in lieu thereof "one sovereign." The jury found the prisoner guilty of stealing a sovereign.

Held, that the court had power so to amend under 14 & 15 Vict. c. 100, s. 1.

CASE reserved at the general quarter sessions of the peace holden at St. Mary, Newington, in and for the county of Surrey, on the 3rd July 1872.

James Gumble was indicted for stealing, on the 29th May 1872, 19s. 6d. from William Jackson Walton.

The prosecutor had been playing at throwing

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REG. v. GUMBLE.

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sticks at cocoa nuts on Epsom Downs, and had to pay the prisoner sixpence, but having nothing less than a sovereign, he said to the prisoner "Have you change for a sovereign?" The prisoner said "Yes," and in consequence of that prosecutor gave him a sovereign. He then pulled some money out of his pocket and said "I haven't enough; I'll go and get it for you. I won't be a minute; just wait here."

The prosecutor waited nearly an hour for the prisoner, and then went for a policeman, leaving a friend who had been with him all the time, to wait for the prisoner. This he did for quite another hour after the prosecutor went for the policeman.

The prisoner's son removed the sticks and the cocoa nuts at the expiration of the first hour.

The prisoner did not return, and was not apprehended until the following Saturday, 1st July, on which occasion, when he saw the prosecutor's friend, he immediately ran away, and was only captured after a chase of some distance. On his apprehension 4*l.* 10*s.* was found upon him.

It was objected by the prisoner's counsel that there was no case against the prisoner. For if he were guilty of any offence he was guilty of stealing a sovereign, and that the court had no power to amend the indictment.

I allowed the case to go on, and put it to the jury that if they believed that the prisoner at the moment of obtaining the sovereign intended by a trick feloniously to deprive the prosecutor of the possession of the sovereign, they were to find him guilty.

They found him guilty, and then the following questions were reserved for the decision of the Court for Crown Cases Reserved:

1. Whether the prisoner, being found guilty of stealing a sovereign, could rightly be convicted under an indictment charging him with stealing 19*s.* 6*d.*, and also,

2. Whether the court would have had the power to amend the indictment at an earlier stage of the case.

WM. HARDMAN, Chairman of the Court.

In the indictment the prisoner was charged with stealing "nineteen shillings and sixpence in money of William Jackson Walton."

No counsel appeared for the prisoner.

J. Thompson for the prosecution.—Although the thing stolen was the sovereign, the indictment is sufficient and no amendment was required. By the 14 & 15 Vict. c. 100, s. 18, it is enacted that "in every indictment in which it shall be necessary to make any averment as to any money or any note of the Bank of England or any other bank, it shall be sufficient to describe such money or bank note simply as money, without allegation so far as regards the description of the property, specifying any particular coin or bank note; and such allegation, so far as regards the description of the property, shall be sustained by proof of any amount of coin or of any bank note, although the particular species of coin of which such amount was composed, or the particular nature of the bank note shall not be proved." Therefore, it not being requisite to charge the prisoner in the indictment with stealing a sovereign, the indictment was proved because the proof of a stealing of the value of the sovereign would necessarily include the stealing of 19*s.* 6*d.* Assuming, however, that not to be so, the allegation of "nineteen shillings and sixpence" may be

struck out as surplusage, and then, under the above section, the indictment would be good, charging generally the stealing money of the prosecutor. For by the above enactment it was not essential to allege the specific sum, nor was it necessary to prove it. Among the instances of surplusage in the books are the following: Where a man was charged with committing arson in the night time, and it was proved that he committed it in the day time, the time charged was treated as surplusage: (*Reg. v. Minton*, 2 East. P. C. 1021.) So upon an indictment for having in possession a die made of iron and steel, it was holden immaterial of what the die was made, and that proof of a die made of either or both would satisfy the charge: (*Reg. v. Oxford*, Rus. & Ry. 382.) [KELLY, C.B., (after the court had conferred together), said they would wish to hear the argument as to the power of the court to amend, taking it as the court did, that the indictment was amended by the court below at an earlier stage of the trial by striking out "nineteen shillings and sixpence," and inserting "one sovereign."] On that point the first section of the 14 & 15 Vict. c. 100 applies, which provides that whenever on the trial of any indictment for any felony or misdemeanor, there shall appear to be any variance between the statement in such indictment and the evidence offered in proof thereof, in (*inter alia*) the name or description of any matter or thing therein named or described, it shall be lawful for the court on the trial to order the indictment to be amended according to the proof. The allegation of nineteen shillings and sixpence was the description of the thing charged as stolen, and, if the proof varied, it was amendable.

KELLY, C.B.—We are all agreed that under sect. 1 of the 14 & 15 Vict. c. 100 the court had power to amend the indictment, and on the terms of the case we take it that the court did amend the case by striking out the words "nineteen shillings and sixpence," and inserting the words "one sovereign," but reserved the point as to its power to do so at the request of the prisoner's counsel. I do not wish it to be understood that I am of opinion that the conviction might not have been sustained upon the original indictment independently of any amendment.

MARTIN, B.—I also think that sect. 1 authorised the court to amend in this case. But under sect. 18, I think that the indictment could not have been sustained as there was a variance in the proof.

BRETT, J.—I think that the words "nineteen shillings and sixpence" were a description of the thing charged as stolen, and without determining what the effect of that is, or whether an amendment was necessary, I think that under sect. 1 the court had power to amend in this case, and I take it that the chairman did make the amendment here before verdict, and I therefore answer the second question in the affirmative.

GROVE and QUAIN, JJ. concurred.

Conviction affirmed.

Q. B.]

REG. v. ALLEN, AND BIRD AND ANOTHER.

[Q. B.]

COURT OF QUEEN'S BENCH.Reported by J. SHORTT and M. W. MCKELLAR, Esqrs.
Barristers-at-Law.

Monday, Nov. 13, 1872.

REG. v. ALLEN (Clerk), AND BIRD AND ANOTHER
(Churchwardens of the Parish of Shouldham).*Churchwardens—Right of election—Right of perpetual curate to nominate one—89th canon—Mandamus.*

A perpetual curate is a "minister" within the meaning of the 89th canon, which declares that "all churchwardens or questmen in every parish shall be chosen by the joint consent of the minister and the parishioners, if it may be; but if they cannot agree upon such a choice, then the minister shall choose one, and the parishioners another;" and in absence of a custom that the parishioners should choose both churchwardens, the perpetual curate has a right to choose one.

Where a mandamus is addressed to churchwardens during their year of office, and disobeyed by them during that period, it is no reason for refusing a peremptory writ that their year of office has expired.

The right of the prosecutor, the perpetual curate, to nominate one of the churchwardens having been denied by the parishioners, he was not bound to submit any name to the vestry meeting.

DEMURRER to the return to a writ of mandamus and also demurrer to a plea.

The writ of mandamus was addressed to the Rev. Wm. Maxey Allen, C. J. Selby, J. Bird, and Thos. Brown, and was in the following terms:

Whereas the parish of Shouldham, All Saints, in the county of Norfolk, is an ancient parish whereof for the time being, the Rev. William Maxey Allen, clerk, is the minister having the care of souls therein, and whereas there ought of right to be two churchwardens in the said parish, to be chosen in Easter week in each successive year by the joint consent of the minister and parishioners of the parish, if it may be, but if the said minister and parishioners cannot agree upon such a choice then the minister of right ought to choose one of such churchwardens, and the said parishioners the other, the said minister and parishioners being at the time of the said choice in vestry duly assembled; and whereas we have been given to understand, and be informed in our court before us by the Rev. William Maxey Allen, clerk, that on Monday in Easter week, in the year of our Lord, one thousand eight hundred and seventy one, the churchwardens who during the year then last past had served in the said parish went out of office, and that at a meeting then duly holden in the vestry of the said parish, the said Rev. William Maxey Allen, clerk, then being the minister of the said parish and the parishioners there and then assembled in such vestry, could not agree upon the choice of two fit and proper persons to be churchwardens of the said parish for the year then next ensuing, and thereupon the said Rev. William Maxey Allen, clerk, in due manner chose one Charles Selby, a fit and proper person to be one of the churchwardens of the said parish, for the year then next ensuing, but the parishioners present at the said meeting did not, although requested and required so to do, nor would choose another fit and proper person to be other churchwarden, but did then unlawfully, and have always ever since refused so to do, whereby the place and office of the said churchwarden has been, and still is, vacant, to the manifest hindrance and obstruction of the affairs of the said parish. And whereas we have further been given to understand, and be informed in our court before us, that to you, or some of you, it doth of right belong to convene a meeting of the parishioners, being inhabitants and ratepayers of the said parish, in order that they may at such meeting proceed to elect in a due, proper, and valid manner, a person to serve as church-

warden in the said parish, for the remainder of the year. We, therefore, being willing that a fit and speedy remedy may be applied in this respect, as it is reasonable, and there being no other remedy for the mischief caused to the said parish by the said place and office of churchwarden being, and remaining vacant, do command you, the said vicar and churchwardens, or alleged churchwardens, of the said parish, firmly enjoining you, or such of you to whom the same doth of right belong, forthwith to convene a meeting of the said parishioners, being inhabitants, ratepayers of the said parish, in order that they may at such meeting proceed to the due, proper, and valid election of a person to serve as churchwarden in the said parish for the remainder of this year. And we do further command you, or such of you to whom the same doth of right belong, to do all acts necessary to be done by you, and each of you, in order to the due and proper convening of the said meeting and election of the said churchwarden, according to your authority in that behalf respectively, or that you show us cause to the contrary thereof, lest by your default the same complaint should be repeated to us; and how you shall have executed this our writ make known to us at Westminster forthwith, then returning to us this our writ, and this you are not to omit. Witness, &c.

The answer of Josiah Bird and Thomas Brown, two of the persons named in the writ, was as follows:

1. We, being two of the persons to whom this writ is directed, do most humbly certify and return to our sovereign lady the Queen that the church of our said parish of Shouldham All Saints aforesaid was heretofore appropriated to the priory of Shouldham, in the said county of Norfolk, and so remained appropriated until the fifteenth day of October in the thirtieth year of the reign of King Henry the Eighth, on which day the said priory was surrendered into the hands of the said King, with all the tithes, both great and small, from our said parish, and so remained in the Crown until the sixth of May in the seventh year of the reign of King Edward the Sixth, when the same were granted by the said King to one Thomas Mildmay, and by him to Francis Gawdy, serjeant-at-law, and afterwards by certain trustees, in whom the same were then vested, to Sir John Hare, Knight, from whom they have descended to and become vested in Sir Thomas Hare, Baronet, now owner, and that at the time of the surrender of the said priory to the Crown there was not any rector, vicar, or other minister of our said parish.

2. And we do further most humbly certify and return that the said William Maxey Allen, clerk, is not by reason of the matters hereinbefore returned the minister of the said parish, who of right ought to choose or appoint one of the churchwardens for our said parish, and that by the statute of the thirty-first and thirty-second Victoria chapter 117 section 2, the said Reverend William Maxey Allen, clerk, is only deemed and styled the vicar of our said parish for the purpose of style and designation, but not for any other purpose.

3. And we do further humbly certify and return that every year in our said parish, from the time whereof the memory of man runneth not to the contrary, and while the said church was so appropriated as aforesaid, and so on until the issuing of this writ, two fit and proper persons have been of right in every year chosen and appointed churchwardens at vestries held for such purpose, and that a vestry meeting was duly holden, as in this writ alleged, on the day therein stated, videlicet, the 10th of April, and thence by adjournment on the 17th of April in the following week, but that the said Reverend William Maxey Allen did not at such meeting in due manner choose or nominate the said Charles James Selby as such churchwarden as in the said writ alleged, nor did he endeavour to obtain the consent of the parishioners, nor ascertain by putting the question as chairman or otherwise, whether the said parishioners were so agreed or would consent jointly with himself to the choice of two churchwardens for the ensuing year, nor did he in any way choose, nominate, or appoint at the said vestry the said Charles James Selby as churchwarden for the then ensuing year, and thereupon the said parishioners, in vestry assembled, proceeded to choose, and did choose, us, the said Josiah Bird and Thomas Brown, as and for the two churchwardens for the year ensuing, as of right there ought to be yearly

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chosen, to serve such office in our said parish, whereby the said offices became full till Easter week this year.

4. And we do further most humbly certify and return that since the issuing of this writ on Monday, in the Easter week of this present year, at a meeting of the parishioners, in vestry duly assembled, and of which the said Rev. William Maxey Allen was chairman, we, the said Josiah Bird and Thomas Brown duly attended in discharge of our said office, and brought in our accounts, which were duly examined and passed, and thereupon gave up and relinquished our said office for the year, for which we had been so chosen as aforesaid.

To this return the prosecutor pleaded (for a fifth plea) as to the third paragraph of the answer, that before, and at the time of the alleged meeting, the said parishioners wholly denied the right and title of the said prosecutor to choose and nominate jointly with them, or otherwise, churchwardens of the said parish, wherefore the said prosecutor did not endeavour to obtain the consent of the said parishioners, nor to ascertain whether they would consent jointly with himself to the choice of two churchwardens, but nominated, as he lawfully might, the said Charles James Selby as churchwarden, without making such endeavour to obtain the consent of the said parishioners, or to ascertain whether they would consent jointly with himself to the choice of two churchwardens for the said parish.

The prosecutor also demurred to the return, on the ground that it did not show sufficient reasons for a non-compliance with the mandatory clause of the writ, upon the ground (amongst others) that the facts alleged admit that the prosecutor was *de facto* minister of the said parish, and that no custom is alleged to exist entitling the parishioners, under the circumstances, to proceed to the election of the defendants.

The defendants demurred to the prosecutor's fifth plea, on the ground that the cause assigned did not justify the prosecutors refraining from any attempt to obtain the consent of the parishioners, or to ascertain whether they would so consent or not when in vestry assembled.

Issue was joined on the demurrer and cross-demurrer.

Arthur Charles, for the prosecutor.—The return to the writ of *mandamus* is bad, for it does not show the existence of a custom that both churchwardens should be chosen by the parishioners, and in the absence of proof of such a custom the ordinary law must prevail. [QUAIN J.—Does not the third paragraph of the return set out a custom?] It does not state that the custom was for the parishioners to appoint both churchwardens; it carefully avoids making such a statement. The general law is declared by the 89th canon (cited in 1 Burns's Ecclesiastical Law, 401), as follows: "All churchwardens or questmen in every parish shall be chosen by the joint consent of the minister and the parishioners, if it may be; but if they cannot agree upon such a choice, then the minister shall choose one and the parishioners another; and without such a joint or several choice none shall take upon them to be churchwardens." In *Catten v. Barwick* (1 Str. 145), the court held, that a particular custom alleged in that case having, owing to a disagreement, to be laid aside, they must resort to the 89th canon. There does not seem to be any case reported in which the right of a perpetual curate to nominate one of the churchwardens has been determined; but it is submitted that, as to this right, a perpetual curate and a vicar stand in exactly the same position; each is

equally a "minister" within the meaning of the 89th canon. There is one case in which the right of a stipendiary curate to nominate one of the churchwardens was upheld—that of *Hubbard v. Penrice* (2 Str. 1246), where Lee, C.J. held that a curate stood in the place of the parson for the purpose of nominating one churchwarden, and cited 2 Vent. 41, that a curate may make a presentment. The statement in the return that at the time of the dissolution of the monasteries the church of Shouldham was appropriated to the priory of Shouldham, does not prove anything as to the mode in which the churchwardens were appointed; for it is quite inconsistent with this statement that the church was served by one of the members of the priory, and after the dissolution of the monasteries, by a vicar or perpetual curate. As to the complaint contained in the 3rd paragraph of the return that the prosecutor did not in due manner nominate, or endeavour to obtain the consent of the parishioners, it is sufficient to say that the canon prescribes no particular mode in which this must be done. Finally, with reference to the statement in the last paragraph of the return that the defendants have ceased to be churchwardens, this can be no answer to a writ of *mandamus*, which was served upon them whilst they were still churchwardens.

Merewether, for the defendants, submitted that the return made it sufficiently clear that there was no custom that the perpetual curate should appoint one of the churchwardens, and that there was a custom that the parishioners should appoint both. [COCKBURN, C.J.—But the return does not traverse the allegation in the writ as to the mode of choosing.] The return states matter which shows that there could not have been a custom for the perpetual curate to appoint one of the churchwardens. It states that the rectory was an improper one, and therefore had no parson who could nominate. [BLACKBURN, J.—But the priory to which it was appropriate must have appointed some person to have the cure of souls there, and the person so appointed would, *inter alia*, attend the vestry meeting and nominate one of the churchwardens.] There is no trace whatever of this monastery having appointed one of the churchwardens, or indeed of any monastery doing so. [BLACKBURN, J.—I should have conjectured that the particular member of their body sent to officiate would have done so.] It is submitted that the monastery would not be a "minister" within the meaning of the 89th canon, and that the perpetual curate is not such a minister either. The case cited by Lee, C.J., from 2 Vent. 41, was the case of a curate appointed by the bishop under a sequestration, and the decision was simply to the effect that the curate, who was the deputy of the parson, stood in the same position as to presentment as the parson. The perpetual curate in the present case does not represent any one who could nominate a churchwarden; he is merely the representative of the lay rector, who is in no sense of the term a parson. There is no authority whatever for the proposition that a perpetual curate is a "minister" within the meaning of the 89th canon. [QUAIN, J., cited, Black. Com. 386; "These appropriating corporations or religious houses were wont to depute one of their own body to perform divine service and administer the Sacraments in those parishes of which the society was thus the parson. This officiating minister

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was in reality no more than a curate, deputy, or viceregent of the appropriator, and therefore called *vicarius* or vicar. His stipend was at the discretion of the appropriator, who was, however, bound of common right to find somebody, *qui illi de temporalibus, episcopo de spiritualibus, debeat respondere*. But this was done in so scandalous a manner, and the parishes suffered so much by the neglect of the appropriators, that the Legislature was forced to interpose; and accordingly it is enacted by stat. 15 Ric. 2, c. 6, that in all appropriations of churches the diocesan bishop shall ordain (in proportion to the value of the church) a competent sum to be distributed among the poor parishioners annually; and that the vicarage shall be sufficiently endowed, &c."] If the court is of opinion that a perpetual curate is a minister within the meaning of the 89th canon, then the defendants fall back upon the non-compliance by the prosecutor with the requirements of the canon. The canon requires the election to be made by the minister and parishioners jointly "if it may be; but if they cannot agree upon such a choice, then the minister shall choose one and the parishioners another." Now it appears upon the record that this course was not pursued; no attempt whatever was made to get the joint consent of minister and parishioners. [BLACKBURN, J.—Surely the plea to the return meets that. There is no use in asking a man to do a thing if he tells you he is going to do the contrary.] It is submitted that some steps should have been taken to obtain an agreement in the choice. It might well be that the rival parties would be able to agree in their choice of a person, though not in opinion as to their respective rights. Lastly, the court is now asked to order, by *mandamus*, certain persons to convene a vestry, after those persons have ceased to be churchwardens, and to have any further power of convening or otherwise. The rector is the proper person to convene a meeting. In *Reg. v. D'Oyley* (12 A. & E. 158), Lord Denman, C. J., delivering the judgment of the court said, "The proper place for the election of churchwardens is some convenient place within the precincts of the church; and the rector is the proper person to provide as of common right, and as owning the freehold of the church. . . . Assuming, then, that he possesses this right, the question now is, what powers he has by statute, and whether he has exercised his functions according to law. Stat. 58 Geo. 3, c. 6, s. 1, requires notice of the vestry to be given, but does not say who is to give it. We are of opinion that the rector is the fit person; he is at the head of the parish for this purpose," &c. [BLACKBURN, J., referred to *The Mayor, &c., of Rochester v. The Queen* (El. Bl. & El. 1024.)] Williams, J., asked in that case: "How can the Court of Queen's Bench impose on those who were not in office at the appointed time a duty, or confer on them a power, which the Legislature has not thought proper to impose or confer?" [BLACKBURN, J.—But the opinion of the majority of the court was different.] The defendants in the present case have not now the power to convene a vestry meeting. [COCKBURN, C. J.—If the intention of the prosecutor is not to enforce a peremptory writ against the defendants, but merely to get a decision as to his right to nominate one of the churchwardens, then we may as well decide the question in this form as in any other.]

Charles said the prosecutor only desired to have a decision as to his right to nominate one of the churchwardens.

Merewether.—Then the prosecutor will not be entitled to costs. In *Reg. v. The Directors of the Blackwall Railway* (9 Dowl. 558), a case in which by agreement between the parties, an application was made for a *mandamus* merely with a view to obtain the opinion of the court whether, on the construction of a private Act, the proceeding by *mandamus* was the proper one, the court stopped the argument and refused to give any decision. [BLACKBURN, J.—If the defendants are wrong in their contention, then, as they disobeyed the writ before they went out of office, they ought to pay the costs. COCKBURN, C. J.—We are all agreed upon our judgment as to the right of the prosecutor to nominate one of the churchwardens. The only doubt is as to the proper course to be pursued, the defendants being no longer in office, and therefore unable to comply with the writ. I suppose you will arrange it amongst you that the matter will not go any further if we decide in favour of the prosecutor?]

Charles asked for costs against the parties who had disobeyed.

COCKBURN, C. J.—I am of opinion that that which is said to be the general custom of the ecclesiastical law throughout the realm applies in a case of this kind, where there was originally a monastery and that monastery has been dissolved and a perpetual curate appointed as minister of the parish. There must have been, at the time the monastery was in existence, some mode in which the ecclesiastical affairs of the parish were managed. This ecclesiastical body or the representative of it, as administering the spiritual concerns of the parish, must be taken—in absence of any evidence of a custom—to have taken that part in the administration of affairs which would be applicable to the case. The monastery does not appear in the present case, to have appointed a vicar, as they did in most of the cases, where we find that they sent one of their body to act the part of one; but I presume that whoever was delegated by the monastery in the present case took the usual part in performing the offices of the church; and I take it that this view of the law applies to all cases where there is no evidence to the contrary. The general ecclesiastical law, which was in existence before the dissolution of the monasteries would, I conceive, at once attach to the new created state of things. A perpetual curate is for all purposes a minister of the parish; he performs the same functions as a rector. He is not the representative of the rector or vicar in the sense in which an ordinary curate is; he is himself the man who has got the government of the parish; he is the minister of the parish. We are not called on to say whether it is necessary to adopt the opinion of Lee, C. J., in the case cited, that a stipendiary curate would be competent to represent the rector in the election of a churchwarden. It is not necessary to decide that question here, as we are not dealing with the case of such a curate. It is enough to say that the general law obtains in the absence of a custom, for here there is no custom; and according to the general law the right of election is as stated in the 89th Canon.

BLACKBURN, J.—I am of the same opinion. I take it that the rule of law as to the effect of the

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canons was accurately stated by Lord Hardwicke (*Middleton v. Croft*, 2 Atk. 650). It is to the effect that the canons do not by their own force bind the laity, but, as stated by Lord Coke in *Cawdrie's case* "that such canons and constitutions ecclesiastical as have been allowed by general consent and custom within the realm, and are not contrary or repugnant to the laws, statutes, and customs thereof, nor to the damage or hurt of the King's prerogative, are still in force within this realm as the King's ecclesiastical laws of the same." Now, the 89th canon, which has been cited, states that "all churchwardens or questmen in every parish shall be chosen by the joint consent of the minister and the parishioners, if it may be; but if they cannot agree upon such a choice, then the minister shall choose one and the parishioners another; and without such a joint or several choice, none shall take upon them to be churchwardens." There may be a custom to the contrary of this, though the canon says nothing on this subject. The first question is, Has this 89th canon been so far adopted into English law as to be part of the King's ecclesiastical law. I think it has been; and that, unless there is a custom to the contrary, the minister does by common right appoint one of the churchwardens. The argument for the defendants was that a perpetual curate is not a minister within the meaning of this canon. I am puzzled to see any reason why he should not be. The perpetual curate has the cure of souls. Rectors have been in existence from time immemorial, but vicars have not been; yet it is not pretended that a vicar does not by common right appoint one of the churchwardens. That must be because he is a minister within the meaning of the ecclesiastical law, and therefore appoints as of common right. It has been said on behalf of the defendants, that where a monastery became the impropriator of a church, and appointed some one number of their body to perform the duties of the church, they could not appoint one of the churchwardens. But there does not seem to me to be any difficulty about it. It seems to me that the person so appointed would be, within the meaning of the canon, the minister of the parish for the purpose of appointing a churchwarden, and that when the monasteries came into lay hands, and it became necessary to appoint perpetual curates, they were in all respects ministers for the same purpose. I think it not improbable that in some parishes there might have arisen a custom for the parishioners to appoint two churchwardens; but upon the facts stated on this record, there is no evidence of such a custom. On the bare question whether the prosecutor in the present case comes within the 89th canon so as *prima facie* to have a right to appoint one of the churchwardens, my opinion is that he does. As to the other points taken in the case, I do not think it was necessary to make an attempt to induce the vestry to appoint the nominee of the prosecutor, when they had already said that they would not; and as to the defendants having now ceased to be churchwardens, this might be a reason for not committing them for contempt for disobedience to a peremptory writ of *mandamus*; but it does not touch the question of costs.

QUAIN, J.—I am of the same opinion. In the absence of a special custom to the contrary, a perpetual curate as a minister, within the meaning of the 89th canon, has a right to nominate one of

the churchwardens. No case decides that he is not a minister, within the meaning of the canon; and it would be a very strange thing if he were not. There is some evidence that he is. From sect. 2 of 58 Geo. 3, c. 69, it seems that the minister has the right to preside at vestry meetings. That section provides that "in case the rector or vicar, or perpetual curate, shall not be present, the persons so assembled in pursuance of such notice, shall forthwith nominate and appoint by plurality of votes, to be ascertained as hereinafter is directed, one of the inhabitants of such parish, to be the chairman of, and preside in every such vestry," &c., showing that if instead of a rector or vicar there was a perpetual curate, he was a minister within the meaning of the rule, and should preside. If that is so, I see no reason why he should not also be the minister for the purpose of nominating one of the two churchwardens.

Judgment for the prosecutor.

Attorneys for prosecutor, Brooks and Co.

Attorneys for defendants, Field, Roscoe, and Co.

Wednesday, Nov. 20, 1872.

THE NORTH LONDON RAILWAY COMPANY (apps.) v. THE VESTRY OF ST. MARY, ISLINGTON (resps.)

Bating—Bridge over railway—Dedication to the public—Lighting—Metropolis Local Management Act 1855 (18 & 19 Vict. c. 120).

The appellants (a railway company) constructed over their railway a bridge 50ft. wide, on which the railway station was built, and which connected two streets in the metropolis. The three lamps on the bridge were erected and lighted by the railway company, and by deed of agreement between the railway company and the New River Waterworks Company, the latter company had a perpetual easement for the conveyance of its water over the bridge by means of pipes and mains laid under its surface. The bridge had been used by the public uninterruptedly for eighteen months, and a public cab stand, appointed by the Commissioners of Police, was established on a part of the bridge.

Held, that the bridge was a new street within the meaning of the Metropolis Local Management Act, and that the appellants were liable to contribute in respect of it to the paving of the road.

CASE stated by justices.

The following was a case stated for the opinion of the Court of Queen's Bench under the provisions of the statute 20 & 21 Vict. c. 43, by way of appeal against an order made by us, the undersigned justices of the peace of the county of Middlesex, whereby we adjudged that the appellants should pay to the respondents the sum of 75l. 6s. 4d., the amount assessed upon them by the said respondents, being the vestry of the parish of St. Mary, Islington, as the proportion of the estimated expenses determined by the surveyor of the said vestry for the time being, to be paid by the said appellants as owners of the Canonbury railway station and buildings abutting on a new street called Douglas-road North, for providing and laying the pavement and making the road thereof, the same being a new street within the meaning of the Metropolis Local Management Act and the several Acts amending the same (18 & 19 Vict. c. 120; 19 & 20 Vict. c. 112; 21 & 22 Vict. c. 104; and 25 & 26 Vict. c. 102), which the said respon-

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dents as such vestry had, pursuant to the 105th section of the 18 & 19 Vict. c. 120, deemed it necessary should be paved.

The appellants, upon being served with a notice (a copy of which was annexed to the case) to pay the sum so apportioned, having declined to pay such demand, they were summoned at the complaint of the respondents to appear before us at a petty session held on the 18th April last, and the complaint was heard before us on the 2nd May instant, when we made an order upon the said appellants to pay the sum so assessed upon and demanded from them. And the appellants being dissatisfied with our decision in point of law, did then apply to us to state a case, setting forth the facts and the ground of our determination, for the opinion and decision thereon of the Court of Queen's Bench. And the said appellants having duly entered into recognisances before one of us to prosecute such appeal, and to submit to the judgment of the court, and to pay such costs as might be awarded by the same, we do hereby, in accordance with such request, state the following case for the opinion of the said court.

1. It was admitted that if the part of such road opposite Canonbury Station, of which the appellants are owners, and in respect of which they are assessed as aforesaid, is a new street within the meaning of the said Acts, under which the resolutions of vestry were passed, and the demand made and summonses issued, all the preliminary steps had been regularly taken, and our adjudication was right.

2. The North London Railway was originally constructed under the powers conferred by an Act of Parliament passed in 1846, and had stations at Highbury and Newington-road. Between these stations the line of railway crossed the channels of the new river, which was carried over it by an aqueduct. Under further powers conferred by an Act passed in 1861, the railway was widened, and the new river channel was then diverted and carried over the line by a bridge, in the roadway of which pipes were laid for the passage of the waters. The diversion was made under an agreement cited in a deed dated the 28th Nov. last, between the appellants and the New River Company, a copy of which deed accompanies this case, and the bridge was built and the pipes were laid down in accordance with the agreement. There are three lamps on the bridge, which were erected and are lighted by, and at the expense of, the appellants.

3. A new station on the railway, called Canonbury Station, was opened on the 1st Dec. 1870, and it abuts on, and is approached by, and entered from the bridge where it crosses the lines of railway. A station master's house, and other premises adjoining to and forming part of the station premises, abuts on the road beyond the bridge.

4. Before the railway was constructed a public footway existed at or nearly on the spot where the new bridge now stands, and when the railway was made this footway was carried over it by a foot-bridge, and until the erection of the present bridge, in or about the year 1870, there was no way by which carriages could cross the railway at this point.

5. After the railway was constructed, and before the new bridge was constructed, the road called Douglas-road North was laid out, and constructed

on the south side of the railway up to the southern boundary of the ground coloured green on the plan which accompanies this case, and houses were built on each side of such road; and another roadway, called Grosvenor-road, was laid out and constructed on the north side of the railway, up to the northern boundary of the ground coloured green on the said plan, and houses were built on the east side thereof, and other houses have been built on the west side thereof since the construction of the said bridge. A public cab stand, appointed by the Commissioners of Police, was established on a part of the said bridge, longitudinally along the same. The bridge was left open for the passage of the public, and free passage of carriages between the said two roads was suffered uninterruptedly for a period of eighteen months previous to the 13th April last, on which day, and subsequent to the commencement of the proceedings against them barriers were put up by the appellants across the carriage way approaches to the bridge, leaving the footway, which had been flagged and curbed by the appellants on each side, open; no carriages have since that time been allowed to pass over the bridge, and it has ceased to be used as a cab stand.

6. Upon these facts we deemed that the roadway over the bridge had been dedicated to the use of the public as a highway by the appellants, and that it is a new street within the meaning of the recited Acts. We also considered that after a continuous and uninterrupted use by the public of a year and a half the appellants were not entitled to resume their private rights by means of barriers across any part of it. We, therefore, ordered the appellants to pay the sum apportioned on them as owners of the property abutting on the said bridge and the approaches thereto, as part of the new street so ordered to be paved by the respondents.

7. The question for the decision of the court is whether the road over the said bridge where the Canonbury station abuts thereon is a new street within the meaning of the Metropolis Local Management Acts, so as to have entitled the said respondents as such vestry to require payment by the appellants of the said sum of 75l. 6s. 4d., and to have empowered us to adjudge the appellants to pay the same.

8. If the court shall be of opinion in the affirmative, viz., that such road is a new street, the order is to be confirmed; if in the negative, the same to be quashed.

Given under our hands at Upper-street, Islington, in the said county, this 13th June 1872.

HENRY WARNER.

W. HUGHES HUGHES.

J. B. PRICE.

A. BALLANTINE.

The indenture referred to in the case was made the 28th Dec. 1871, between the North London Railway Company of the one part, and the Governor and Company of the New River brought from Chadwell and Amwell to London of the other part. The parts material to the argument are as follow:

And whereas the railway company some time since obtained parliamentary powers enabling them to widen their said line of railway, and by articles of agreement under seal dated the 12th June 1868, and expressed to be made between the railway company of the one part, and the governor and company of the other part, after reciting that it was considered to be for the interest of

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the railway company and the governor and company respectively to do away with the said aqueduct, and to lay the necessary pipes required for the continuous flow of the water of the said New River and otherwise as thereafter mentioned, over a new bridge proposed to be erected by the said railway company over and across their railway, in the said parish of St. Mary, Islington, at the point of the intersection of Douglas-road North, such new bridge to be of 50ft. in width, so as to enable the governor and company, their successors or assigns, conveniently to lay thereon and under the railway of the said new bridge, which would be devoted to the use of the public, not only one line of 48in. pipes, as and for an aqueduct in substitution of the said aqueduct then possessed by them, but also two lines of 36in. pipes as pumping mains in substitution of the two pumping mains belonging to the governor and company then lying under the said railway (which latter were to be removed and discontinued), and that, on the completion of such bridge or aqueduct, they, the railway company, should grant to the governor and company, their successors and assigns, a perpetual right or easement of maintaining the said pipe in the said new bridge, and that, as part of such arrangement, the governor and company had agreed on the railway company making and completing such new bridge, to the satisfaction of the engineer for the time being of the governor and company as aforesaid, and granting such right or easement in or over the same as thereinbefore mentioned, to convey and assure to the railway company, their successors and assigns, the portions of land between the lines marked, &c., which belonged to the governor and company, and which included the then existing aqueduct and the abutments and sites thereof, &c., it is witnessed that in consideration of the sum of 1500l. to the governor and company, paid by the railway company immediately before the execution of the agreement now in recital, and also in consideration of the agreement on the part of the railway company thereafter contained, the governor and company did agree with the railway company, their successors and assigns, that when and so soon as the said railway company, their successors and assigns, should have made and completed such bridge and aqueduct, as thereafter agreed to be erected to the satisfaction of the engineer for the time being of the governor and company, and should have granted such right or easement in or over the same as hereinbefore mentioned in substitution of the bridge and aqueduct so conveyed to them by the hereinbefore-recited indenture of the 8th March 1860, they, the governor and company, their successors or assigns, should and would convey and assure unto the railway company, their successors and assigns, the fee simple and inheritance of such portions of land lying between the said lines, &c., as belonged to and were the property of the governor and company, with the existing aqueduct and the abutments thereof: And it was further witnessed, that, in consideration of the premises, the railway company did agree with the governor and company, their successors and assigns, that the railway company, their successors and assigns, should and would, at their own costs and charges, and to the satisfaction and under the superintendence of the engineer for the time being of the governor and company, their successors or assigns, make and construct a good and substantial bridge, 50ft. in width, over and across their railway, in the said parish of St. Mary, Islington, at the points marked, at such level as might be approved of by such engineer, to enable the governor and company conveniently to lay down and place thereon one line of 48-inch mains and two lines of 36-inch pipes, as aforesaid: And whereas since the date of execution of the last-recited agreement, the railway company have constructed the said bridge, and the said governor and company have placed thereon, and in the approaches thereto, one line of 48-inch mains and two lines of 36-inch pipes, but inasmuch as the vestry of the said parish of St. Mary, Islington, intimated to the railway company that they found that the laying down upon such bridge of the said mains and pipes, with the requisite covering over the same, would bring the roadway of the said bridge to a higher level than was convenient in reference to the approaches and the existing houses fronting thereupon, and raised various difficulties in regard thereto, it has been mutually agreed between the said governor and company and the said railway company, that in order to prevent the said vestry from having any control over the

approaches to such bridge, or the levels thereof, that the railway company and their successors should not only retain for ever hereafter the said bridge and the approaches thereto as their private property, but should also enter into the covenant for the maintenance and keeping of the said bridge, and the approaches thereto hereinafter contained, &c. Now, this indenture witnesseth that in order to carry out the said agreement, and in consideration of the conveyance, and covenants, and stipulations on the part of the governor and company hereinafter contained, the railway company do hereby grant unto the governor and company, their successors and assigns, full and free right from time to time, and at all times hereafter to maintain and continue, and from time to time, as may be found necessary, to replace in or under the roadway of the said new bridge over the company's railway at Douglas-road North, in the said parish of St. Mary Islington, in the County of Middlesex, and the approaches thereto, one line of 48in. main and two or more lines of other pipes of such diameter as they may find convenient for the purposes of carrying and conducting through such mains and pipes respectively the stream and water of the New River over the said railway, and of pumping water through the same mains and pipes, and also full and free liberty from time to time and at all times hereafter to dig up and temporarily remove the surface of the road over the said bridge and approaches for the purpose of repairing, removing, relaying and replacing the same mains and pipes, the governor and company nevertheless replacing the surface of the said road over the said bridge and the approaches thereto, and restoring the same to a complete and proper condition, and to the satisfaction of the railway company or their engineer forthwith as soon as may be after every such removal or repairs as aforesaid, &c. And the railway company do hereby for themselves and their successors covenant, promise, and agree with and to the governor and company, their successors and assigns, in manner following, that is to say, that they the said railway company, their successors or assigns shall not, nor will at any time or times either in the use and occupation of the said bridge and the approaches thereto or in the use and occupation of the said railway or the works connected therewith, or in any other manner howsoever, do or commit, or cause to be done or committed any act or thing whatsoever which shall or may in any wise endanger or tend to endanger the efficiency and stability of the said bridge or of any bridge for the time being standing on the site thereof, or of any substituted permanent or temporary bridge, as regards the use of the same bridge by the governor and company as hereinbefore mentioned, or which shall or may in anywise endanger, or tend to endanger, the mains and pipes of the governor and company for the time being, upon or over such bridge and approaches thereto, or the supply of water through the same, or whereby or by means whereof the governor and company, or their successors or assigns, or their architect or surveyor for the time being, or their servants, or workmen, or any of them, may, can, or shall be in anywise prevented, or hindered, in or about the commencing, carrying, or prosecuting, or completing any such work of repair, removal, or relaying, or other works or operations to or upon the said bridge or the approaches thereto, or the mains and pipes for the time being therein or thereover, provided such repairs and operations respectively in no way impede or obstruct the traffic of the said railway, but, on the contrary, that they, the railway company, their successor or assigns, shall and will from time to time, and at all times, as far as practicable, use and occupy the same bridge and approaches, and railway, and works so and in such manner as will make the same most available for the laying and maintaining thereon and thereover of the pipes and mains of the governor and company as aforesaid, &c.

Meadows White, for the appellants, contended that the bridge was not a highway dedicated to the public nor a new street within the meaning of the Metropolis Local Management Acts. The bridge is lighted by the appellants themselves, which would not be the case if it were a public highway; and the length of user relied on in support of a dedication is short. [COCKBURN, C.J.—The magistrates have found as a fact that

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the bridge has been dedicated to the use of the public as a highway by the appellants.] But the magistrates have also found and stated the circumstances under which it has been so used, and if those circumstances are insufficient to establish a dedication, this finding will not preclude the appellants from contending that it is not a highway. *Le Neve v. The Vestry of the Hamlet of Mile End Old Town* (8 E. & Bl. 1055) shows that there may be a partial dedication to the public. In that case there was a continuous line of houses on both sides of a public road in the metropolis, and immediately in front of the houses on either side was a paved footway from 10 to 15 feet wide, and between each footway and the carriage way an intermediate space from 33 to 58 feet wide. The occupants of the houses on either side had always used so much of the space opposite their houses in such manner as suited their respective trades, paying a small yearly rent to the lord of the manor to whom the soil belonged. Subject to the use of it by the occupants, the public had always passed over this intermediate space as of right, where and when those obstructions permitted. A publican having erected opposite his house a moveable shed on fixed sockets with forms for his customers to use, which caused no obstruction to the paved footway, it was held that this space was not part of a "street" within the meaning of the Metropolis Local Management Act 1855. [COCKBURN, C. J.—What proof is there of a dedication for a limited use in the present case?] If it were a street, the vestry would be bound to light it, whereas it is lighted by the appellants. Sect. 130 of the Metropolis Local Management Act 1855 (18 & 19 Vict. c. 120) enacts that "every vestry and district board shall cause the several streets within their parish or district to be well and sufficiently lighted, and for that purpose shall maintain, or set up and maintain, a sufficient number of lamps in every such street, and shall cause the same to be lighted with gas or otherwise, and to continue lighted at and during such times as such vestry or board may think fit, necessary, or proper; and all public lamps, and the lamp posts, and lamp irons, and fittings thereof, to be provided by any vestry or district board, shall vest in such vestry or board." [COCKBURN, C. J.—So long as you light it sufficiently the vestry need not.] In *Poole v. Huskisson* (11 M. & W. 830), Parke, B. says: "In order to constitute a valid dedication to the public of a highway by the owner of the soil, it is clearly settled that there must be an *intention* to dedicate—there must be an *animus dedicandi* of which the user by the public is evidence and no more; and a single act of interruption by the owner is of much more weight upon a question of intention than many acts of enjoyment." Putting up the barriers in the present case was such an act of interruption. [COCKBURN, C. J.—But you do not interrupt until the vestry first takes action.] In the deed made by the appellants with the New River Company there are covenants by the appellants to repair the bridge—a thing which, if the bridge were a street, could not be done without the consent of the vestry—showing an intention not to give the vestry control over it. If the bridge be a street, the vestry would also have power to pave and to alter its level, under sect. 98 of the above-mentioned Act, which provides that "it shall be lawful for every vestry and district board from time to time

to cause all or every of the streets within their parish or district or any part thereof respectively to be paved or repaired when and as often, and in such form and manner, and with such materials as such vestry or board think fit, and to cause the ground or soil thereof to be raised or lowered, and the course of the channels running in, into, or through the same to be turned or altered in such manner as they think proper, and to alter the position of any mains or pipes in or under such street, such alteration to be made subject to the approval of the engineer of the company to which such mains or pipes belong." The railway company could never have intended to part in this manner with their control over the bridge; otherwise it would be impossible for them to carry out the covenants in their deed with the New River Company. [MELLOR, J.—Why cannot their perpetual easement be consistent with a dedication to the public? There may be a partial or limited dedication. BLACKBURN, J.—What powers would the vestry have under the Metropolis Local Management Act, which would be inconsistent with the rights of the railway company?] The deed recites that it had been agreed between the parties that "in order to prevent the said vestry from having any control over the approaches to such bridge or the levels thereof, the railway company and their successors should not only retain for ever thereafter the said bridge and the approaches thereto, as their private property, but should also enter into the covenant for the maintenance and keeping of the said bridge and the approaches thereto." [BLACKBURN, J.—This dedication to the public had been going on for a year before this deed was made, and the deed cannot alter the condition of things which existed at the time of its execution.] But the deed was executed in pursuance of a previous agreement, the object of which was that the mains and pipes should be carried over the railway in a particular way. In *Barracough v. Johnson* (8 Ad. & Ell. 99) it was held that in determining whether or not a way has been dedicated to the public, the proprietor's intention must be considered; and if it appear only that he has suffered a continued user, that may prove a dedication, but such proof may be rebutted by evidence of acts showing that he contemplated only a licence revocable in a particular event. This is all that has taken place in the present case. The provisions as to paving, &c., contained in the 109th section of the Metropolis Local Management Act are all inconsistent with what was the evident intention of the appellants. That section provides that "no company or person shall break up or open the pavement, surface, or soil of any street, the paving whereof is under the control and management of the vestry or district board of any parish or district, for the purpose of making and laying down any main of pipes, or for any other purpose whatsoever, except in cases of emergency arising from defects in piping or other works, without having previously given three clear days' notice in writing to such vestry or district board, &c., and no such pavement, soil, or surface, shall be broken up or opened for the purpose of laying down any new main of pipes, for the conveyance of water, during any part of the months of December, January, and February, without the consent of the said vestry, &c."

Theniger for the respondents.—The argument for the appellants goes no further than this—that

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there was sufficient evidence to justify the magistrates, if they had been so minded, in finding that this bridge was not a highway; but the magistrates have found that it is a highway, and in such a case there are many authorities to show that the court will not interfere with their finding. There is abundant evidence of dedication to the public. Though the pipes are only 10ft. wide, the bridge is 50ft., and was made for the express purpose of accommodating the roads on the north and south side of the river. The public used the bridge uninterruptedly for eighteen months, and without any notice whatever that the railway company had made it and kept it for their own private property; further, there was a public cab stand on the bridge. All these circumstances furnish evidence more than sufficient to support the finding of the justices. In answer to the argument for the appellants, grounded on the fact that they light the bridge, it may be said that though the bridge is, without the three lamps lighted by the appellants, sufficiently well lighted for the ordinary public, the railway company, for the sake of their railway station, may desire to have the additional light afforded by these lamps. The 130th section of the Metropolitan Local Management Act already referred to makes it obligatory on the vestry or district board to cause the several streets within their parish or district to be well and sufficiently lighted. In *Reg. v. St. Mary, Islington* (El. Bl. & El. 743), when an application was made to the court for a *mandamus* to compel the defendants to light a street, Lord Campbell, C. J., said: "If we thought that the vestry had refused to perform an absolute duty imposed upon them by the statute, we would exercise our authority and grant a *mandamus*"; and Crompton, J.: "It is not at all clear that this is a street within the meaning of the Act. If it were, an imperative duty to light it would be cast upon the vestry." At most, this fact of the appellants lighting the bridge is some evidence in their favour; but it is far outweighed by the evidence of an opposite character. In the original agreement between the appellants and the New River Company there is no undertaking on the part of the former to repair the bridge; and the absence of such an undertaking is strong evidence of dedication. No local authority can do any act under the provisions of the Metropolitan Local Management Act so as to interfere with the works of the waterworks company. [COCKBURN, C. J.—There does not appear to be any limitation in the language of the 98th section.] In the case of *St. Mary, Newington v. Jacobs* (L. Rep. 7 Q. B.), the respondent was held entitled to convey his machinery across the pavement in a carriage or trolleys, though the weight crushed and injured the flags, the magistrates having found as a fact that his premises could not be reasonably enjoyed without access across the existing footway, and that the rights of ownership and those of the public might be jointly exercised consistently with the general welfare. Mellor, J. in delivering the judgment of the court said: "The owner who dedicates to public use as a highway a portion of his land, parts with no other right than a right of passage to the public over the land so dedicated, and may exercise all other rights of ownership not inconsistent therewith; and the appropriation made to and adopted by the public of a part of the street to one kind of passage, and another part to another,

does not deprive him of any rights as owner of the land, which are not inconsistent with the right of passage by the public. If this were not so, the owner of a large estate having dedicated a portion of his land to the use of the public as a roadway, and they, or the persons representing them, having raised a footpath on one side of such roadway for their own more convenient use thereof, would, after a lapse of time be so bound by this convenient arrangement of such roadway as to be unable to open a new gateway or entrance to his land from such roadway, without being liable to be convicted under the provisions of the Highway Act. If this were really the law, the result would be most serious to owners who have dedicated, or who may dedicate roadways to the public, and in towns would, to a great extent, prevent the owners of houses and buildings from changing their character and use to any purpose of business which could not be accomplished without the use of a horse or cart, or carriage. That such is not the law appears to us to be the result both of principle and authority; and we think that the provisions of the Highway Acts and the Metropolitan Local Management Act, so far as they apply to roads or streets, are subordinate to the paramount rights reserved by the owner. We do not deny that the owner cannot derogate from the grant of roadway made by him to the public, and cannot do anything which would really and substantially interfere with the right of passage by the public. So far as we are aware, no case is to be found in the books which conflicts with the view of the law above expressed, notwithstanding the numerous instances which must have occurred, in which an owner rebuilding or changing the character of his houses or other buildings, has made crossings of the footpath, in order to carry into effect some object of convenience or business." All this reasoning applies to the circumstances of the present case, and furnish a complete answer to the argument for the appellants, that the control by the vestry over this bridge as a street would be necessarily inconsistent with the easement of the New River Company to carry their mains over it.

F. M. White, in reply.

COCKBURN, C. J.—I think our judgment must be for the respondents, for the reasons which I have already given.

BLACKBURN, J.—I am of the same opinion. That the railway company had granted an easement to the New River Company, is, I think, quite clear, and they could not derogate from that grant by a dedication of the bridge to the public; but I think they do not derogate from their grant by this dedication of it to the public. It is unnecessary to consider whether the powers conferred by the Metropolitan Local Management Act would give the vestry the right to interfere with the mains and pipes of the New River Company; for the justices have found that in point of fact the railway company did dedicate the road to the use of the public, and that is sufficient to entitle the respondents to our judgment. As to the erection of the barriers by the appellants, that was done too late to do away with the dedication.

MELLOR, J.—The magistrates have found as a fact that there was a dedication of this bridge to the public from what took place with regard to it; and I am of opinion that there is nothing in point of law to prevent them coming to that conclusion.

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Therefore, I think that we ought not to disturb their finding.

Judgment for the respondents.

Attorneys for appellants, *Paine and Layton.*

Attorneys for respondents, *Edwards, Layton, and Jacques.*

Friday, Jan. 17, 1873.

VAUX v. CHAPMAN; THE MAYOR, &C., OF HARWICH v. VAUX.

Duty upon coal—Landed or unloaded for the purpose of being forwarded—Sold by retail to persons residing away.

By a local Act a rate or duty was imposed upon coal imported and landed at the town of Harwich, or otherwise brought or delivered within the limits of the said town: Provided that in every case where any coals shall have been landed or unloaded within the said town, and which shall have paid the rate or duty hereby imposed, and which shall have been so landed or unloaded for the purpose of being forwarded to any other place or places, and not to be consumed within the said town, a drawback of the whole rate or duty is to be paid to the coal owners for coals so landed or unloaded, which shall have been forwarded to any other place for sale or consumption.

Held, that this provision for the payment of a drawback did not relate to coal sold by retail in the town, although set apart from its arrival for the consumption only of persons living out of the town; and that the drawback actually allowed under these circumstances through a mistake could be recovered back.

THE first of these actions was brought by Messrs. Vaux and Franks against the commissioners hereinafter described, to enforce the payment or return of 11l. 4s., being the amount of the drawback of the whole rate or duty paid by Messrs. Vaux and Franks to the said commissioners, in respect of a certain quantity of coal landed or unloaded in Harwich, as hereinafter mentioned, and which drawback is claimed by Messrs. Vaux and Franks, as due and payable to them under the circumstances hereinafter mentioned; and the second of these actions is brought by the mayor, aldermen, and burgesses of Harwich as such commissioners, and by their clerk duly appointed under the said Act as nominal plaintiffs, against the said Messrs. Vaux and Franks to enforce the return of 11l. 4s., being the amount of drawback on certain other coal landed and stored by Messrs. Vaux and Franks, as hereinafter mentioned, which drawback was claimed by the said Messrs. Vaux and Franks of the said commissioners and paid by them under the circumstances hereinafter mentioned; and by the consent of the parties, and by the order of Master Unthank, dated 18th Nov. 1871, according to the Common Law Procedure Act 1852, the facts are stated for the opinion of the Court of Queen's Bench, without any pleadings, in the following case:—

Messrs. Vaux and Franks are coal merchants and importers, carrying on business at Harwich, in the county of Essex. Since about the year 1855 a railway terminus connected with the Great Eastern system of railways has been made in the town and port of Harwich.

Edward Chapman is the clerk for the time being to the commissioners appointed under and by

virtue of the provisions of the statute 59 Geo. 3, c. cxviii., which statute is declared to be a public Act, and is to be taken to form part of this case. The powers of these commissioners have been duly transferred under the provisions of the statute 5 & 6 Will. 4, c. 76 to the mayor, aldermen, and burgesses of the borough of Harwich; no objection is to be taken that any of the parties respectively sued or suing are not the right ones, or that there is a misjoinder or nonjoinder of parties, and the mayor, aldermen, and burgesses, are hereinafter referred to as the commissioners.

By the 55th, 59th, 60th, and 61st sections of the said Act, a copy of which forms part of this case, it is enacted as follows:

LIV. And whereas in order to raise a sufficient sum of money for effecting the purposes of this Act, it is expedient that a duty be charged on coals imported and landed at the said town, Be it therefore enacted, that from and after the passing of the Act there shall be paid to the said commissioners, or to their collector or collectors, or to such person or persons as they shall from time to time appoint to collect and receive the same, any rate or duty which the said commissioners shall think fit to order and direct, not exceeding the sum of 2s. for every chaldron of sea coal, culm, or other coal, which shall or may be imported and landed at the said town, or otherwise brought or delivered within the limits of the said town.

LIX. Provided also and be it enacted, that in every case where any coals or culm shall have been landed or unloaded within the said town, and which shall have paid the rate or duty hereby imposed, and which shall have been so landed or unloaded for the purpose of being forwarded to any other place or places, and not to be consumed within the said town of Harwich, then and in every such case the collector or collectors of the said rate or duty is and are hereby directed and required to return and pay on demand to the owner or owners, or other person or persons on his or their behalf, a drawback of the whole rate or duty paid for every chaldron of coals so landed or unloaded, and which shall have been forwarded to any other place for sale or consumption.

LX. And be it further enacted that if the collector of the said rate or duty shall refuse or neglect to return and pay on demand to any person or persons entitled to the same, the drawback hereby directed to be allowed, or if any person or persons shall fraudulently obtain or endeavour to obtain the allowance of the said drawback not being legally entitled to the same, every such person or persons shall for every such offence forfeit and pay any sum not exceeding 40s.

LXI. And be it further enacted, that if any person or persons shall after allowance or drawback made or paid by virtue of this Act for the coals or culm put on board or landed as aforesaid, bring back, reload, unload, or deliver the said coals or culm, or any of them, in or to the said town, then and in such case every person or persons so offending shall repay to the said collector or collectors, receiver or receivers, the duties of such coals or culm as shall be brought back, reloaded, unloaded, or delivered in the said town as aforesaid, and so proportionally for a greater or less quantity than a chaldron; one moiety thereof to be to the use of the informer, and the other moiety thereof to be paid to the said commissioners, to be applied for the purposes of this Act.

The course of business pursued by Messrs. Vaux and Franks was as follows. When coals ordered by them arrived at Harwich by land or water carriage, part of them was delivered at once to country customers. As to this part no question arises. The remainder of the coals so ordered was taken by them to their premises in Harwich, and if part of it was purchased by them for the purpose of being consumed without the town, this remainder was deposited in their premises in separate heaps or stores, one set of heaps or stores being deposited in a place appropriated for that part intended to be consumed within the town of Harwich; the other set of heaps or stores (which was composed

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of the coal purchased by them for consumption without the town) being deposited in a place appropriated for such coal: and in fact with the exceptions hereinafter mentioned, the set of heaps or stores intended for consumption within the town was sold from time to time to purchasers within the town, and there consumed; and the other set of heaps or stores intended for consumption at other places than the said town, was sold from time to time to purchasers who lived at other places than the town, and there consumed.

Occasionally some of the last mentioned set of heaps or stores are sold to hucksters who at the time of sale informed Messrs. Vaux and Franks that their intention is to sell them for consumption in other places than the town, but Messrs. Vaux and Franks have no means of ascertaining whether these coals are sold, in fact, within or without the town. Occasionally, if either set of heaps or stores falls short of the demand, coal is supplied to a customer from the other heaps; so that a purchaser of coal intended for consumption outside the town may be supplied from the set of heaps appropriated for consumption within the town, and *vice versa*.

Messrs. Vaux and Franks charged somewhat less for coals supplied to be consumed at other places than the town than they did for coal to be consumed within the town.

Between the 11th Jan. and 21st April, both in the year 1870, Messrs. Vaux and Franks landed or unloaded within the town of Harwich, for the purpose of being sold to customers in other places than the town, 143 tons (equal to 112 chaldrons) of coals, upon which they paid to the commissioners the sum of 11*l.* 4*s.*, being the duty of 2*s.* per chaldron. The said coals, after they had been so landed or unloaded, were stored in Messrs. Vaux and Frank's premises within the limits of the said town, and deposited in the places so appropriated as aforesaid to coals to be consumed at other places than the town, and were sold from time to time to customers living at other places than the town, and for the purpose of consumption in such places, and were there consumed. None of these coals had been purchased or ordered by customers before they were so deposited on the premises of Messrs. Vaux and Franks.

Messrs. Vaux and Franks claimed to have a drawback allowed them at the same rate and demanded a return of the said duty of the collector of the said dues and of the commissioners, but the commissioners refused to pay or allow the same or any part thereof; whereupon, after the necessary steps in that behalf, the first action was brought to try the question of whether Messrs. Vaux and Franks were entitled to such drawback or return of the duty or not.

Between the 5th Dec. 1864 and the 31st Dec. 1866 Messrs. Vaux and Franks landed or unloaded within the town of Harwich 143 tons (equal to 112 chaldrons) of coals, upon which they paid the sum of 11*l.* 4*s.*, being the duty of 2*s.* per chaldron to the said commissioners. These coals as soon as they were landed, were taken to the premises of Messrs. Vaux and Franks and there deposited in the places appropriated to coals intended to be consumed beyond the limits of the town of Harwich, and were in fact from time to time, when sold, so consumed. The duty paid by Messrs. Vaux and Franks on such coals amounted to the sum of 11*l.* 4*s.*

Messrs. Vaux and Franks represented to the said commissioners, as the fact was, that the said coal last mentioned had been landed for the purpose of being forwarded to other places than the town, and was in fact consumed without the limits of the said town, and therefore claimed, and the commissioners then allowed and returned to them, the sum of 11*l.* 4*s.* for drawback of duty they had paid thereon. The commissioners, at the time they made such allowance, believed that this coal had at once been forwarded to the purchasers, and never deposited and stored as hereinbefore mentioned. On discovering that it had been so deposited and stored, they demanded a return by Messrs. Vaux and Franks to them of the drawback so repaid, but Messrs. Vaux and Franks refused to refund the same, or any part thereof, whereupon, after the necessary steps in that behalf, the second action was brought to try the question of whether the commissioners ought, under the circumstances hereinbefore alleged to have allowed the said drawback or not. None of these coals had been purchased or ordered by customers before they were deposited on the premises of Messrs. Vaux and Franks.

The questions for the opinion of the court are—first, whether under the circumstances above set forth in reference to the first action, Messrs. Vaux and Franks are or are not entitled to payment of the drawback on the coals landed and stored as is above mentioned; secondly, whether under the circumstances above set forth in reference to the second action the commissioners are or are not entitled to a return of the drawback allowed and repaid by them on the coals stored as above mentioned.

If the court shall be of opinion in the affirmative in the first action, then judgment shall be entered for Messrs. Vaux and Franks in that action for 11*l.* 4*s.*, and costs of suit.

If the court shall be of opinion in the negative in the first action, then judgment shall be entered for the said commissioners and Edward Chapman with costs of defence.

If the court shall be of opinion in the affirmative in the second action, then judgment shall be entered for the said commissioners and Edward Chapman in that action for 11*l.* 4*s.* and costs of suit.

If the court shall be of opinion in the negative in the second action, then judgment shall be entered for Messrs. Vaux and Franks in that action, with costs of defence.

Philbrick appeared for the coal merchants, the plaintiffs in the first action, and the defendants in the second.—The words upon which the question in both actions turns are "which shall have been so landed or unloaded for the purpose of being forwarded to any other place or places, and not to be consumed within the said town;" these words are broad enough to include all coals sold in Harwich to persons consuming them away from there, as described in this case. The destination of the particular coal is determined from the moment of its arrival. [COCKBURN, C.J.—I presume that is merely to avoid payment of the duty.] No doubt. [COCKBURN, C.J.—The drawback could never have been intended to relate to coal retailed in the town of Harwich. ARCHIBALD, J.—The Act apparently means merely to except coal in transit to other places of sale.] At all events in the second action, the allowance of drawback made by the commis-

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sioners under a mistake of law, cannot be recovered by them.

Day, Q.C. (with him Grantham), appeared for the Commissioners, but was not heard.

PER CURIAM (Cockburn, C.J., Mellor, and Archibald, JJ.)

Judgment for the Commissioners in both actions.

Attorneys for the coal merchants, F. and T. Smith and Sons.

Attorneys for the commissioners, Batty and Whitehouse.

Thursday, Nov. 21, 1872.

Ex parte BOUVIER.

Habeas Corpus—Prisoner convicted in France—Surrender to authorities under Extradition Act 1870 (33 & 34 Vict. c. 52).

The applicant, who had been an avoué in France, was now a prisoner in Jersey. He had been convicted par contumace, by the Cour d'Assise de Côté du Nord of three offences, abus de confiance, or breach of trust, fraudulent bankruptcy, and forgery. The first of these three offences is not one for which a surrender is stipulated by the French treaty of 1843, or by the statute confirming it, viz. 6 & 7 Vict. c. 75, and there has been no extradition treaty with France since. By 33 & 34 Vict. c. 52, s. 3, sub-sect. 2, a fugitive criminal shall not be surrendered to a foreign state unless provision is made by the law of that state, or by arrangement, that the fugitive criminal shall not, until he has been restored, or had an opportunity of returning to Her Majesty's dominions, be detained or tried in that foreign state for any offence committed prior to his surrender, other than the extradition crime proved by the facts on which the surrender is grounded." By sect. 4, "an order in council for applying this Act in the case of any foreign state shall not be made unless the arrangement . . . (2) is in conformity with the provisions of this Act, and in particular with the restrictions on the surrender of fugitive criminals contained in this Act." By sect. 27, 6 & 7 Vict. c. 75, amongst other Acts, is repealed, "and this Act (with the exception of anything contained in it which is inconsistent with the treaties referred to in the Acts so repealed) shall apply (as regards crimes committed either before or after the passing of this Act) in the case of the foreign states with which those treaties are made, in the same manner as if an order in council referring to such treaties has been made, in pursuance of this Act, and as if such order had directed that every law and ordinance which is in force in any British possession with respect to such treaties should have effect as part of this Act." Affidavits concerning the French law were produced by both sides.

Upon a rule for a habeas corpus directing the Governor of Jersey Prison to produce the applicant, the court expressed doubts as to the exemption of old treaties from the restrictions of the Act of 1870. They held, however, that the French law, although the affidavits were contradictory, carried out the restriction provided for.

THIS was a rule calling upon John le Rossignol, Governor of Her Majesty's prison in and for the Island of Jersey, to show cause why a writ of habeas corpus should not issue to have before this court the body of Alfred Louis Marie Bouvier, who

was detained in the said prison, to undergo and receive all and singular such matters and things as the court shall then and there consider of and concerning him in this behalf.

It appeared from the affidavits upon which the rule was granted that Bouvier was arrested and lodged in the said prison on the 22nd Oct. 1872 on a warrant granted under the Extradition Act 1870 by Her Majesty's Principal Secretary of State for the Home Department, and endorsed by the bailiff of the said Island of Jersey. On the 24th Oct. he was taken before the police magistrate of the said island on such warrant, and was by him ordered to be handed over to the French authorities, being in the meantime sent back to prison, there to remain for the period of fifteen days, being the time allowed by the said Extradition Act 1870 for obtaining a writ of habeas corpus or to bring other measures for an appeal from the said order. The warrant had been granted upon a judgment of *La Cour d'Assise de Côté du Nord*, in France, dated 10th July 1872, on which judgment Bouvier had been condemned on three several charges of *abus de confiance*, *forgery*, and *fraudulent bankruptcy*. By the convention between Her Majesty the Queen and His Majesty the King of the French, signed at London Feb. 13th, 1843, and which is the only convention in force between England and France for the extradition of criminals, it was "agreed that the high contracting parties shall on requisition made in their name, through the medium of their respective diplomatic agents, deliver up to justice persons who, being accused of the crimes of murder (comprehending the crimes designated in the French Penal Code by the terms assassination, parricide, infanticide, and poisoning), or of any attempt to commit murder, or of forgery, or of fraudulent bankruptcy, committed within the jurisdiction of the requiring party, shall seek an asylum, or shall be found within the territories of the other," &c. It appeared, therefore, that *abus de confiance* was not an offence included in the above convention, and it was alleged in the affidavit of A. L. M. Bouvier "that as a judgment is indivisible (*judicatio est tota in toto, et tota in quâlibet parte*), the surrendering of me to the French authorities on a judgment, one of the offences for which such judgment has been given not being comprised in the said Extradition Act 1870, would be surrendering me to punishment for an offence not contemplated by the said Act, and would consequently be in violation of such Act."

On the 4th Dec. 1865, notice was given by the French Government to terminate the above-mentioned convention on the 4th June 1866, but it has been continued in force from year to year by mutual agreement, and is now declared to be in force till 1st Sept. 1873. On the 28th March 1852, a new convention was concluded with France for the surrender of criminals, but it was not sanctioned by Parliament, and it has therefore never had any effect.

The order of the police magistrate of the said island of Jersey was as follows:

Police Correctionnelle.

Oct. 24, 1872.—Alfred Louis Marie Bouvier, faux et banqueroute frauduleux, envoyé en prison pour être remis aux autorités Françaises après quinze jours.

G. T. MARETT, St. D.

By 33 & 34 Vict. c. 52, s. 3, sub-sect. 2, a fugitive criminal shall not be surrendered to a foreign

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state unless provision is made by the law of that state, or by arrangement, that the fugitive criminal shall not, until he has been restored, or had an opportunity of returning, to Her Majesty's dominions, be detained or tried in that foreign state for any offence committed prior to his surrender, other than the extradition crime proved by the facts on which the surrender is grounded." By sect. 4, "an order in council for applying this Act in the case of any foreign state shall not be made unless the arrangement . . . (2) is in conformity with the provisions of this Act, and in particular with the restrictions on the surrender of fugitive criminals contained in this Act."

In moving for the rule, it was contended that neither under the treaty or convention, or under the Extradition Act 1870, was there any power to surrender a fugitive criminal for the offence of *abus de confiance*; that only the crime of fraudulent bankruptcy was mentioned in the warrant; and that by sect. 3, sub-sect. 2, of the Extradition Act 1870, there was no power to surrender the criminal, inasmuch as no provision or arrangement had been made as intended by that sub-section.

In showing cause against the rule, the following affidavit was used:

I, Adolphe Moreau, of No. 5, Chancery-lane, in the county of Middlesex, Esq., make oath and say:

1. I am the officially appointed counsel to the French Embassy in London, and I am well acquainted with the law and constitutions of France, and that part thereof which relates to legal proceedings in matters of extradition.

2. I say, speaking from such knowledge, that according to the law of France provision is made that a fugitive criminal shall not, until he has been restored, or had an opportunity of returning to her Majesty's dominions, be detained or tried in France for any offence committed by him prior to such surrender other than the extradition crime, proved by the facts upon which the surrender is granted; and I say, speaking from my own knowledge and experience, that this law is observed in practice by the French tribunals and authorities.

3. The general principles and rules of the French law in matters of extradition are comprised in a circular dated 5th April 1841, containing the special instructions of the Minister of Justice (*Garde des Sceaux*) to the law officers of the Government. This circular is printed at length in a book entitled "Monographie Alphabétique de l'Extradition, par Erariste Blondel," which is now produced and shown to me, marked A, and which is a recognised authority and book of reference in the French courts; and I say, speaking from my own knowledge and actual experience, that the law is correctly laid down in such circular, and is the law followed by the French courts in such matters.

4. It is a principle of French and of international law that the individual whose extradition has been granted can only be prosecuted and tried for the very crime for which his extradition has been obtained; and I say, speaking from my own knowledge and actual experience, that this is the invariable practice of the French tribunals.

5. All these principles and rules are to be found laid down by Monsieur Felix as principles and rules of international law in his "Traité du Droit International Privé," vol. 2 of which is now produced and shown to me, marked B, in which he specially refers to the above circular as containing a *résumé* of such principles and rules; and I say, speaking from my knowledge and actual experience, that international law is accepted as binding law by all the French tribunals, and that the said work of Monsieur Felix and the said circular are accepted by all such tribunals as binding authorities, and that the practice of such tribunals in such matters conforms to the law as laid down in the work of Monsieur Felix and the said circular.

The Attorney-General (Sir J. D. Coleridge) and Bowen showed cause against the rule.—The 6 & 7 Vict. c. 75, which was passed to give effect to the

treaty of 1843, referred to in the affidavits, is repealed; the Extradition Act now in operation is the 33 & 34 Vict. c. 52 (The Extradition Act 1870), and all that is necessary to ascertain in the present case is whether the proceedings which have been taken are authorised by that Act. The affidavits show that the machinery provided by it has been followed. By the 22nd section "this Act (except so far as relates to the execution of warrants in the Channel Islands) shall extend to the Channel Islands and Isle of Man in the same manner as if they were part of the United Kingdom, and the Royal Courts of the Channel Islands are hereby respectively authorised and required to register this Act." The order made by the police magistrate referred to in the affidavits is therefore warranted, as he had the same power as a police magistrate in England would have. Then by sect. 27 it is provided that "the Act (with the exception of anything contained in it which is inconsistent with the treaties referred to in the Acts so repealed) shall apply (as regards crimes committed either before or after the passing of this Act) in the case of the foreign states with which those treaties were made, in the same manner as if an Order in Council referring to such treaties had been made in pursuance of this Act, and as if such order had directed that every law and ordinance which is in force in any British possession with respect to such treaties should have effect as part of this Act." The condition imposed by sect. 3, sub-sect. 2, is inconsistent with the treaty. If therefore the machinery of the Act has been followed, the case is the same as if an Order in Council had been made. If the condition in sub-sect. 2 of sect. 3 is inconsistent with the treaty, it does not apply. The matter is made more clear by the 18th section, which provides that, "if by any law or ordinance made before or after the passing of this Act by the Legislature of any British possession, provision is made for carrying into effect, within such possession, the surrender of fugitive criminals who are in or suspected of being in such British possession, Her Majesty may, by the Order in Council applying this Act, in the case of any foreign state, or by any subsequent order, either suspend the operation, within any such British possession, of this Act, or of any part thereof so far as it relates to such foreign state, and so long as such law or ordinance, or any part thereof, shall have effect in such British possession, with or without modifications and alterations, as if it were part of this Act." The intention was to make a general Act which should apply to all cases except where there was anything inconsistent with the treaties referred to. The treaty of 1843 is one of such treaties, and there being something in sect. 3, sub-sect. 2, inconsistent with the treaty, the condition so imposed does not apply to that treaty. But, further, the objection which was taken to the proceedings in moving for the rule is answered by the affidavit of Adolphe Moreau. It is clear that Bouvier could not, until he had been restored or had an opportunity of returning to Her Majesty's dominions, be detained or tried for the offence of *abus de confiance*, or for any offence committed by him prior to such surrender, other than the extradition crime proved by the facts upon which the surrender is granted. The law of France is not as stated on behalf of Bouvier. This court will be guided by the statement of the law by a person in the position of M. Moreau, as described in his affidavit, the

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more so as the circular to which he refers is also referred to by an author of such repute as M. Felix: (see the passage referred to at vol. 2, p. 333.) [Stopped by the court].

G. Browne, in support of the rule.—Under sect. 3, sub-sect. 2, the court will order the discharge of the prisoner Bouvier. It is not clear that by the law of France provision is made that he shall not, until he has been restored or had an opportunity of returning to Her Majesty's dominions, be detained or tried for any offence other than the extradition crime proved by the facts on which the surrender is grounded. M. Moreau is not justified in his declaration of the law of France, which is contrary to that set forth in Bouvier's affidavits, and the cases cited from Dalloz at p. 93 of Clarke upon the Law of Extradition:

The rule that a prisoner surrendered upon a charge of crime, but accused also of misdemeanor, should only be tried for the crime, had been acted upon in the case of *Dermenon*, who was given up by Geneva in 1840 on a charge of fraudulent bankruptcy. The *renvoi* of the *Chambre de Mises en Accusation* ordered that if acquitted on this charge he should be tried for simple bankruptcy and breach of trust. He was so acquitted, and the Minister of Justice held himself bound to re-deliver him to Geneva. That State refused to receive him; but the question whether this operated as a new extradition, or whether he ought to be liberated at the French frontier, was held to be a purely political matter: (Dalloz, *Jurisp. Gén.* 1840, I., 438.)

The rule was also recognised in the case of *Sauve*, a deserter from the French army, accused of theft. He was delivered up by Switzerland on the express condition that he should not be tried as a deserter, but only for the theft, for which he had been condemned *par contumace*. It was held in this case that the judges, empowered according to the information to judge of the misdemeanor as well as the crime, ought to declare themselves without jurisdiction over the former. *Sauve* was tried and condemned as a deserter, but this judgment was overruled by the *Conseil de Révision* of Paris, and he was sent back to be allowed to purge his contumacy, and to be tried for the thefts charged against him: (Dalloz, *Jurisp. Gén.* 1862, V. 159.)

Other cases, however, show that the principle must be faken with some modifications:

In the case of *Wolf Cromback*, in 1845, the prisoner was delivered up by Switzerland for "*faus en écriture de commerce*." The order of extradition was general, but this was the only description of forgery specified in the treaty under which he was claimed. On his trial the writings proved not to be of a commercial character, and he was convicted of "*faus en écriture privée*." He thereupon prayed the court that he might be sent back to Switzerland, quoting *Dermenon's* case; but this point was overruled, and he was sentenced to five years of "*réclusion*" and to "*l'exposition*." He appealed to the *Cour de Cassation*, which, after deliberation in *Chambre de Conseil*, decided that, as the treaty provided for the delivery up, not only of those declared guilty, but of those pursued as such in virtue of warrants certified by the proper legal authority, the legality of the extradition and of its consequences must be tested, not by reference to the gravity and legal character of the crime as described in the sentence of condemnation, but with regard to the original charge against him upon which he was pursued. The appeal was therefore rejected: (Dalloz, *Jurisp. Gén.*, 1845, I., 3.)

In the same year the *Abbé Grandfaus*, charged with "*faus en écriture privée et d'enlèvement de mineurs*," was given up by Tuscany, with an express stipulation that he should not be tried for the latter offence. The *Chambre des Mises en Accusation*, however, finding there were no sufficient grounds for the heavier charge, remanded him, and instructed the *Cour d'Assises* to try him for the smaller offence. On appeal against this *arrêt*, the *Cour de Cassation* held that the Criminal Courts must proceed without regard to the conditions of extradition. That was a matter for the consideration of the Government, which might prevent the execution of the sentence and redeliver the criminal: (Dalloz, *Jurisp. Gén.* 1845, I., 405.)

The other French decisions refer chiefly to the incompetence of the tribunals to consider the legality of the surrender which has been made. The doctrine was fully laid down in the case of *Burgerer* in 1841. He was given up by the republic of Berne on a charge which did not come within the treaty. He appealed against his conviction, but the *Cour de Cassation* held that the two countries might have extended or modified the convention by subsequent agreements, according to the requirements and obligations of the friendly relations which subsisted between them; that the French tribunals were not called upon to inquire into the reasons which had determined the Republic of Berne, the sole guardian of its own independence and dignity, to grant the extradition; and that, whether it had been demanded or spontaneously accorded, the prisoner had been legally remitted to the jurisdiction of the law by which his crime was punishable: (Dalloz, *Jurisp. Gén.* 1841, I., 440.)

[BLACKBURN, J. also cited the following from the same book, p. 91:

Extradition can only be admitted with regard to a person accused of a crime other than a political crime, and not of a misdemeanor. It follows that if the extradition has been obtained of a person accused at once of a crime and a misdemeanor, he ought not to be put upon his trial for the misdemeanor.

And again:

The order of extradition states the act upon which it is founded, and that act alone should be investigated.

The *Attorney-General* pointed out that in this case the warrant of committal and the requisition only mentioned the two extradition crimes—forgery and fraudulent bankruptcy.] At all events, it does not sufficiently appear between such contradictory authorities what the French law is on the subject, and therefore extradition ought not to be granted under the present Act.

COCKBURN, C.J.—I am of opinion that this rule should be discharged. I rather hesitate to express any decided opinion as to the construction to be put upon the 27th section, although I see plainly what was the intention of the Legislature—that is to say, it was intended, while getting rid of the statutes by which the treaties were confirmed, to save the existing treaties in their full integrity and force. This has been probably effected, but is certainly not very clearly expressed. Nothing would have been more simple than to enact that, although it was expedient to repeal the statutes, yet that the treaties should still have full force and effect; instead of which this complicated and obscure language has been adopted. If it were necessary in the present case to decide that point, I should have been prepared to do so, and to declare that the object had been accomplished, though at the same time I should be disposed to advise the Government to make the matter safe by amending the Act, in case any question might hereafter arise upon it. Upon the second ground upon which we are asked to discharge the rule, I think there can be no real doubt. By sect. 3, sub-sect. 2, the statute is to have full force where provision is made by the law of the state demanding the extradition of the criminal, or by arrangement, that the fugitive criminal shall not, until he has been restored, or had an opportunity of returning to Her Majesty's dominions, be detained or tried in the foreign state for any offence committed prior to his surrender other than the extradition crime proved by the facts on which the surrender is grounded. I consider that the requirements of this provision are satisfied. We are now clearly informed of the practical working of the French law by the affidavit of M. Moreau referring to the circular which is binding upon the courts of that country.

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It expressly provides that the criminal who is surrendered in respect of one offence will not be tried for another, until he has been restored or has had an opportunity of returning to Her Majesty's dominions. This view of the French law is confirmed by M. Felix, M. Blondel and other authors of the highest possible authority. I am satisfied that we must discharge the rule.

BLACKBURN, J.—I have no doubt that it was intended that the old treaties should still have force and effect, and that they should be enforced by the machinery provided under the Extradition Act 1870. It was not intended to abrogate the old treaties, but I have very serious doubts whether the Legislature have effected by the 27th section what was intended. If it was necessary to decide that point, I should desire to take time to consider, but I content myself with saying that it seems desirable that there should be some further legislation upon the subject. But upon the other point I am of opinion that the requirements of sect. 2, sub-sect. 3, are complied with. The French law does provide that the fugitive criminal shall not be tried for an offence committed prior to his surrender other than the extradition crime proved by the facts on which the surrender is grounded. When we read the affidavit of M. Moreau and the text books, this is made clear. The criminal ought therefore to be surrendered.

MELLOR, J.—I am inclined to agree with the construction of sect. 27 suggested by the Attorney-General; but I feel some doubt, and it would be advisable to set all doubt at rest by further legislation. Upon the other point I entirely agree with the judgments of my Lord and my brother Blackburn.

Rule discharged.

Attorney for the Crown, *The Solicitor to the Treasury.*

Attorneys for applicant, *Saunders and Hawkford, for F. Hawkford, Jersey.*

Saturday, Jan. 11, 1873.

REG. v. THE JUSTICES OF EXETER; *Ex parte* MANN.

Althouse licence—Annual value—Improvement of premises—Illegal condition in licence—Quashing—Certiorari—9 Geo. 4, c. 61—The Review of Justices' Decisions Act 1872 (35 & 36 Vict. c. 26)—The Licensing Act 1872 (35 & 36 Vict. c. 94, ss. 45, 46).

At a general annual licensing meeting, the occupier of a house licensed as a public-house under 9 Geo. 4, c. 61, the annual value of which was under 30l. a year, applied for a renewal of the licence. The justices renewed the licence, but with the following notice upon it:—"This licence is renewed on condition that the licensed premises shall, before the next general annual licensing meeting, be improved and made of the annual value of 30l., in default of which this licence will not be renewed."

Held, upon a certiorari to quash this condition, that the provision in sect. 46 of the Licensing Act 1872 as to improving the premises does not apply to a house already licensed under 9 Geo. 4, c. 61; and that the condition was null and void. The court directed that this judgment should be intimated to the justices, but they refused to quash the condition.

The justices did not appear to oppose the writ, but filed an affidavit under 35 & 36 Vict. c. 26, s. 2;

the court allowed the matter to be dealt with by way of motion.

A *certiorari* had issued to bring into this court a licence granted by justices of Exeter to John Mann. It was sought to quash a condition in the licence, on the ground that the justices had no jurisdiction to express in the licence any such condition, as the house was licensed under 9 Geo. 4, c. 61, before and at the time of the passing of the Act 35 & 36 Vict. c. 94, and at the time of the holding of the last general annual licensing meeting.

Upon the licence and under the seal the following memorandum was written:—"Take notice, that this licence is renewed on condition that the licensed premises shall, before the next annual licensing meeting, be improved and made of the annual value of 30l., in default of which this licence will not be renewed."

The justices had purposely refrained from showing cause why the writ of *certiorari* should not issue, and immediately after making a return to the writ they directed their chairman to file an affidavit, under the provisions of the Review of Justices' Decisions Act 1872 (35 & 36 Vict. c. 26).

Sect. 2 enacts: Whenever the decision of any justice or justices is called in question in any Superior Court of Common Law by a rule to show cause or other process issued upon an *ex parte* application, it shall be lawful for any such justice to make and file in such court an affidavit, setting forth the grounds of the decision so brought under review, and any facts which he may consider to have a material bearing on the question at issue, without being required to pay any fee in respect of filing such affidavit, or any stamp duty thereupon.

Sect. 3: Whenever any such affidavit has been filed as aforesaid, the court shall, before making the rule absolute against the justice or justices, or otherwise determining the matter, so as to overrule or set aside the acts or decisions of the justice or justices to which the application relates, take into consideration the matters set forth in such affidavit, notwithstanding that no counsel appear on behalf of such justices.

It appeared from the affidavit that the justices, from evidence obtained, were of opinion that the premises occupied by John Mann were not of the annual value of 30l., but that, inasmuch as the premises had been theretofore licensed, and the business thereof properly conducted for several years, the justices had renewed the licence conditionally "on the required improvement in value being made to the premises before the next annual licensing meeting, as provided by the 45th and 46th sections of the Licensing Act 1872;" and that the justices had given their best and most careful consideration to the several clauses and provisions of the Act, and more particularly to the 45th and 46th sections thereof, and to other the matters and things in reference to the renewal and conditional grant of the licence; and that the grounds on which they had come to their decision (which was unanimous) were, that they "verily believed and considered the same to be in accordance with the Licensing Act 1872, and other the statutes in connection therewith."

John Mann had for the last ten years holden a general public-house or licensed victualler's licence, under 9 Geo. 4, c. 61, which contains no provision whatever with respect to the rateable or annual value of the house to be licensed thereunder. Exeter is a city containing not less than 10,000 inhabitants, and John Mann's premises are below the annual value of 30l.

Poland (*Besley* with him).—The rule was made absolute for a *certiorari* last term. The justices

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have intimated their intention not to take any steps to prevent the condition being quashed, if the court thinks that it ought not to have been imposed. Therefore the matter may be dealt with at once, without the case being put into the Crown Paper. [The COURT assented to this being done.] The only question then will be, what is the proper construction to be put upon sects. 45 and 46 of the Licensing Act 1872. These sections are as follows:—Sect. 45: "Premises to which, at the time of the passing of this Act no licence under the Acts recited in the Wine and Beerhouse Act 1869 (32 & 33 Vict. c. 27), [The Acts recited are 11 Geo. 4 & 1 Will. 4, c. 64; 4 & 5 Will. 4, c. 85; 3 & 4 Vict. c. 61; 24 & 25 Vict. c. 21; 26 & 27 Vict. c. 33; and 23 Vict. c. 27. See especially s. 1 of 3 & 4 Vict. c. 61, and s. 8 of 23 Vict. c. 27] authorising the sale of beer or wine for consumption thereupon is attached, shall not be subject to any of the provisions now in force, prescribing a certain rent or value or rating as a qualification for receiving any such licence. Premises not at the time of the passing of this Act licensed for the sale of any intoxicating liquor for consumption thereupon, shall not be qualified to receive a licence authorising such sale unless the following conditions are satisfied:—(a) The premises, unless such premises are a railway refreshment room, shall be of not less than the following annual value: If situated within the City of London or the liberties thereof, or any parish or place subject to the jurisdiction of the Metropolitan Board of Works, or within the four miles radius from Charing-cross, or within the limits of a town containing a population of not less than 100,000 inhabitants, 50*l.* per annum; or if the licence do not authorise the sale of spirits, 20*l.* per annum. If situated elsewhere, and within the limits of a town containing a population of not less than 10,000 inhabitants, 30*l.* per annum; or if the licence do not authorise the sale of spirits, 20*l.* per annum. If situated elsewhere, and not within any such town as above mentioned, 15*l.* per annum, or if the licence do not authorise the sale of spirits, 12*l.* per annum. (b) The premises shall be, in the opinion of the licensing authority, structurally adapted to the class of licence for which a certificate is sought: Provided that no house not licensed at the time of the passing of this Act for the sale of any intoxicating liquor for consumption on the premises, shall be qualified to have a licence attached thereto, authorising such sale, unless such house shall contain, exclusive of the rooms occupied by the inmates of such house, if the licence authorise the sale of spirits, two rooms; and if the licence do not authorise the sale of spirits, one room for the accommodation of the public." Sect. 46: "Whereas, in certain cases, a licence under the Wine and Beerhouse Acts 1869 and 1870 is not to be granted unless the house and premises in respect of which such licence is granted are of such rent and value, or are rated to the poor rate on a rent or annual value of such amount as is respectively in that behalf stated in the Acts recited in the Wine and Beerhouse Act 1869, and it is expedient to substitute in such cases 'annual value' for the said rent, value, or rating, and to provide for the ascertaining the annual value of such house and premises: be it therefore enacted, that in cases not provided for by the last preceding section, a licence under the Wine and Beerhouse Acts 1869 and 1870, shall not be granted in respect of any pre-

mises which are not, in the opinion of the licensing justices who grant such licence, of such annual value as is mentioned in that behalf in the Acts recited in the Wine and Beerhouse Act 1869, and those Acts should be construed as if 'annual value' were therein substituted for 'rent,' 'value,' 'rated on a rent or annual value,' and other like expressions. If at the first general annual licensing meeting after the passing of this Act, the licensing justices are of opinion that any premises which are licensed for the sale of intoxicating liquors at the passing of this Act, are not of such annual value as authorises the grant of a licence for such premises, they may, notwithstanding, renew such licence upon the condition to be expressed in the licence, that the holder thereof before the next general annual licensing meeting, improve the premises so as to make them of sufficient annual value, and if the holder fail to comply with such condition, the licence shall not be renewed at such next general annual licensing meeting." It is to be observed, that no property qualification whatever was imposed upon public houses by the 9 Geo. 4, c. 61. This Act, formerly called the Alehouse Act, is in the Licensing Act 1872 called the Intoxicating Liquor Licensing Act 1828. (See sect. 74 of the Licensing Act 1872, the interpretation clause.) That Act of 1828 was passed at a time when the houses licensed under the Acts recited in the Wine and Beerhouse Act 1869, did not exist. Those houses were first created by 11 Geo. 4 & 1 Will. 4, c. 64 (the Beer Act), and 23 Vict. c. 27 (commonly called Mr. Gladstone's Act) respectively. No property qualification was imposed upon beerhouses by the original Beer Act. Beerhouses were first made subject to the property qualification by 3 & 4 Vict. c. 61, which Act applies to beerhouses only. By sect. 1 of 3 & 4 Vict. c. 61, it is enacted that "no licence to sell beer or cider by retail . . . shall be granted to any person who shall not be the real resident holder or occupier of the dwelling-house in which he shall apply to be licensed, nor shall any such licence be granted in respect of any dwelling-house which shall not, with the premises occupied therewith, be rated in one sum to the rate for the relief of the poor of the parish, township, or place in which such house and premises are situate, on a rent or annual value of 15*l.* per annum," if situated within the Bills of Mortality, or in places containing 10,000 inhabitants, &c. By sect. 8 of 23 Vict. c. 27, it is enacted that "no licence to sell foreign wine by retail to be consumed on the premises, shall be granted for any refreshment house, which, with the premises belonging thereto, and occupied therewith, shall be under the rent and value of 10*l.* a year." In like manner, 23 Vict. c. 27, by the 8th section of which a property qualification is imposed upon houses licensed for the sale of wine, applies to wine houses only. These are the "Acts recited by the Wine and Beerhouse Act 1869," to which reference is made in the 46th section of the Licensing Act 1872, and none of them touch 9 Geo. 4, c. 61. It being the intention of the Legislature to remove all doubts as to the real value of the house licensed, under the "Acts recited," "rateable value" being an uncertain value, and "rent or value" being a vague expression, the 46th section of the Act of 1872 was passed to prevent such doubts arising for the future. [MELLOR, J.—It is strange that the Legislature should have raised the value of the wine and beer houses, and have left the value of the other houses

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alone. The preamble of the Act includes all houses.] This is because the wine and beer houses had, until the passing of the Wine and Beerhouse Act 1869, been licensed by the Excise only, whereas the public-house licences had been always under the control of the justices. It would be confiscation to impose the new property qualification upon old public houses. [MELLOR, J.—As to confiscation, was it not a kind of confiscation to change rateable into annual value?] Not so; it was only the substitution of the real test for a vague and uncertain one, which was often evaded. The old public-houses are expressly excluded from the operation of sect. 45, by its two first paragraphs. [LUSH, J.—Assuming this, was there any legal obligation to renew?] No; but it is the practice to renew in cases where there is no complaint as to character. [COCKBURN, C.J.—No doubt that the justices would have acted harshly if in such a case they had refused without reason, but still they have a discretion which we cannot overrule. But can a document of this kind be so divided as to be quashed in part? We are confident that if we say that the justices had no jurisdiction to impose such a condition, they will treat it as a nullity when the time comes.] The condition is illegal, and ought to be quashed. Sect. 48 of the Licensing Act 1872 prescribes that licences granted at the first licensing meeting after the Act, should be in the forms heretofore in use.

No counsel appeared for the justices.

COCKBURN, C.J.—The condition is not above, but below the seal to the licence, which is good in itself. But I should be sorry to put my decision on so narrow a ground, being of opinion that the justices applied sect. 46 of the Act in a manner beyond their power. Looking at sect. 45, one sees two classes of cases—first, licences already existing; secondly, licences granted after the passing of the Act; and that a distinction was intended to be made, and is in fact made, between them. "Premises not at the time of this Act licensed," excludes existing licences, before proceeding to legislation for the future. With natural tenderness for vested interests, the Legislature has foreborne to require what might be beyond the means of the applicant, or be perhaps physically impossible. Where there is a public-house licence existing, the section does not apply. The justices acted beyond their powers, but it would be useless for us to quash a condition which we consider altogether inoperative.

MELLOR, J.—I agree with the decision of the court, and though I hesitate as to the construction of the Act, I do not hesitate sufficiently to differ from the rest of the court. I agree that it is idle to quash a part without quashing the whole of the licence. The opinion expressed by the court will, no doubt, prevent the justices from acting on the condition they have imposed. It is very inconvenient that the court should be called upon to decide so complicated a question without the assistance of counsel on both sides. At any rate, the justices should have given a full reference to the statute on which our opinion is requested. My hesitation is grounded on the apprehension of limiting the provisions of an Act passed on grounds of public policy, with intent to check intemperance. The words seem to justify the construction put on them by the court.

LUSH, J.—I do not doubt that the justices have put a wrong construction upon sects. 45 and 46.

Although the language is by no means clear, I think our judgment accords with the words as well as the intention of the Act. There appear to be three kinds of licence referred to: existing public-house licences, existing wine and beerhouse licences, and new licences of both kinds. Sect. 45, in substance, says that existing public-houses shall not be subject to any value qualification, and then proceeds to deal with future licences. Then comes sect. 46, dealing with beer and wine houses. Now it might well be that some of these houses had got wrongly rated. Such houses would have become disfranchised by sect. 45, were it not for the power of inserting the condition given by sect. 46. The two sections must for all purposes be read together.

ARCHIBALD, J.—The sections are by no means clearly worded, but their meaning may be ascertained pretty accurately. Unless the earlier paragraph of sect. 45 be unmeaning, it must mean that existing public-houses are not to be touched. From the use of the word "authorises," in sect. 46, it also appears that these houses are excluded from the operation of that section. The general intention of the Act may be seen in the preamble, but that intention could only have been meant to be carried out with due regard to vested interests. There would be no hardship in slightly increasing a property qualification, whereas there would be a great hardship in creating one where it did not exist before.

Licence sent back to the justices, with the opinion expressed by the court.

Attorneys for applicant, H. J. and T. Child, for T. Floud, Exeter.

Tuesday, Jan. 21, 1873.

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Highway—Limited dedication—Right of owner of soil to plough up footpath—Right of deviation where highway foundrous—Nuisance—Right to abate.

Appellant was the occupier of an arable field, across which a footway ran, which had been used as a highway by every person at his pleasure, but such user by the public was subject to the right of the appellant and others, the owners and occupiers of the field, to plough up the footway whenever they required so to do in ploughing the field. The footway, after being last ploughed up, being in a muddy and bad condition, the public deviated on to the land on either side, and in so doing injured the appellant's crops. To prevent this deviation, appellant placed hurdles at intervals, which hurdles were dangerous to the public in the dark. An action of trespass having been brought against respondent for entering on the appellant's land and knocking down some of the hurdles:

Held, that the public had no right to deviate when the footway was foundrous and impassable, in the absence of evidence that such a right had been granted by the owner of the soil, or had been invariably enjoyed; and (2) that even supposing the existence of the hurdles a nuisance, the respondent was not justified in abating it, in absence of proof that he could not otherwise enjoy the public right.

This was an appeal from a decision of the Judge of the County Court of Surrey, holden at Brighton on the 8th March 1872.

The action was brought by the appellant to

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recover the sum of 21l., as damages, from the respondent, for entering upon certain land in the occupation of the appellant, and pulling up and throwing down twenty hurdles of the appellant, set up upon the said land. The respondent appeared and defended the said action.

The appellant was the tenant and occupier of an arable field, situate in the parish of Portslade, in the county of Surrey, called Aldrington Laine, over which was a footpath running diagonally across the said field, in a straight direction from one end to the other, and which path, it was admitted by the appellant, the public had a right to use; but such user was subject to the right of the appellant and others, the owners and occupiers of the said field, to plough up whenever they required so to do, in ploughing the said above-mentioned field.

The right of the appellant so to plough up the said path had been determined by the judgment of the Court of Exchequer Chamber, in the action of *Arnold v. Blaker* (L. Rep. 6 Q. B. 433). The case for the opinion of the court in that action was settled by Bramwell, B., and the following statements from it are to be taken as parts of this case:—

"The footway in question is the nearest footway by half a mile from the Portslade station of the London, Brighton, and South Coast Railway to the village and parish church of Portslade, and is the only footpath leading from the village to the station. The said railway station was opened for public traffic in 1842, and since that time the number of inhabitants of the village and parish of Portslade has increased very largely. 58,774 railway passenger tickets were issued at the said railway station in 1867, and 65,631 in 1868. Since 1842 the said footway has been much more used by the public than before that time; and the jury found that any path which prevented the plaintiff from ploughing through it, as formerly, would be a prejudice to him and not a benefit."

Prior to the last ploughing up of the said path, and to the said action of *Arnold v. Blaker*, the surveyors of the parish of Portslade had hardened the said path by bringing chalk and stones upon it, and had made it a solid and raised path, of the average width of four or five feet, and which path the plaintiff, in consequence of its being so made solid, could not plough up, and he thereupon brought his said action against the surveyors of highways of Portslade, Blaker being one.

After the decision of the Court of Exchequer Chamber, the appellant gave the parish authorities notice in writing to remove, and they thereupon removed the material hardening the path, and the appellant afterwards ploughed up the path, as portions of the field were ploughed up in the ordinary cultivation thereof, and sowed the whole with wheat, but did nothing after such ploughing up and sowing to make, set out, or define the said path for the use of the public.

After the appellant had so ploughed up and sown the said field and path, the public continued to walk across the field in the direction where the path had been, but soon finding the ground where the path had been in a muddy and bad condition, they walked out on either side of it for a better way, and in some parts of it to a width of eighteen feet or thereabouts, injuring thereby the appellant's crops.

To prevent the public from so walking out on either side, the appellant, in the month of December, placed hurdles on the parts which had been thus trodden over by the public at irregular intervals, but not opposite to each other, they being about twelve yards from each other, at right angles to the line where the path had been first trodden out on either side of it, leaving a space of about six feet between the inner ends of the said hurdles, which hurdles were dangerous to the public in the dark. The appellant had in previous years placed at intervals bushes for a similar purpose, after the field had been ploughed, but the public often walked outside of them when the path had become in a bad condition.

The respondent threw down three of the said hurdles, and it was for such alleged trespass that the present action was brought.

The appellant's witnesses were cross-examined on the facts, and at the close of the appellant's case, the learned judge suggested an adjournment to enable the parties to come to some terms, the learned judge having suggested that it would be more advantageous to all parties that the footpath should be hardened, and that in any future ploughing the appellant should plough on either side of the path instead of across it. But such adjournment having failed to produce any amicable arrangement, the learned judge, at a subsequent court, without calling on the respondent, gave judgment in favour of the respondent, on the ground that it was the duty of the appellant, after he had ploughed up the said path, to set out again a proper path for the use of the public, instead of leaving them to tread out a path in the best way that they could, and that the path so trodden out having become in a muddy and foundrous state, the public were justified in deviating on the appellant's land to find a firmer and better path; that it was by the appellant's own negligence that the alleged trespass was occasioned, and that such negligence contributed to the injury complained of, and that the respondent was therefore justified in removing the said hurdles.

The question for the opinion of the Court of Queen's Bench was, whether, under the circumstances stated, the respondent was or was not justified in removing the said hurdles. If the court should be of opinion that he was justified in doing so, the judgment of the court below was to stand; but if the contrary, the judgment was to be reversed; the costs to be in the discretion of the Court of Appeal.

Manisty, Q.C. (with him *Grantham*), for the appellant, after stating the facts of the case, was stopped; and the court called on

Brown, Q.C. (with him *Lord*), for the respondent, who contended, first, that the public had an absolute right to deviate to the right or left of the footway, where it was foundrous; secondly, that quite irrespectively of this right, the hurdles in the present case being dangerous to the public at night, any one of the public might throw them down, and thus abate a public nuisance. First, by the ancient common law relating to highways, if a highway becomes foundrous, the public may deviate to the right or the left of it. [COCKBURN, C.J.—Does not that apply to the case of a prescriptive highway, and not to a highway dedicated subject to such a limitation as exists in the present case? Where such a limitation exists, is not the right strictly subject to that limitation?] In *Taylor v.*

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Whitehead (Doug. 745), where it was held not to be a good justification in trespass that the defendant had a right of way over part of plaintiff's land, and that he had gone upon the adjoining land because the way was impassable from being overflowed by a river, Lord Mansfield distinguishes such a case from that of a highway, as to which the right would be indisputable. His Lordship said (p. 749): "The question is upon the grant of this way. Now it is not said to be a grant of a way generally, over the land, but of a precise specific way. The grantor says, you may go in this particular line, but I do not give you a right to go either on the right or left. I entirely agree with my brother Walker, that by common law, he who has the use of a thing ought to repair it. The grantor may bind himself; but here he has not done it. He has not undertaken to provide against the overflowing of the river; and for aught that appears that may have happened by the neglect of the defendant. Highways are governed by a different principle. They are for the public service, and if the usual track is impassable, it is for the general good that people should be entitled to pass in another line." So in *Bullard v. Harrison* (4 M. & S. 387), where it was held that a person who prescribes in a *que estate*, cannot justify going out of it on the adjoining land because the way is impassable, Lord Ellenborough, C.J. takes the same distinction between a private way and a highway, as the footpath in the present case is. "The question," said his Lordship, "intended to be agitated upon this record is, whether in the case of a private way, the grantee may break out and go *extra viam*, if it be impassable, as in the case of a public way. As to that, I consider *Taylor v. Whitehead* has settled the distinction, that the right of going on the adjoining land extends not to private as well as public ways. And there may be many reasons in the case of highways, why the public should have an outlet, because it is for the public good that a passage should be afforded to the subjects at all times. But the same necessity does not exist in the case of a private right;" and his Lordship referred to Williams' note to *Pomfret v. Ryecraft* (1 Saun. 323, note 6). In *Young v. —* (1 Ld. Ray. 725), we find that it was ruled at Nisi Prius that every man of common right may justify the going of his servants or of his horses upon the banks of navigable rivers, for towing barges, &c., to whomsoever the right of the soil belongs; and if the water of the river impairs and decreases the banks, &c., then they shall have reasonable way for that purpose in the nearest part of the field next adjoining to the river; and Holt, C.J., compared it to the case where there is a way through a great open field, which way becomes foundrous, the travellers may justify the going over the outlets of the land not inclosed, next adjoining. [COCKBURN, C.J.—The word "outlets" seems to mean something between the highway and the field. It supposes that the field through which the road runs is separated from the road by something called an outlet. BLACKBURN, J.—And that is an authority that the right to deviate is not without stint or limit.] In Roll. Abridg. tit. "Chimin Common," pl. p. 390, we read: "Si la soit un common chimin pur tous les subjects le roy et ad estre use temps dont memorie que quant le chimin ad estre foundrous, les subjects le roy hont use daler per outlets sur le terre prochain adjoynant, le chimin

gisant en le open field nemy enclose, ceux outlets sont parcell de chimyn, car les subjects le roy doint aver un bon passage, et le bon passage est le chimin, et nemy solement le beaten tracke, car si la terre adjoynant soit meme ove graine les subjects le roy (le chimyn estant foundrous) poient aler sur le graine (Trin. 10 Car. B. R.) Per *curiam*.—Sur un tryall al barr sur un information vers Sir Edward Duncombe." [COCKBURN, C.J.—I see that Comyn (Dig. tit. "Chimin, A." 286) uses the same word, *outlets*: "If a highway lies in an open field, and passengers use to turn out of the great track when it is foundrous, these outlets are part of the highway." In *Henn's case* (Sir W. Jones, Rep. 296), we read, "The judges agree that it hath been adjudged, that if a man do inclose where he may by law, that he is bound to have a good way, and also to keep it in continual repair at his own charge, and the country ought not to be contributory thereto. Mr. Attorney said it was a Norfolk case, that in an action of trespass for depriving his close, the defendant pleaded that time out of mind there was a common footpath through that close, &c. The plaintiff replied that the defendant went in other places out of the way (which was a kind of new assignment); the defendant rejoined that the footpath was *adeo rutosa et funderosa* in default of the plaintiff which ought to amend it, that he could not pass along that, and therefore he went as near the path as he could in good and passable way, and this was resolved a good plea and justification; out of which Mr. Attorney inferred that in case where a man incloseth and doth not make a good way, it is lawful for passengers to make gaps in his hedges to avoid the ill way, so that they do not ride further into his inclosed grounds than is needful for avoiding the bad way." [BLACKBURN, J.—The inference of the Attorney-General is not a decision of the court. LUSH, J.—And there the owner was bound to repair.] That is so in this case, but it does not appear to have been so in other cases. In *Absor v. French* (2 Show. 28), in trespass the defendant pleaded that there was a highway from such a place to such a place, that the plaintiff stopped the same so as he could not pass, and that therefore he went over the plaintiff's close, doing as little harm as he could, and the plea was held good upon demurrer, "for if the way be so foul as is not passable, I may then justify the going over another man's close next adjoining." [BLACKBURN, J.—If that were law it would follow that if I, being owner of Whiteacre, you being owner of Blackacre, dedicate a strip of land at the edge of Whiteacre as a highway, I thereby give to the public a right, in case the way becomes foundrous, to go over your property, Blackacre, which would certainly be a very startling thing.] Blackstone (2 Com. 36) says: "When the law gives anything to one it gives impliedly whatsoever is necessary for enjoying the same. By the law of the Twelve Tables at Rome, where a man had the right of way over another's land, and the road was out of repair, he who had the right of way might go over any part of the right he pleased, which was the established rule in public as well as private ways. And the law of England seems to correspond with that of Rome as to highways and private ways having their origin in the necessity of the thing," &c. The text books on the subject are unanimous in favour of this right of the public in case of highways. Gale on

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Easements, p. 492, refers to a "mistake of Blackstone, who lays it down that in public as well as in private ways, a man who had the right of way might, if it were out of repair, go over the adjoining land. The cases cited by Blackstone," says the author, "in support of this proposition, appear to be those of public ways only. This distinction is also recognised by the civil law; if the public highway was impassable, a traveller might pass along the land adjoining; but no such right appears to have existed in respect of private ways;" and he cites the Roman law: "Cum via publica vel fluminis impetu vec ruinâ amissa est, vicinus proximus viam præstare debet." So Glen on Highways, p. 176: "It seems to be established that if a common highway is in furrows and out of repair, as to become impassable, or even dangerous to be travelled over, or inconvenient, the public have a right to go upon the adjacent land, and it makes no difference whether it be sown with grain or not." [MELLOR, J.—No doubt it has been the prevailing impression hitherto that such a right exists. In the notes to *Dovaston v. Payne* (2 S. L. C. 131), it is laid down that "if a highway become so out of repair and foundrous as to be impassable, or even inconvenient, the public have a right to go on the adjacent ground, whether it be cultivated or uncultivated;" citing, in addition to the authorities already referred to, 1 Hawk. P. C. 76, s. 2.] The same view is expressed in the last edition of Burn's Justice of the Peace, tit. "Highways," p. 984. *Reg. v. The Inhabitants of Hornsea* (23 L. J. 59, M. C.), and *Daves v. Hawkins* (8 C. B., N. S., 848) were also referred to. The existence of this right on the part of the public explains the existence of the strips of waste land by the side of roads. "It is said that in former times the landowners, to prevent their fences being broken and their crops spoiled when the roads were out of repair, set back their hedges, leaving strips of waste land at the side of the road, along which the public might travel without going over the lands in cultivation;" (Williams' Real Property, 313.) [COCKBURN, C.J.—In all these cases cited the highway was a prescriptive one, and there is a body of authority for the proposition that in the case of such a highway the public have a right, if they cannot otherwise get along by reason of the foundrous state of the highway, to go upon the adjoining lands. But there is nothing to show that this footpath is a prescriptive highway; and if it is, it is a prescriptive highway restricted by the owner's right to plough it up.] If this is a matter in doubt, it should be remembered that the evidence for the defence was not gone into before the County Court judge, who decided against the plaintiff on his own evidence. Secondly, these hurdles are stated in the case to be dangerous to the public using this footway by night, and the defendant was therefore entitled to knock them down. [BLACKBURN, J.—Is there any authority for the proposition that if something is so near to a highway as to be dangerous, but is not on it, any one may abate it as a nuisance?] In *Hardcastle v. South Yorkshire Railway and River Dun Company* (4 H. & N. 74), Pollock, C.B., delivering the judgment of the court, says: "When an excavation is made adjoining to a public way, so that a person walking upon it might, by making a false step, or being affected with sudden giddiness, or in the case of a horse or carriage way, might by the sudden starting of a horse, be thrown into the

excavation, it is reasonable that the person making such excavation should be liable for the consequences; but when the excavation is made at some distance from the way, and the person falling into it would be a trespasser upon the defendant's land before he reached it, the case seems to us to be different. . . . We think that the proper and true test of legal liability is, whether the excavation be substantially adjoining the way, and it would be very dangerous if it were otherwise—if in every case it was to be left as a fact to the jury whether the excavation were sufficiently near to the highway to be dangerous." [COCKBURN, C.J.—But though an action might be maintainable in such a case, could any person go with a cart load of materials and fill up the excavation?] In *Barnes v. Ward* (9 C. B. 392), where the defendant was held liable for an injury caused by an excavation adjoining a public footway, Maule, J., in delivering judgment, says that "the arguments for the plaintiff were, that when a public way has existed from time immemorial, the public have a right to enjoy it with ease and security; and that if a man prevents that enjoyment, even by the use of his own property, he is responsible as for a public nuisance;" whilst on the part of the defendant it was argued, that no use which a man chooses to make of his own property can amount to a nuisance to a public or private right, unless it in some way interferes with the lawful enjoyment of that right. The judgment of the court was this: "Considering that the present case refers to a newly made excavation adjoining an immemorial public way, which rendered the way unsafe to those who used it with ordinary care—it appears to us, after much consideration, that the defendant, in having made that excavation, was guilty of a public nuisance, even though the danger consisted in the risk of accidentally deviating from the road; for the danger thus created may reasonably deter prudent persons from using the way, and thus the full enjoyment of it by the public is in effect as much impeded as in the case of an ordinary nuisance to a highway." These remarks are strictly applicable to the present case; and if so, the defendant would be entitled to treat the hurdles as a nuisance; for they are found to be dangerous to any person using the footpath at night who may deviate. [COCKBURN, C.J.—The deviation in the present case is not an accidental one, but a designed and wilful one.]

Manisty, Q.C. in reply.—In *Hardcastle v. South Yorkshire Railway and River Dun Company* (*ubi sup.*), the court in giving judgment says: "When a man dedicates a way to the public, there does not seem any just ground, in reason and good sense, that he should restrict himself in the use of his land adjoining to any extent further than that he should not make the use of the way dangerous to the persons who are upon it and using it. To do so would be derogating from his grant; but he gives no liberty or licence to the persons using the way to trespass upon his adjoining land; and if they in so doing come to misfortune, we think they must bear it, and the owner of the land is not responsible. [BLACKBURN, J.—Even supposing the hurdles in the present case to be a nuisance, I am much startled at the proposition that any person who likes may abate it, unless he cannot otherwise enjoy the public right. MELLOR, J.—In *Dimes v. Petley* (15 Q. B. 276), it was held that a private individual cannot justify damaging the property

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of another, on the ground that it is a nuisance to a public right, unless it does him a special injury. COCKBURN, C.J.—[If our decision is in your favour, do you claim to have judgment for the sum of 21*l.* claimed in the action?] The plaintiff's only desire is to have the legal question determined; he does not insist on the 21*l.*

COCKBURN, C.J.—We must deal with the case as it now comes before us. If it had been desired to adduce evidence on behalf of the defendant that should have been done at the trial. We are of opinion that the judgment of the County Court Judge in favour of the defendant must be reversed. It is quite unnecessary to quarrel with or indeed to consider the right of the public, as stated in the old cases, where the highway is foundeours, to deviate on to the adjoining lands. It may be that from the nature of the times, the roads formerly being few, the right of the public to do so was indispensable, and became well established. It may well be, too, that the liability to repair the roads of the country not being in those days well settled, it was, for the public good and convenience, necessary to establish the rule that where the roads were not in a proper condition to travel upon, the public might do the best they could, at the expense of the owners of the adjoining lands. But the cases seem to have been those in which no right was reserved to the owners of the road qualifying the right of the public to use it. Whether the user of the road in the present case be modern or not, we find that the owner has reserved to himself the right to plough it up in the ordinary course of cultivating his land; and a path is given by him to the public in a precise and known direction. When the owner is ploughing the rest of his field, the pathway soon gets into a muddy and perhaps impassable condition. But inasmuch as the owner has a right so to plough up the pathway, unlike, in this respect, the cases cited by Mr. Brown, a totally different state of things arises from that existing in those cases. The owner has a legal right to turn the pathway into a condition which renders it impassable—he has reserved that right to himself contemporaneously with the dedication of it to the public as a highway—the public must therefore take it *talem qualem* the owner has dedicated it; if they use it at all they must take it as they find it. If it becomes impassable, it does not follow that the ordinary rule of law as to highways which has been cited applies. As to the second point insisted on by Mr. Brown, I cannot conceive that there can be anything in the circumstances of this case to entitle the defendant to go and knock down the hurdles put up by the plaintiff—hurdles placed where they are, not to interfere with the user of the pathway by the public, but merely to mark out the limit of the dedication. It may be that where anything is so closely contiguous to a highway that persons passing along the highway, though using reasonable care, may still be liable to injury from the proximity of this thing, that a right of action may accrue to any person who is injured; but it is a very different thing to say that any person can go and abate it as a nuisance. The case which was last cited shows that an individual can only abate a nuisance where it is necessary to the user of his own right that the nuisance should be abated. No such nuisance existed in the present case; and the abatement was only necessary to a person seeking to enjoy a right of deviation which does not exist. The defendant had no

right, for the sake of the general public, to throw down the hurdles. On both points, therefore, the case of the defendant fails; and the judgment of the court below must therefore be reversed.

BLACKBURN, J.—I am of the same opinion—that the judgment of the County Court Judge cannot stand; and that, as the case is stated before us, all we can do is to reverse that judgment, without ordering that the appellant is to have judgment for 21*l.*—a course which the counsel for the appellant are contented with. The first question is, whether there exists a right of deviation here because the footway is foundeours and parts of it impassable. As to that, I agree that there are many dicta to be found in the text books in favour of the view that such a right of deviation exists; but there is, notwithstanding, no authority for it. *Sir Edward Duncomb's case* (Cro. Car. 366) is the foundation on which the whole doctrine rests, and the only case at all like the present. In that case there was a prescriptive highway, and when it was out of repair there existed a prescriptive right of user by the public of what is called the outlets of the highway, which I understand to mean certain definite portions of the land adjoining the highway—not at all that the public had a right to go anywhere they liked. What was done in that case was this: Sir Edward Duncomb having taken possession of the outlets and inclosed them, thereby deprived the public of a right which they formerly possessed; and it was held that there was an obligation on him to keep the way in repair at his own charge and peril—a primary liability which the parish could enforce against him, as he had deprived the public of their former right of deviating on to the outlets. And I think it would be very reasonable to hold that where a prescriptive highway runs across an open common, *prima facie*, unless something is shown to the contrary, when that highway becomes foundeours, the public would have a right to deviate to that extent. But where there is no prescriptive right of this kind, I must say, though there are several dicta of great weight, there is no authority to show the existence of a common right on the part of the public to deviate to the lands on either side, whether those lands be subject to any prescriptive obligation or not; and where there are in the case distinct intimations of the non-existence of such a right to deviate, it would require extreme authority to satisfy me that any person dedicating to the public a footway of, say six feet broad, across his field, would thereby give the public a right to deviate on either side into his field. Whether, in the present case, there was any prescriptive right so to deviate, is a different question. It is enough to say that there is no evidence of any such prescriptive right. Because the owner has reserved to himself a right to plough up the footway, it cannot be said that the public has therefore a right to deviate. It would be a different matter if the plaintiff had by any wrongful act of his own, stopped up the highway. I think that the case cited from *Showers* shows that the public might in such a case knock down the obstruction; but it is not necessary to decide that point. The road here is foundeours, because from the nature of it it is necessarily so when ploughed up, until it becomes hardened by the feet of the passengers over it; but it cannot therefore be argued that the public may deviate on to the adjoining ground. Such a thing would be contrary to common sense and justice; and there

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is no authority in support of it. *Sir Edward Duncomb's* case is not applicable to a case like the present. Then as to the other contention on behalf of the defendant, that he can justify knocking down the hurdles, because they constitute a nuisance, I will only say that the case of *Dimes v. Petley* (*ubi sub.*) appropriately states the law on this subject, and as soon as it is looked at, it will be perceived that the defendant in the present case had no such right. The judgment, therefore, in favour of the defendant must be reversed.

MELLOR, J.—I am of the same opinion. The footway in the present case seems to be the same which was before the Court of Exchequer Chamber in the case of *Arnold v. Blaker* (L. Rep. 6 Q. B. 433). The case was not argued in the court below, because covered by the decision in *Mercer v. Woodgate* (L. Rep. 5 Q. B. 26). The language cited by my brother Blackburn in that case from *Fisher v. Prowse* (2 B. & S. 780), is applicable here: "It is of course not obligatory on the owner of land to dedicate the use of it as a highway to the public. It is equally clear that it is not compulsory on the public to accept the use of a way when offered to them. If the use of the soil as a way is offered by the owner to the public under given conditions, and subject to certain reservations, and the public accept the use under such circumstances, there can be no injustice in holding them to the terms on which the benefit was conferred. On the other hand, great injustice and hardship would often arise if, when a public right of way has been acquired under a prior state of circumstances, the owner of the soil should be held bound to alter the state of circumstances to his own disadvantage and loss, and to make further concessions to the public altogether beyond the scope of his original intention." This expresses most accurately the right doctrine on the subject. Once we see that there may be a restriction on the right of the public, or a reservation by the owner who dedicates, it seems unnecessary to consider anything further; and the cases cited by Mr. Brown, seeing that they were all cases of highways where no such restriction or reservation existed, may be left out of consideration. I think the case of *Dimes v. Petley* (*ubi sup.*) is decisive of the second point made by Mr. Brown. If one considers what it is which entitles a man to recover damages in respect of an obstruction—namely, that he suffers some special injury from its existence—that will show the nature of the right which he has to abate a nuisance.

LUSH, J.—I am of the same opinion on both points, and for the reasons already given by my learned brothers.

Judgment for the appellant.

Attorneys for appellant, *Palmer, Bull, and Fry*, for *Upperton, Upperton, and Bacon*, Brighton.

Attorney for respondent, *W. Clarke*.

Wednesday, Jan. 22, 1873.

BAILEY (app.) v. WILLIAMSON (resp.)

Right to deliver a public address in Hyde Park—Rules of the park—35 & 36 Vict. c. 15.

Sect. 4 of 35 & 36 Vict. c. 15, gives summary jurisdiction for the conviction of any person doing an act in contravention of any regulation in the schedule. By sect. 9, any rules made in pursuance

of the schedule, when Parliament is not sitting, shall be laid before both Houses within three weeks after the beginning of the next session, and any rules or parts thereof as shall be disapproved shall not be enforced. Regulation 8 of the schedule provides that no person shall deliver or invite any person to deliver any public address in a park except in accordance with the rules of the park; and regulations 19 and 20 provide for the making and issuing rules of the park by the ranger and commissioners. Rules of Hyde Park were issued on the 1st Oct. 1872, the Act having passed on the 27th June, and the last session having concluded on the 10th Aug. One of the rules was that no public address of an unlawful character, or for an unlawful purpose, may be delivered; another, that no public address may be delivered except upon certain conditions. The appellant, having infringed these conditions in delivering a public address of a lawful character in Hyde Park, was convicted by a magistrate:

Held, upon appeal, that these rules were in force, although not laid before Parliament; that this Act assumes that the parks are the property of the Crown, and that the public have no rights of user except by favour of the Crown; that the rules were within the authority of the Act; and that the conviction was valid.

THIS was a case stated by a metropolitan magistrate, under 20 & 21 Vict. c. 43, upon the conviction of the appellant. The case was as follows:

The appellant had appeared before me on a summons to answer the complaint against him by the respondent, who is a superintendent of the Metropolitan Police, which charged him with an offence under sect. 4 of the Parks Regulation Act 1872 (35 & 36 Vict. c. 15), for that he did unlawfully act in contravention of a certain regulation contained in the first schedule annexed thereto—to wit, by delivering a certain public address in Hyde Park, not in accordance with the rules of the said park, contrary to the statute, &c. I convicted the appellant of the said offence, and adjudged him to pay a fine of 5*l.* and 2*s.* costs, or in default of payment to be imprisoned in the House of Correction for Middlesex for one calendar month.

The following facts were proved before me. A copy of the Rules of Hyde Park, made under the 19th and 20th regulations in the first schedule to the Act was put in evidence. The first schedule contains the following:

Regulations to be Observed by Persons using the Royal Parks.

7. No person shall drill or practise military evolutions, or use arms, or play any game or music, or practise gymnastics, or sell or let any commodity, in a park except in accordance with the rules of the park.

8. No person shall deliver or invite any person to deliver any public address in a park except in accordance with the rules of the park.

14. No person shall commit any act in violation of public decency, or use profane, indecent, or obscene language to the annoyance of other persons using a park.

16. No person shall wilfully interfere with or annoy any other person using or enjoying a park, or any part thereof, in accordance with the rules of the park, or otherwise using or enjoying the same in any lawful manner.

18. No person shall enter into or remain in any part of a park during any time between sunset and sunrise appointed for closing the same, except for the purpose of passing along a way kept open for the use of the public.

19. For the purpose of this schedule "the Rules of the Park" shall be deemed to be such rules as may, in relation to any matter within the jurisdiction of the

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ranger (if any) of the park, be from time to time made by the ranger, and in relation to any other matter to which these regulations are applicable be from time to time made by the Commissioners of Her Majesty's Works and Public Buildings.

20. Any rules, whether made by the ranger or by the Commissioners of Her Majesty's Works and Public Buildings, shall be issued under the common seal of the said commissioners, and any rules purporting to be the rules of the park may be proved by the production of a copy thereof purporting to be printed by the printers of Her Majesty.

Copies of the said regulations and of the rules so made for Hyde-park were posted in conspicuous places in the said park, at the several entrances thereto, on boards on the 30th Sept. 1872. The following are the concluding Rules of Hyde-park :

10. No chairs or other seats may be placed for hire except with the licence of the Commissioners of Her Majesty's Works and Public Buildings, and subject to the terms and conditions of such licence.

11. No public address may be delivered except within forty yards of the notice board on which this rule is inscribed.

12. No public address of an unlawful character or for an unlawful purpose may be delivered.

13. No public address may be delivered unless a written notice of the intention to deliver the same, signed with the names and addresses of two householders residing in the metropolis, be left at the office of the Commissioners of Her Majesty's Works and Public Buildings at least two clear days before. Such notice must state the day and hour of intended delivery. After such a notice has been received, no other notice for the delivery of any other address on the same day will be valid.

Dated the 1st Oct. 1872.

GEORGE, Ranger.

Sealed with the common seal of the Commissioners of Her Majesty's Works and Public Buildings.

GEORGE RUSSELL, Secretary.

In one spot in the said park a notice was put up on an iron post, which was firmly fixed in the ground, on a granite base, and on which was inscribed, in a conspicuous manner, on an iron plate, the 11th of the said rules, with a heading to it as follows : "The notice board respecting public addresses.—No public address may be delivered except within forty yards of the notice board on which this rule is inscribed."

A *fac simile* of this notice was put in evidence, and will be in court to be referred to if deemed necessary.

On Sunday, the 3rd Nov. 1872, several hundreds of persons, carrying flags, and headed by a band of music, walked into the said park and assembled there for the purpose of holding a public meeting ; a chairman was appointed, who addressed the assembly, and the appellant then addressed the persons there assembled, and concluded by moving the first resolution, and others also afterwards delivered addresses at the same meeting. The addresses delivered by the appellant and by the other speakers were delivered at more than forty yards distance from the notice board containing only the 11th rule before mentioned, viz., at a distance of 106yds. therefrom, and at a very much larger distance from the notice boards containing complete copies of the regulations and rules. Several persons were selling fruits in the said park on that occasion. There were numerous park keepers and police constables in the park at that time. They were well aware of the aforesaid proceedings, but they did not in any way interfere with those persons who delivered addresses or sold fruits, nor did they demand their names or addresses, nor did they warn them that

they were infringing the law, but summonses were applied for by the police on the afternoon of the 4th Nov., and granted by me against the appellant and other speakers who addressed the meeting. No notice was left at the office of the Commissioners of Her Majesty's Works as required by the 13th rule.

On the part of the appellant it was contended as follows : That the Parks Regulation Act imposed upon the park keepers and police constables the duty of demanding the name and address of any person infringing the rules of the park, and, in the event of refusal to give such name and address, of taking the offender into custody. That it was the duty of such park keepers and police constables to have taken this course with the chairman who first addressed the meeting; and that not having done so the appellant was justified in concluding that the delivery of an address under the circumstances was a lawful act and sanctioned by the park keepers and police constables. That under the 7th section of the said Act the duties and responsibilities of police constables were imposed upon the park keepers, and that the latter were consequently bound, as soon as the rules of the park were infringed, to prevent the continuance or the repetition of such infringement. That by the 9th section of the Act any rules made in pursuance of the Act should, in order to become valid, be first approved by Parliament. That if the rules acquired any validity without such approval of Parliament, it was only such as would have enabled the park keepers and police constables to enforce compliance with such rules, but not such as would render noncompliance with such rules a misdemeanor punishable by fine or imprisonment. That the 11th section of the Act prohibited interference with any right to which any person was at the passing of the Act by law entitled. That the appellant was at the time of the passing of the Act entitled by law to deliver a public address in Hyde Park, and that the rules for the violation of which the appellant was summoned before me, and convicted amounted to such interference with the said right as was prohibited by the Act. That the 11th of the rules made in pursuance of the Act was ambiguous, unreasonable, and bad, inasmuch as the area within which it was lawful to deliver public addresses in Hyde Park was not measured from a fixed point; a notice board being movable would render it possible for the Ranger of Hyde park to reduce by a half or by three-fourths, according to the position in which such notice board was placed, the area within which public addresses might be delivered. That the said 11th rule was inscribed, forming part of a complete copy of the regulations and rules, on several boards posted at the various entrance gates of the park. That no information was consequently conveyed to the appellant of the precise place at which it was lawful to deliver public addresses, and that the appellant could not be convicted of the offence that he had delivered a public address at a greater distance than forty yards from one particular spot only where a notice containing such rule was posted up. That the authority given by the 19th section of the first schedule of the Act to the Ranger and Commissioners of Her Majesty's Works to make rules from 'time to time' was intended by the Legislature to be used only in exceptional circumstances, which could not, in the ordinary course of things, be foreseen. That

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the 12th of the rules by implication legalises the delivery in Hyde park of a public address, if of a lawful character and for a lawful purpose, and that the public address delivered by the appellant was of such a character and for such a purpose. That the 13th of the rules of the park was void, under the 19th clause of the regulations in the first schedule of the Act, as not being within the jurisdiction of the Ranger of Hyde-park or of the said commissioners. That the 13th rule was unreasonable and also ambiguous and bad, inasmuch as it left it uncertain whether a written notice should be given by each individual who intended delivering a public address or by one individual alone; and that it left it equally doubtful whether, after one individual had delivered a public address, it would be lawful for another individual to deliver another public address in the park on the same day. And, finally, that on the question of a pre-existing right to deliver a public address in Hyde-park before the passing of this Act a magistrate would have no jurisdiction.

It was contended on behalf of the respondent that, as the regulations which under sect. 4 of the Act came into force one month after the passing of the Act declared that no person should deliver any public address except in accordance with the rules of the park, no public address could be legally delivered unless rules were made upon the subject, and that, therefore, it became necessary to make rules to give effect to the 8th and other 'regulations' in which 'rules' are referred to. That the rules dated Oct. 1 last, made by the ranger and by the commissioners were valid, although they had not been laid before Parliament, as they had power under the 19th regulation from time to time to make rules, and as sect. 9 of the Act contemplated rules being made when Parliament was not sitting. That sect. 11 only applied to rights of way and similar rights, and had no bearing on the present case. That the rules 11 and 13 were both valid, and ought to have been complied with, and that the appellant was properly brought before me by summons, and that I had jurisdiction to deal with the offence.

I was of opinion that the appellant did commit the offence mentioned in sect. 4 of the Act—viz., that he unlawfully and wilfully did an act in contravention of the 8th regulation by delivering a public address in Hyde-park not in accordance with the rules of such park; that the said rules, dated Oct. 1st last, were valid; that the appellant delivered his public address not in accordance with either rule 11 or 13, and, further, that, notwithstanding the contention on behalf of the appellant that he had a pre-existing right under sect. 11 of the Act to deliver a public address in Hyde-park, I was justified in and had jurisdiction to convict the appellant. I therefore convicted him accordingly. The question for the opinion of this court is whether I was wrong in point of law in convicting the appellant; if I was wrong, the conviction is to be quashed; otherwise, to be confirmed."

35 & 36 Vict. c. 15, is entitled "An Act for the Regulation of the Royal Parks and Gardens," and recites that it is expedient to protect from injury the royal parks, gardens, and possessions under the management of the commissioners of Her Majesty's works and public buildings, hereinafter called "the commissioners," and to secure the public from molestation and annoyance while enjoying

such parks, gardens, and possessions; it is enacted as follows:

Sect. 2. This Act shall apply to all the Royal parks, gardens, and possessions, the management of which is for the time being vested in the commissioners, and such parks, gardens, and possessions are hereinafter included under the term "park."

Sect. 4. If any person does any act in contravention of any regulation contained in the first schedule annexed hereto, he shall, on conviction by a court of summary jurisdiction, be liable to a penalty not exceeding £5; but the regulations contained in the said schedule shall not take effect until the expiration of one calendar month after the passing of this Act.

Sect. 7. Every park keeper, in addition to any powers and immunities specially conferred upon him by this Act, shall, within the limits of the park of which he is keeper, have all such powers, privileges, and immunities, and be liable to all such duties and responsibilities, as any police constable has within the police district in which such park is situated; and any person so appointed a parkkeeper as aforesaid shall obey such lawful commands as he may from time to time receive from the commissioners in respect of his conduct in the execution of his office.

Sect. 9. Any rule made in pursuance of the first schedule to this Act shall be forthwith laid before both Houses of Parliament, if Parliament be sitting, or if not, then within three weeks after the beginning of the then next ensuing session of Parliament; and if any such rules shall be disapproved of by either House of Parliament within one month after the same shall have been so laid before Parliament, such rules, or such parts thereof as shall be disapproved of, shall not be enforced.

Sect. 10. Copies of regulations to be observed in pursuance of this Act by persons using a Royal park to which this Act applies shall be put up in such park in such conspicuous manner as the commissioners may deem best calculated to give information to the persons using the park.

Sect. 11. Nothing in this Act shall authorise any interference with any rights of way or any right whatever to which any person or persons may be by law entitled.

Sect. 12. All powers conferred by this Act shall be deemed to be in addition to and not in derogation of any power conferred by any other Act of Parliament, and any such powers may be exercised as if this Act had not been passed.

Sect. 13. Nothing in this Act contained shall be deemed to prejudice or affect any prerogative or right of Her Majesty, or any power, right, or duty of the commissioners, or any powers or duties of any officers, clerks, or servants appointed by Her Majesty or by the commissioners.

Sect. 15. Any offence against this Act may be prosecuted before a court of summary jurisdiction.

The Act obtained the Royal assent on the 27th June 1872; the session of Parliament concluded on the 10th Aug. following; and the rules under the Act were not issued until October of the same year.

Baker Greene (with him *Shackleton Hallett*) argued for the appellant.—It seems to have been the intention of the Legislature that rules issued under the Act should not come into force until a month had elapsed after the passing of the Act, in order to give Parliament an opportunity of declaring that it disapproved of them. [BLACKBURN, J.—Where are there any words making it a condition precedent to the validity of the rules that they should be laid for a month before Parliament?] There are no express words to that effect, but it may be inferred from the 9th section. [BLACKBURN, J.—That section merely says a rule shall not be enforced after disapproval; that must mean shall not be further enforced.] It is unconstitutional to delegate so absolute a power of legislation by rules. [BLACKBURN, J.—Scarcely a railway or dock Act is passed without power to the directors to make bye laws inflicting penalties.] If any of

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the rules are beyond the powers granted by the 1st schedule, none of them can be enforced, and the public are remitted to their common law rights to assemble in the parks. [BLACKBURN, J.—What possible right of that kind can they have? People can enter the parks only under the leave and licence of the Crown.] The Act itself recognises some right in the public. [MELLOR, J.—On the contrary, it is enacted that no person shall do either of the forbidden things except in accordance with the rules.] At all events penalties cannot be inflicted until Parliament has approved of the rules. [COCKBURN, C.J.—The words are, “such rules, or such parts thereof, as shall be disapproved shall not be enforced.” This implies most clearly that until disapproved the rules are to be valid.] There is a common law right to hold public meetings in the parks. [BLACKBURN, J.—On what grounds?] For many years they have been held. [BLACKBURN, J.—Sect 11 recognises only rights to which persons may be by law entitled. You must show a legal right. QUAIN, J.—And such a legal right as a right of way.] The parks are public property. [COCKBURN, C.J.—What authority can you find for that?] The long usage of popular right. [COCKBURN, C.J.—Clearly there is no immemorial right, and you cannot even suggest any other ground for the claim.]

The *Attorney-General* (with *Poland*) appeared for the respondent, but was not heard.

COCKBURN, C.J.—We are all clearly of opinion that the conviction must be affirmed. The Act is for the regulation of the Royal parks, and for the protection of the public in their enjoyment of the parks for the purposes of innocent recreation and exercise. There has been, no doubt, a habit of using the parks for other purposes than those of recreation, but that habit is of recent growth. It has produced inconveniences which required to be remedied, and the use of the parks for these purposes required to be regulated; and with that view this Act was passed. The Act has annexed to it a schedule of certain regulations, which declare that certain things shall not be done in the Royal parks except under certain circumstances. But these regulations were evidently intended to be supplemented and rendered more complete by rules to be made for the purpose by the ranger or the commissioners, according as the regulations applied to the subjects of their respective jurisdictions. Now, the regulation in question is that which provides that no person shall deliver any public address in the park except in accordance with the rules of the park. That presupposes that the regulation shall be made complete by the supplementary rules to be made by a competent authority; and in this instance the regulation is supplemented by rules 11, 12, and 13. The defendant has been convicted upon evidence which does not admit of dispute, of infringing these rules, and the conviction must be supported, unless any of the objections urged against it can be sustained. The first objection is that the rules are not to come into effect until they have been laid before Parliament for a month. But I cannot adopt that construction. It would certainly have been more satisfactory if there had been a distinct enactment that the rules should, or should not, be operative in the interval until they had been laid a month before Parliament. It would have been better had such an intention been plainly expressed one way or the other, as it was in the various Acts

which authorised the judges to make rules or orders of court; as, for instance, in 13 & 14 Vict. c. 16, where the words are, “no such rule, order, or regulation shall have effect until three months after the same shall have been so laid before both Houses of Parliament.” But, in the absence of such plain and express words, I cannot say that it was intended that the rules should not come into effect until they had been laid a month before Parliament. If the regulations themselves are to be considered as coming into effect from the time of the passing of the Act, that must mean the regulations supplemented by the rules; and the rules must be considered as coming into operation, by virtue of the statute, after a month from the time the Act has been passed, subject to be afterwards disapproved by Parliament. In the meantime the rules must be considered as operative, and if a person chooses wilfully to violate them he is subject to the penalties imposed. But then it is urged that the rules were such as the ranger and commissioners had no power to make. It is quite clear, however, that all these rules might well be made by one or other of these authorities; and we have no power to reverse them, or to say whether they are or are not reasonable. The Legislature has reserved that power to itself. If, therefore, the rules made are within the scope of the authority, it must be left to the Legislature to alter them at its pleasure; we have not the power. Then it has been urged that the Act reserves all rights to which the public are by law entitled, and that the public are entitled to use the Parks for the purpose of public meetings. That, however, appears to me to be a startling proposition. I have always understood that the parks were the property of the Crown, and they are so treated in this very Act, the 11th section of which proceeds upon that assumption. I have always understood, and believe, that whatever enjoyment the public may have had of the parks has been entirely by the grace and favour of the Crown. It is clear that the Legislature, in this very Act, proceeded upon that assumption. This very section, which reserves any rights the public may have, deals with public meetings as within the scope of the Act, which it would not be if the people had any such right of meeting. That is not, then, an argument to which we can listen. It seems to me therefore that the rules were made within the jurisdiction and authority of the Act; that they are within the scope of that authority, and that there is nothing in the Act to interfere with their operation; and that the conviction is right, and the appeal must be dismissed.

BLACKBURN, J.—I am of the same opinion. There is only one objection which has in it even the appearance of plausibility; all the others have been disposed of in the course of the argument, and do not require to be mentioned. The one objection I allude to as plausible is, however, clearly untenable. The parks are the property of the Crown, having been acquired by the Crown within a period comparatively modern. They had been for many years under the management of the Commissioners of the Crown, and devoted to a great extent to the public use and recreation. No doubt, if anyone were to advise the Crown to deprive the public of that use which they had thus enjoyed, he would make a great mistake and would be checked by Parliament, but this did not affect the question of legal right. When any use

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was attempted to be made of the parks contrary to that which was allowed by the Crown, the law gave the Crown a legal right to prevent it; but the means of enforcing that right were defective. The only method was by an "information of intrusion" in the Exchequer, a clumsy, cumbrous, and inconvenient proceeding. Thence it was that the present Act was passed, only to provide a better remedy for an existing right. The rules were to be made public a month, which was to insure a fair warning to the public, and then they were to be summarily enforced. The only plausible argument has been that the rules are required to be laid before Parliament a month before they are enforced; but there is nothing in the Act to render this necessary. Then as to the reservation of any rights the public might by law be entitled to, upon this matter they had none. There is, indeed, a notion that people are entitled to do what they please in the Parks; but it was a notion without any legal foundation, and without the slightest authority. I am not aware that there is even a right of way, for Hyde Park is closed at night, whereas Richmond Park is not. As to the other objections, they are not worth mentioning, as they are already disposed of; and, in conclusion, I am of opinion that the conviction was perfectly valid.

MELLOR, J.—I am entirely of the same opinion. As to the main point, it is expressly provided that the rules do not take effect until they have been published a month; and if it had been intended to provide that they should not "take effect" until they had been laid a month before Parliament, it would have been so enacted in terms.

QUAIN, J.—I also am of the same opinion. I observe that the enactment is not that the rules shall not be valid until approved, but that they should cease to be so when disapproved. As to any conviction which might occur in the meantime, it must be on the assumption of the validity of the regulations.

Judgment for respondent.

Attorneys for the appellant, *Merriman, Powell and Co.*

Attorney for the respondent, *The Solicitor to the Treasury.*

COURT OF EXCHEQUER.

Reported by T. W. SAUNDERS and H. LEIGH, Esqrs.,
Barristers-at-Law.

Friday, Nov. 22, 1872.

RICHARDSON v. WILLIS.

Practice—Jurisdiction—Indictment at assizes for libel—Acquittal of defendant—Action by defendant against prosecutor for costs—Declaration alleging trial and acquittal—Plea, "Nul tiel record"—Evidence—Certified copy of record of acquittal—6 & 7 Vict. c. 96, s. 6.—14 & 15 Vict. c. 99, s. 13.

1. *An action brought in a Superior Court, under 6 & 7 Vict. c. 96, s. 8, to recover the costs sustained by the plaintiff upon the trial of an indictment for libel preferred against him at the assizes by the defendant, upon which trial a verdict of "Not guilty" was returned, and judgment was given for the plaintiff, who was duly discharged, is a "proceeding" in which, under sect. 13 of the Evidence Amendment Act (14 & 15 Vict. c. 99) a certified copy of the record of such trial and acquittal, under the hand of the proper officer of the*

court of assize, is admissible in evidence in proof of such trial and acquittal, in answer to a plea of "Nul tiel record."

2. *The issue on a plea of "Nul tiel record" is triable by the court, and not by a jury, and is proved by the production, in open court, of the record itself, or a duly certified copy of it.*

So held by the Court of Exchequer (Kelly, C.B., and Martin, Bramwell, and Channell, B.B.).

THIS was a motion on the part of the plaintiff for judgment on an issue on a plea of *Nul tiel record*. The defendant had indicted the plaintiff for a libel, and on the trial of the indictment, on the Crown side of the court, at the last Essex Assizes at Chelmsford, before Martin, B., and a jury, the plaintiff was acquitted; and thereupon, under sect. 8 of the statute (6 & 7 Vict. c. 96), became entitled to the costs sustained by him by reason of the said indictment; it being enacted by that section that, "in the case of any indictment or information by a private prosecutor for the publication of a defamatory libel, if judgment shall be given for the defendant, he shall be entitled to recover from the prosecutor the costs sustained by the said defendant by reason of such indictment or information . . . such costs so to be recovered to be taxed by the proper officer of the court, before whom the said indictment or information is tried." The costs so sustained by the now plaintiff by reason of the said indictment against him for libel by the now defendant, were duly taxed by the deputy clerk of assize for the Home Circuit at 52*l.* 8*s.* Being unable to obtain a side bar rule for their payment, in consequence of the indictment not having been removed by *certiorari* into the Queen's Bench, the plaintiff brought an action for the recovery of them against the defendant.

The declaration charged that, after the passing of the Act 6 & 7 Vict. c. 96 (amending the law respecting defamatory words and libel) the defendant, then being a private prosecutor within the meaning of the said Act, appeared at the assizes holden in and for the county of Essex and indicted the plaintiff upon the charge of falsely and maliciously publishing a defamatory libel of and concerning the defendant, and, as such private prosecutor as aforesaid, preferred a bill of indictment thereof against the plaintiff before the grand jury, and gave evidence before the petty jury on the same; and that the said petty jury acquitted the plaintiff of the premises in the said indictment so charged upon him as aforesaid, and found him "Not guilty" upon the same; whereupon judgment was given for the said plaintiff, and he was duly discharged of and from the premises in the said indictment specified; whereby, and by reason of the aforesaid statute and of the premises, the plaintiff became entitled to recover from the defendant the costs sustained by him, the said plaintiff, by reason of such indictment as aforesaid, and the said costs were duly taxed by the proper officer of the court before which the said indictment was tried, as by the aforesaid statute is directed, and the same were allowed at the sum of 52*l.* 8*s.* Averment of the performance, happening, and elapsing respectively of all conditions, things, and times necessary to entitle the plaintiff to the payment of the same. Yet—breach assigned, the refusal of the defendant to pay the said sum so taxed and allowed, which still was unpaid and owing to the plaintiff.

The defendant pleaded and demurred to the said declaration as follows: Pleas—first, *Nul tiel*

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RICHARDSON v. WILLIS.

[Ex.]

record; secondly, that the defendant did not indict the plaintiff as alleged; thirdly, that the defendant was not a private prosecutor in preferring or giving evidence on the said indictment; fourthly, that the said costs were not duly taxed as alleged; fifthly, demurrer to the declaration as bad in substance.

A ground of demurrer relied on (amongst others) by the defendant was that an action does not lie for the costs claimed, the remedy being by rule of court.

Replication—first, as to the first plea, that there is a record of the said judgment remaining in the said court of assizes of oyer and terminer and general gaol delivery, as the plaintiff hath above alleged, and the plaintiff prays that the said record may be inspected by the court here; and hereupon the plaintiff is commanded that he have the same here on Friday, 22nd Nov. 1872, and the same is given to the defendant at the same place, &c.; secondly, joining issue on the second, third, and fourth pleas respectively; thirdly, joinder in demurrer to the declaration.

Notice, that the plaintiff would, on the 22nd Nov., produce to the Court of Exchequer the above-named record of the said judgment, was duly served by the plaintiff's agent on the defendant's attorneys.

The 14 & 15 Vict. c. 99 (the Act to amend the Law of Evidence), enacts as follows;

Sect. 13:

And whereas it is expedient as far as possible to reduce the expense attendant upon the proof of criminal proceedings, be it enacted, that whenever in any proceeding whatever, it may be necessary to prove the trial and conviction or acquittal of any person charged with any indictable offence, it shall not be necessary to produce the record of the conviction or acquittal of such person, or a copy thereof; but it shall be sufficient that it be certified, or purport to be certified, under the hand of the clerk of the court, or other officer having the custody of the records of the court where such conviction or acquittal took place, or by the deputy of such clerk or other officer, that the paper produced is a copy of the record of the indictment, trial, conviction, and judgment or acquittal, as the case may be, omitting the formal parts thereof.

Philbrick, on the part of the plaintiff produced, under sect. 13 of the 14 & 15 Vict. c. 99, a properly certified copy, under the hand of the deputy clerk of assize, of the record of the trial and acquittal of the plaintiff as in the replication and declaration respectively mentioned; and thereupon he prayed for judgment for the plaintiff on the issue above mentioned.

Willis for the defendant *contra*, moved for judgment for the defendant, and contended, in the first place, that the plaintiff's motion was misconceived. The application to produce the record of the trial and judgment could only be made to the court of assize where the judgment was. It is an issue triable by a jury and not by this court. Had there been a record in the Exchequer it might be conceded that the plaintiff's application would have been well founded. But, where an action is brought on an acquittal which took place before a court of assize, the question can only be determined in that court, and by a jury, and there is no authority for bringing the present defendant here. [KELLY, C.B.—Is there any authority one way or the other? MARTIN, B.—It is laid down in the books of practice that the issue on a plea of *Nul tiel record*, where the record of another court is pleaded, must be tried by the court and not by a jury, and must

be proved by the production of a transcript or exemplification of the record in open court: (2 Chit. Arch. Pract. 12th edit. p. 940.) And in 2 Tidd's Pract., 8th edit., it is said at p. 773, "An issue is either in law upon a demurrer, or in fact, which is triable by the court upon *Nul tiel record*." And again at p. 108, "the issue of *Nul tiel record* is triable by the record itself if it be of the same court, or by the tenor of it if it be of a different court." The defendant is not here pleading any proceedings in another court in bar of the present proceedings, nor does the judgment produced here show the plaintiff to be entitled to any costs at all. [BRAMWELL, B.—Suppose the action had been brought in the Queen's Bench or in this court, would that document have been evidence then?] It would seem that, upon the authorities referred to by Martin, B., it would. [BRAMWELL, B.—What difference is there between that case and the present one?] But again, sect. 13 of the Evidence Amendment Act (14 & 15 Vict. c. 99) as clearly as can be, confines the matter to a "*criminal proceeding*," and does not extend to an action, the result or consequence of a criminal proceeding; and therefore the record itself ought to be produced, the "certified copy," which is made evidence by that section applying to proof in "*criminal proceedings*" only.

KELLY, C.B.—I am of opinion that the plaintiff in this case is entitled to the judgment of the court. No authority has been produced to us to support Mr. Willis's proposition, that the issue to be decided in the present case should be, or rather must be, tried before a jury. On the contrary, when we come to look into the matter, we find it to be clearly laid down in the books of practice, to which my brother Martin has referred in the course of the argument, as a decided and undoubted rule that such an issue shall be tried by the court or a judge, and not by a judge and a jury; and that the question is settled by the production in court of the record itself, or a certified copy of it. The contention, therefore, which has been argued for to-day by the defendant's counsel is not, I think, maintainable. A second question then was raised, namely, whether the acquittal obtained by the defendant in another court must be proved in this court by the production of the record itself, or whether it would be sufficient, under sect. 13 of the Evidence Amendment Act (14 & 15 Vict. c. 99), that it should be proved by the production of a copy of the record of the trial and acquittal, certified under the hand of the proper officer of the court of assize in which the trial and acquittal took place. Now the preamble of that Act says, "Whereas it is expedient, as far as possible, to reduce the expense attendant," not upon criminal proceedings, but "upon the proof of criminal proceedings," and it was strongly urged before us by Mr. Willis that this "certified copy" was only sufficient in a "*criminal proceeding*." Now, is there any doubt in the present case, that it is expedient to produce this document not in a "*criminal proceeding*," but "*in proof of a criminal proceeding*." Again, the words of the statute are, "whenever in any proceeding whatever it may be necessary to prove the trial and conviction or acquittal of any person," &c.—words which are as large as words can be. In the present case it is not the trial, not the conviction, but the acquittal of the person. Is there, then, anything in the latter part of the section which can be taken to limit the operation of the

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[Ex.]

former part of it. I cannot think that there is. Most clearly this is a proceeding in which it became necessary to prove the acquittal of the person, the defendant, within the meaning of sect. 13. The objection raised on the part of the defendant, in my judgment, fails entirely, and the plaintiff therefore is entitled to judgment.

MARTIN, B.—I am quite of the same opinion.

BRAMWELL, B.—I am of the same opinion. The first objection taken by Mr. Willis is that the issue in this case cannot be tried by this court, but must be decided by the court of assize, which tried the indictment against the present plaintiff, and a jury. Now I am entirely against Mr. Willis on that point, and so are the books of practice. Another point, which has not been taken at the Bar, has occurred to me, which is probably only one of form. On the present record in this court the plaintiff is distinctly directed or "commanded" to have the record here in court, to be inspected by us; yet Mr. Willis, on the part of the defendant, has argued that we should not and could not do the very thing which we as a court have already said we would do. If that be so, his course should have been to have moved in the first place to rescind that direction or command of the court on the ground that it was improper as being *ultra vires*. With regard to the second objection urged by Mr. Willis, there is no limitation, in the 13th section of the Act, to proof in "criminal" proceedings. The words are as wide and general as they possibly can be, "*any proceeding whatever*." There is another point which did occur to me, and to which I made allusion in the course of the argument. The first part of the section in question specifies only the proof of "the trial and conviction or acquittal of any person," and for a moment I was inclined to think that it might be said that the section would not apply to a judgment; but a consideration of the latter part of the section disposes of that objection at once, for the words there used are "the record of the indictment, trial, conviction, and judgment, or acquittal."

CHANNELL, B.—I am of the same opinion. The question is, is this document a certified copy, under the hands of the proper officer, of the record of the trial and acquittal of the plaintiff, and, if so, is it receivable in evidence as proof of such trial and acquittal? I am of opinion that it is, and that sect. 13 of the Act in question (the 14 & 15 Vict. c. 99), expressly makes it so.

Judgment for the plaintiff, as prayed, with costs.

Attorneys for the plaintiff, J. and R. Oldman, 8, Gray's-inn-square, W.C.

Attorneys for the defendant, Evans, Laing, and Eagles, 10, John-street, Bedford-row, W.C.

Monday, Jan. 20, 1873.

RICHARDSON v. WILLIS.

Libel—Indictment for by a private prosecutor—Judgment for the defendant—Recovery of his costs—6 & 7 Vict. c. 96 s. 8.

By the 8th section of the 6 & 7 Vict. c. 96 (Libel Act), if a private prosecutor proceeds by indictment for a libel and the defendant is acquitted, such defendant may recover from the prosecutor his costs sustained by him by reason of such indictment to be taxed by the proper officer of the court before which it was tried.

Held, that the proper and only mode of recovering such costs so taxed, is by an action.

This was a demurrer to a declaration in an action brought under the provisions of the 6 & 7 Vict. c. 96 s. 8 (The Libel [Act]) to recover from the defendant the costs incurred by the plaintiff in an indictment for libel, wherein the defendant was the prosecutor and the plaintiff was the defendant, and upon which indictment the present plaintiff was found not guilty (a). The declaration stated "for that after the passing of an Act passed in the 6 & 7 Vict. entitled, &c., the defendant then being a private prosecutor within the meaning of the said Act, appeared at the assizes holden in and for the county of Essex, and indicted the plaintiff upon the charge of falsely and maliciously publishing a defamatory libel of and concerning the defendant, and as such private prosecutor as aforesaid preferred a bill of indictment therefor against the plaintiff before the grand jury, and gave evidence before the petty jury on the same, and the plaintiff says that the said petty jury acquitted him of the premises in the said indictment so charged upon him as aforesaid, and found him "not guilty" upon the same. Whereupon judgment was given for the said plaintiff, and he was duly discharged of and from the premises in the said indictment specified. Whereby and by reason of the aforesaid statute and of the premises, the plaintiff became entitled to recover from the defendant the costs sustained by him, the said plaintiff, by reason of such indictment as aforesaid, and the said costs were duly taxed by the proper officer of the court before which the said indictment was tried as by the aforesaid statute is directed, and the same were allowed at the sum of 52l. 8s., and all conditions have been performed and all things have happened and all times have elapsed necessary to entitle the plaintiff to the payment of the same. Yet the defendant has wholly neglected and refused to pay the said sum so taxed and allowed as aforesaid, and the same is still unpaid and owing to the plaintiff," &c.

The defendant pleaded several pleas traversing the material allegations of the declaration, and also demurring to the declaration.

Willis appeared for the defendant in support of the demurrer. An action is not the proper remedy whereby the plaintiff can obtain his costs. He should obtain them by execution upon the taxation of the officer of the court. [MARTIN, B.—I am not aware of any power which a judge at the trial has to issue execution. KELLY, C. B.—The word "recover" must surely mean recover by action]. The record of the indictment could be removed into this court and execution might then issue. [MARTIN, B.—I never heard of such a thing, and I have spoken to Mr. Avery, of the Central Criminal Court, a gentleman of very great experience, and he has never heard of such a proceeding.]

Philbrick, for the plaintiff, was not called upon.

(a) By the 8th section it is enacted that "in case of any indictment or information by a private prosecutor for the publication of any defamatory libel, if judgment shall be given for the defendant, he shall be entitled to recover from the prosecutor the costs sustained by the said defendant by reason of such indictment or information; and that upon a special plea of justification to such indictment or information, if the issue be found for the prosecutor, he shall be entitled to recover from the defendant the costs sustained by the prosecutor by reason of such plea, such costs so to be recovered by the defendant or prosecutor respectively, to be taxed by the proper officer of the court before which the said indictment or information is tried."

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[Ex.]

KELLY, C.B.—The statute provides that in certain circumstances the defendant in an indictment for libel shall recover his costs from the prosecutor, and an action in the present instance is brought to recover them, and by the general rule of law, where no other means of redress are pointed out, the party has his remedy by an action in one of the Superior Courts.

MARTIN, PIGOTT, and POLLOCK, BB., concurred.

Judgment for the plaintiff.

Attorney for the plaintiff, *Oldman.*

Attorney for the defendant, *John Evans.*

Thursday, Jan. 16, 1873.

ENGLAND v. COWLEY.

Trover—Conversion—Trespass—Landlord preventing owner from removing his goods—Interference with owner's right of dominion—What amounts to a conversion.

C., the landlord of a house, the rent of which was in arrear from the tenant, being informed that E., the holder of a bill of sale of the tenant's furniture in the house, was removing the furniture between eight and nine o'clock in the evening, went to the house, accompanied by a policeman, and informed E. that he was the landlord and that unless a quarter's rent, which he claimed to be due, was paid to him he would not permit the furniture to be removed. Thereupon, no physical force having been used, E. desisted from removing the furniture, and quitted the house, leaving a man behind in possession. On the following day C. levied a distress on the goods in the house for the quarter's rent. E. brought trover against C. for the wrongful conversion of his goods, and the jury having found a verdict for the defendant it was

Held by the majority of the Court of Exchequer (Kelly, C.B., and Bramwell and Pollock, BB., dissentiente Martin, B.), discharging a rule for a new trial, that C. had not so interfered with the possession or dominion of the goods as to amount to a conversion, or to give the plaintiff E. a right to maintain trover.

The depriving an owner of the use of his goods so as to amount to conversion, must be a total and entire deprivation of the general dominion over them, a preventing him from doing anything at all with them, and not merely preventing him from using them in one particular way.

Sed contra (per Martin, B.), an owner of goods is entitled to the use of them at all times, and in all places, and the preventing him from having the use of them at any time or in any way in which he desires to use them is a conversion.

THIS was an action of trover by the plaintiff to recover damages against the defendant for wrongfully converting to the defendant's own use, and depriving the plaintiff of the use and possession of certain goods, household furniture, &c., of the plaintiff, to which the defendant pleaded not guilty by statute 2 Geo. 2, c. 19, s. 21, upon which plea issue was joined and taken. The facts as they appeared at the trial before Bramwell, B., at Guildford, at the last summer assizes for the county of Surrey, were shortly as follows: On the 20th April 1871, the defendant, a Mr. William Cowley, the owner of a leasehold house, No. 19, River-terrace, Chelsea, let the same house to a Mrs. Ellen Morley, under an agreement in writing

of that date, for a year, from the 25th March 1871 at the yearly rental of 50*l.*, and by the terms of the said agreement the rent was to be payable quarterly, on the four usual quarter days, free from all deductions in respect of parochial or other rates and all taxes (except property tax); the first quarterly payment of the said rent was to be made on the 24th June then next; and it was thereby also further agreed, between the defendant and the said Mrs. Morley, that she should be allowed the sum of 6*l.* 5*s.* out of the quarter's rent due and payable on the said 24th June then next. Under that agreement the said Mrs. Morley took possession of the said house as tenant to the defendant.

Shortly afterwards, viz., about the beginning of May following, Mrs. Morley, having a quantity of furniture and household goods belonging to her deposited in a warehouse as a security to a person who had lent her money thereupon, and being desirous of redeeming them for the purpose of therewith furnishing the house she had so taken of the defendant, applied to the plaintiff to lend her the amount of money necessary to enable her to redeem her said goods. This the plaintiff agreed to do upon having its repayment with interest by agreed instalment secured to him by a bill of sale of the said goods and furniture, to which Mrs. Morley assented.

In pursuance of that agreement the plaintiff, on the 10th May 1871, redeemed the goods for Mrs. Morley, and removed them from the warehouse to, and placed them in, the house, No. 19, River-terrace, and on the same day (the 10th May) Mrs. Morley executed and delivered to the plaintiff a bill of sale, comprising the whole of the goods and furniture, for 150*l.*, being the amount of principal money advanced by the plaintiff, and interest calculated thereon; and by the terms of the bill of sale the sum of 150*l.*, was to be repaid to the plaintiff by weekly instalments of 30*s.*, covering a period of 100 weeks from the date thereof.

Mrs. Morley falling into arrear with her weekly instalments due to the plaintiff, the latter determined to take possession of the goods and furniture, under the powers of his bill of sale, and accordingly on the 6th August 1871, he placed a man in possession, who remained about a week. Mrs. Morley not having called upon or sent to the plaintiff, or communicated in any way with him on the subject of her debt to him, the plaintiff went to the house and found that she had left and gone away, having previously sent away some of the goods from the house. Thereupon, on the 11th Aug., the plaintiff sent his men with vans to the house, for the purpose of removing the goods and furniture comprised in his bill of sale. Upon the men and vans arriving at the house, about eight o'clock in the evening, they commenced removing the goods and furniture, and had already placed a portion of them in the vans, when the defendant, the landlord, who had been apprised of what was taking place, arrived, and at once informed the plaintiff's men that he was the landlord of the house, and that unless a quarter's rent (amounting to 12*l.* 10*s.*) which was due was paid to him, he should not allow the goods to be taken away. The men informed the defendant that they had orders to remove the goods, and they should do so, whereupon the defendant obtained from the police station the assistance of

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two police officers, to prevent the goods being taken away.

Whilst this was going on, the plaintiff himself arrived at the house, and asserted his right to the goods under the bill of sale, whereupon the defendant informed him that he (defendant) was the landlord, and that he would not allow any goods to be removed until 12l. 10s., which he claimed for a quarter's rent of the house, was paid. The plaintiff, thereupon, according to his own version of the affair and that of his witnesses, tendered to the defendant the sum of 6l. 5s., the amount of the quarter's rent due at Midsummer, less the agreed deduction before mentioned, but this the defendant declined to accept. The defendant, however, in his evidence, denied that the plaintiff had made him any tender. He admitted that he said "he would not allow the goods to be removed that night," as he intended to distrain upon them the next day, and that that was his reason for preventing their removal.

The defendant threatened to have the plaintiff's men locked up if they removed any more goods. The plaintiff thereupon, having made a list of the furniture remaining in the house, went away with his men and the van containing the portion of the goods which had been placed therein previously to the arrival of the defendant, but leaving a man in possession of the premises.

By the defendant's instructions a man was employed by the police to watch outside the house all that night, to see that no further attempt to remove the goods was made, and on the next morning, the 12th Aug., a distress was levied by a broker at the suit of the defendant, on the goods remaining in the house for a quarter's rent, which, after making the allowance mentioned in the agreement, amounted to 6l. 5s., and a man was left in possession until the following day, the 13th, when the rent was paid by some person on behalf of Mrs. Morley.

In summing up to the jury the learned baron told them that, if they were of opinion that the defendant did not deprive the plaintiff of his goods, did not take possession of or assume dominion over them, but merely prohibited the plaintiff from removing them from one place to another, allowing the plaintiff to continue in possession if he liked to do so, then there was no conversion, and the defendant would be entitled to their verdict. And again, did the defendant claim the goods as his own, as had been stated by the plaintiff and his witnesses, or not? and if he did, then their verdict would be for the plaintiff, and for the full value of the goods, which it was agreed amounted to 40l.

The jury found a verdict for the defendant, and leave was reserved to the plaintiff to move to enter the verdict for him for 40l., if the court should be of opinion that the learned baron ought to have directed a verdict for the plaintiff.

M. Chambers, Q.C., having subsequently, in Michaelmas Term last, obtained a rule on the part of the plaintiff to set aside the defendant's verdict and enter it for the plaintiff for 40l., pursuant to such leave, on the ground that the judge ought to have directed the jury that a conversion of the goods had been proved; or for a new trial on the ground that the verdict was against the weight of evidence; or why the verdict should not be set aside and a verdict entered for the plaintiff

for such sum as the court should direct, on the grounds first stated.

Holl, for the defendant, now showed cause against it, and contended that the learned judge had rightly directed, and left the proper questions to the jury, and that the latter by their verdict had found, as was clearly shown by the evidence, that the defendant had merely verbally told the plaintiff that he must not remove the goods until the rent was paid. There was nothing approaching to a conversion which was necessary to support an action of trover in that. The plaintiff acquiesced in the defendant's assertion of his right as landlord. There was no asportation of a single article of furniture by the defendant.

[*MARTIN*, B.—If I were about to drink a glass of wine, and A. were to threaten to knock me down if I drank it, should I not have a right of action against him? *BRAMWELL*, B.—But if my brother Martin put down the glass upon the table without drinking the wine, there would surely be no conversion by A. in that case?] No case has gone so far as to say that there would be a conversion under such circumstances. [*MARTIN*, B., referred to *Fouldes v. Willoughby* (8 M. & W. 540; 1 Dowl. N. S. 806; 10 L. J. N. S., 364 Ex.), and the judgment of *Alderson*, B., therein, where that learned judge says, "Any asportation of a chattel for the use of the defendant, or a third person, is a conversion, because it is inconsistent with the general right of dominion which the owner has in the chattel, who is entitled to the use of it at all times and in all places. So if a man has possession of any chattel, and refuse to deliver it up, that is conversion, because there is an assertion of a right inconsistent with any right of general dominion over it." *Alderson*, B., says where a man "has possession of" goods, &c., and again, that "any asportation" of a chattel would be a conversion, and in *Fouldes v. Willoughby* the defendant had possession of the plaintiff's houses. But that is not the present case at all. There was no "asportation" here, nor was the defendant in "possession" of the goods at any moment of time; nor did he ever deal with them in any way. [*KELLY*, C.B.—Suppose he had gone out of the room and had locked the door?] That might have been a different matter altogether. But as the facts stand, it is submitted that *Fouldes v. Willoughby* is rather in favour of than against the present defendant; for although the defendant had possession, it was held that mere asportation is not sufficient to support an action of trover. He cited:

Heald v. Carey, 11 C. B. 977; 21 L. J. 97, C. P.;

Burroughes v. Bayne, 2 L. T. Rep. N. S. 16; 5 H. & N. 286, 29 L. J. 185, Ex.;

Fowler v. Hollins, in the Exchequer Chamber, 27 L. T. Rep. N. S. 168; L. Rep. 7 Q. B. 616; 41 L. J. 277, Q. B.;

and contended that the mere verbal assertion of a right by the defendant did not and could not amount to an interference with the plaintiff's dominion, and the latter should have paid no attention to it, but have removed his goods in spite of it.

Joyce (with whom was *M. Chambers*, Q.C.), for the plaintiff, *contra*, supported the rule, and argued that the defendant, by his conduct, had prevented the plaintiff from removing his goods, and so had interfered with the plaintiff's dominion over them, and had, in effect, exercised a dominion of his own over them. He admittedly and avowedly interfered with and prevented

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[Ex.]

the removal of the goods, in order that he might be able to distrain upon them on the following day; and having so far succeeded in inducing the plaintiff to abstain from exercising his right of removal, he cannot now be heard to say that he did not interfere or exercise any dominion over the goods merely because the plaintiff need not have submitted to his dictation. His conduct produced a certain result, and for that result he must be answerable. And in the notes to *Wilbraham v. Snow* (2 Wms. Saund. 47 m.) it is said, "So where a carpenter who worked in the King's yard refused to go there any more, upon which the surveyor would not let him have his tools until the King's work was done, under a pretended usage to do so; a demand and refusal having been proved, it was held by Holt, C.J. that the denial of goods to him who has a right to demand them is an actual conversion, and not evidence of it only; for what is a conversion but an assuming upon one's self the property in and right of disposing of another man's goods? And whoever detains another man's goods without cause takes upon himself the right of disposing of them." That is a distinct and decisive authority in favour of the plaintiff.

POLLOCK, B.—As there is a difference in opinion amongst the members of the court, with respect to this case, I have to deliver my judgment first, and I think that the plaintiff's rule ought to be discharged. I am quite of opinion that the action of trover is a useful one, and should be preserved, and that the courts should not look too closely or scrutinisingly into the means whereby the property in goods is interfered with. But in all the cases in which it has been held that trover will lie, it appears that the defendant has either been in the actual possession of the goods, or that he has used physical force to prevent the plaintiff from exercising his right of dominion over them. In this case there was no use of any physical force by the defendant, and no possession of the goods by him. The plaintiff stood by quietly and acquiesced in all that the defendant said, and did not insist on the maintenance of his own rights. If persons mean to stand and insist upon their rights they should assert them, and act upon the assertion at the time those rights are questioned. Nor can the plaintiff plead that he was prevented by "fear" from asserting his rights on the occasion, for, as is said (Co. Lit. 253 b) (referring to the nature and amount of "fear" sufficient to prevent one having title from entering into lands, in which case he would be held to have possession and seisin by verbally claiming the land to be his), "Here it is to be observed that every doubt or fear is not sufficient, for it must concern the safety of the person of a man." . . . Again it must not be a vain fear, but such as may befall a constant man; as if the adverse party lie in wait in the way with weapons, or by words menace to beat, mayhem, or kill him that would enter; and so in pleading must be shown some just cause of fear, for fear of itself is internal and secret." Then, again, it was said that the defendant here insisted on the detention of the goods, but that cannot be so, for he never had the possession of them. There was no detention of the goods here sufficient to maintain an action of trover, and the argument that has been urged as to the defendant being now estopped from denying that he did what the plaintiff charges him with having done is not, I think,

maintainable, and savours too much of fiction to be admissible.

BRAMWELL, B.—I am entirely of the same opinion, and upon the same grounds. An action of trover is not, in my judgment, maintainable in this case. In the first place, nothing was actually done by the defendant; there was nothing beyond a verbal threat that he would have the men locked up if they persisted in removing the goods, and that is not sufficient to support such an action. The plaintiff need not have been thereby prevented from doing with his goods that which he was proposing and anxious to do. He might have persisted, in spite of the defendant's threats, in removing the goods, and had he been actually physically stopped and prevented from doing so, he might have brought an action of trespass against the defendant for so stopping him, whilst, if he had succeeded in removing the goods, why the goods would have remained in his possession. But I think, further, that trover could not have been maintained, even if the defendant had attempted and had succeeded in preventing the plaintiff from removing the goods, by physically putting his hand upon them or upon the plaintiff himself. In the old form of pleading the words were that the defendant converted the goods of the plaintiff to his own use. The words "or wrongfully deprive the plaintiff of the use and possession of the plaintiff's goods" (See Schedule B., Common Law Procedure Act 1852) were inserted in the Act in the House of Lords by Lord Denman in order to make—as it was supposed would be their effect—the action of trover intelligible; but it was not intended thereby to extend its operation. The deprivation there intended and meant is a wrongful deprivation of A. by B. of the whole and entire use and possession of A.'s goods, and not the merely depriving A. of the means of his enjoyment of the goods. One way of depriving an owner of the use of his goods is to say to him, "You shall not have them;" and it is immaterial to the owner whether the defendant has destroyed them, or merely kept them from the owner. But here the defendant neither converted the goods to his own use, nor did he use them, take them, or sell them; nor did he so convert them as to deprive the plaintiff of the possession of them. All that the defendant did was to prevent the plaintiff from using the goods in a particular way. Suppose a man has a duelling pistol in his room, and wants to go into the room to get it in order to fight a duel, and A. stands at the door and says, "You shall not go into that room." Would that be a conversion of the pistol by A. ? Again, suppose a man is riding along a turnpike road, and A. comes up and stops him, and says, "You shall not pass that way," would that be a conversion by A. of the horse? So, again, if one man having a watch in his pocket, is going out to pawn it, and another says "You shall not go;" would that be a conversion of the watch? Surely not, in either of the cases put, and numberless illustrations might be added. It seems to me, if I may say so, with deference to those who may entertain a contrary opinion, to be idle and absurd to say that there would be a conversion in any such a case. The expression in the books "depriving of the use," means an entire and total depriving of A. by B. of the general dominion of his goods, the preventing the owner doing anything at all with them, and not merely saying that he shall not do some one

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particular thing with them. In this case, too, the plaintiff's man was left in possession of the goods all the night, and the plaintiff might have carried them off. Again, if this is to be held to be a conversion, the defendant would be liable for the full value of the whole of the goods, which would be very unreasonable. Both in reason and justice, and upon authority, I am of opinion that the plaintiff's rule should be discharged.

MARTIN, B.—I am of the contrary opinion, and think that the rule should be made absolute. This is, in my judgment, a very important matter, and the question raised is a serious one, and therefore I do not lightly differ from the rest of the court. I well know the aversion which my brother Bramwell entertains towards the action of trover, but I must say for myself that I think it ought to be maintained, and that we should not seek to fritter it away. The real question here is, whether or not there was a conversion by the defendant of the plaintiff's goods, under the circumstances of the case? The facts are that the plaintiff, being the owner of the goods under a bill of sale, is in the act of removing them under the powers of the deed, when the defendant steps in, accompanied by a policeman, and says to the plaintiff, "these goods shall not be moved from the house, and I will give you in charge of the police and have you locked up if you persist in moving a single article," and thereupon the plaintiff refrained from further removing the goods, and left the house. This, in my opinion, was a depriving, by the defendant of the plaintiff of the possession of his goods amply sufficient to entitle the latter to maintain trover, and I think it is contrary to reason and common sense to say that it was not. An owner of goods is entitled to the use of his goods at all times and at all places, and the preventing him from having the use of them at any time or in any way or manner in which he desires to use them is a conversion. A man is not to be called on to use physical force to remove his goods, when confronted by a person who forbids their removal, under threat of handing over the owner, if he persists, to the police who are there to help the other in preventing their removal.

KELLY, C.B.—I agree with the majority of the court that this rule ought to be discharged. (His Lordship here recapitulated the facts.) Now, looking at the facts, I confess I can see nothing which, in my opinion, amounts to a conversion. The plaintiff was in possession of the goods in the house as far as he possibly could be. No doubt the defendant comes to the house and, alleging rent to be due, says that the goods must not be removed until such rent is paid; but that does not, I think, amount to an assertion of a right on his part to the exclusion of the plaintiff. There is no case, I think, as far as I am aware, from the earliest times, in which this has been held to be a conversion, where the defendant had not got the entire and absolute dominion over the goods, or where he had not prevented the owner from having possession of them. In *Fowler v. Hollins*, in the Exchequer Chamber (*ubi sup.*), the defendant no doubt had entire possession of the goods; but I was of opinion, together with my brothers Byles and Brett, that as the defendant was in possession of and dealt with the goods as broker only, and not as owner, he was not guilty of a conversion so as to render

him liable in an action of trover; but my brothers Martin, Channell, and Cleasby were of a contrary opinion. So it was in *Wilbraham v. Snow* (*ubi sup.*). But the strongest dictum on the point is that of Alderson, B., in *Fouldes v. Willoughby* (*ubi sup.*), to which my brother Martin has already referred. But, as I said before, in none of the books, from the earliest time to the present moment, is there to be found a case in which there has been held to have been a conversion where the goods remained all the time in the possession or part possession of the owner; and I do not think that it is incumbent on the courts to at all extend the definition of the term "conversion." Sufficient remedies exist at present, either by an action on the case or of trespass, as the case may be, for any injury or loss which a person may sustain.

Rule discharged.

Attorney for the plaintiff, *C. H. Lind*, 5, New-inn, Strand, W.C.

Attorney for the defendant, *W. Day*, 1, Queen-street, May Fair, W.

CROWN CASES RESERVED.

Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

Saturday, Jan. 18, 1873.

(Before COCKBURN, C. J., BOVILL, C. J., KELLY, C. B., MARTIN, B., BRAMWELL, B., KEATING, J., BLACKBURN, J., MELLOR, J., PIGOTT, B., LUSH, J., BRETT, J., CLEASBY, B., GROVE, J., DENMAN, J., and ARCHIBALD, J.)

REG. v. ELIZABETH BIRD.

Larceny—Indictment—Description of money.

An indictment charged the stealing of "nineteen shillings in money" of the moneys of A. B. It appeared that A. B. got into a merry-go-round at a fair, and handed the prisoner a sovereign in payment for the ride, asking her to give change. The prisoner gave A. B. 11d., and said she would give the rest when the ride was finished. After the ride was over the prisoner said A. B. only gave her 1s., and refused to give her the 19s. change. Held that the prisoner could not be convicted upon this indictment of stealing 19s.

CASE reserved for the opinion of this court at the General Court of Quarter Sessions for the county of Buckingham, holden at Aylesbury, in the said county, on the 15th Oct. 1872.

Elizabeth Bird was tried upon an indictment, which charged that she, the said Elizabeth Bird, "on the 12th Oct. 1872, 19s. in money, of the moneys of Maria Lovell, feloniously did steal, take, and carry away, against the peace of our lady the Queen, her Crown, and dignity."

It was proved that the said Elizabeth Bird was the daughter of a man who travelled about to fairs with a "shooting gallery" and a "merry-go-round" or "revolving velocipede machine," for riding on which he made a charge of 1d. to each person for each ride.

On the day in question the said Maria Lovell got into the "merry-go-round," which was then in charge of the said Elizabeth Bird, and handed to the said Elizabeth Bird a sovereign in payment for the ride, asking her to give her the change. The said Elizabeth Bird, thereupon, handed to the said Maria Lovell 11d., and said that she would give her the rest of the change when the ride was finished, as the "merry-go-round" was then about to start. The said Maria Lovell assented to this,

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and about ten minutes after, when the ride was over, she found the said Elizabeth Bird, who was then attending to the shooting gallery, and asked her for her change, to which the said Elizabeth Bird replied that she had only received from her 1s., for which she had given the proper change, and she declined to give any more.

Upon these facts it was contended by the counsel for the prisoner—first, that the prisoner could not be convicted of stealing the 19s., because no specific 19s. had ever been appropriated as the change for the sovereign handed to the prisoner; nor had there been a taking, either actual or constructive, of the 19s. from the said Maria Lovell; secondly, that under the above form of indictment, the prisoner could not be convicted of stealing the sovereign; and that even if the indictment was sufficient, there was no evidence of a felonious taking of the sovereign, as it was not taken from Maria Lovell against her will; and, further, that the prisoner could not be convicted of larceny of the sovereign, as a bailee, because, assuming that there was any evidence of a bailment, which was denied, the bailment was not to re-deliver the same money which was delivered to the prisoner.

I overruled the objections, and directed the jury that if they were satisfied that the said Maria Lovell gave the prisoner the sovereign, and that she knew it, and wilfully refused to give the said Maria Lovell the remainder of the change, they might properly convict the prisoner of stealing the 19s.

The jury having returned a verdict of guilty, I reserved the above points for the consideration of the Court for the Consideration of Crown Cases Reserved, and judgment was in the mean time postponed and the prisoner admitted to bail.

The question for the opinion of the court is whether, under the circumstances above stated, the prisoner was properly convicted on the above indictment.

Dated this eleventh day of November, 1872.

(Signed)

BUCKINGHAM AND CHANDOS.

Chairman of the above Court of
Quarter Sessions.

The case was first argued in the Court for the Consideration of Crown Cases Reserved, before Kelly, C.B., Martin, B., and Brett, Grove, and Quain, JJ., who directed it to be argued before all the judges.

Graham for the prisoner.—The conviction cannot be supported. First, there was no larceny of the sovereign, because the prisoner was not bound to return it to the prosecutrix. To make the prisoner a fraudulent bailee she must have been bound to return the sovereign in specie:

Reg. v. Hassell, L. & C. 58; 8 Cox C. C. 491;

Reg. v. Garrett, 2 Fos. & Fin. 14;

Reg. v. Hoare, 1 Fos. & Fin. 647.

[BLACKBURN, J.—May the prisoner not have been a bailee of the sovereign subject to her right of lien on it for 1s. P.] Not here, as the sovereign was handed to the prisoner with the intention that it should become her property, and credit was given to her for the change. [COCKBURN, C.J.—Was there any intention to part with the sovereign P.] It is submitted that there was:

Reg. v. Thomas, 9 Car. & P. 741;

Reg. v. Harvey, 1 Leach C. C. 467;

Parker's case, 2 East P. C. 671;

Reg. v. Oliver, Bell C. C. 287; Cox C. C. 384;
Reg. v. Prince, 11 Cox C. C. 145; L. Rep. C. C. E. 150;
Walsh's case, Bus. & Ry. 215;
Reg. v. Reynolds, 2 Cox C. C. 170;
Reg. v. Nicholson, 2 Leach C. C. 610.

If the prosecutrix intended to part with the property, the mere fact that the possession was obtained by a fraud does not make the offence larceny:

Reg. v. Jackson, 1 Mood. C. C. 119;

Reg. v. Atkinson, 2 East P. C. cap. 16, sect. 104;

Reg. v. North, 8 Cox C. C. 433;

Reg. v. Williams, 7 Cox C. C. 355;

Reg. v. M'Kale, 37 L. J. 97, M. C.; 11 Cox C. C. 32.

[COCKBURN, C.J.—Suppose the prosecutrix never intended to part with the property in the sovereign until she got the 19s. change P.] It is contended that the property in the sovereign was parted with, and that the prosecutrix could not have maintained an action to recover it, as she never intended to have that sovereign returned to her. Secondly, the conviction for stealing 19s., as alleged in this indictment, cannot be sustained. Before the 14 & 15 Vict. c. 100, s. 18, it was necessary to allege in the case of money stolen the specific coins, and it was customary to charge the stealing of so many pieces of the current coin of the realm called sovereigns, shillings, &c., as the case might be, and it was necessary to prove that some one of the specific coins alleged were stolen. To remove difficulties that had arisen on this state of the law, sect. 18 enacts that "in every indictment in which it shall be necessary to make any averment as to any money, &c., it shall be sufficient to describe such money, &c., simply as money, without allegation so far as regards the description of the property specifying any particular coin, and such allegation so far as regards the description of the property, shall be sustained by proof of any amount of coin, although the particular species of coin, of which such amount was composed shall not be proved. Now, under the allegation of stealing 19s. in this indictment, the prisoner could not be convicted of stealing a sovereign. That was a variance. The prosecutrix was bound to prove that shillings had been stolen. Having particularised the money stolen, it should have been proved that shilling pieces were stolen. [GROVE, J.—The allegation is not nineteen pieces of the current coin called shillings, but 19s. in money. BLACKBURN, J.—That means, I should say, money to the value of 19s.] The word shilling must be taken as descriptive of the things stolen, and must be proved,

Archb. Crim. Pleadings, 190 (edit. 1862);

Reg. v. Deeley, 1 Moo. C. C. 308;

Reg. v. Owen, 1 Moo. C. C. 118;

Reg. v. Craven, Bus. & Ry. 46;

Reg. v. West, Dears. & B. 109; 7 Cox C. C. 183;

Reg. v. Bond, 1 Den. C. C.;

Reg. v. Jones, 1 Cox C. C. 106.

No counsel appeared for the prosecution.

The judges retired to consider, and on their return into court,

COCKBURN, C. J. said: The majority of the judges are of opinion that the prisoner was not properly convicted of stealing the 19s. charged in the indictment, for she had not taken them from the prosecutrix, and could not therefore be convicted on this indictment. The majority of the judges do not say that she might not have been convicted on an indictment charging her with stealing the sovereign if the issue had been properly left to the

jury. (a) Upon the present indictment, however, she must be discharged.

Conviction quashed.

Saturday, Jan. 25, 1873.

(Before KELLY, C.B., MELLOR, J., PIGOTT, B., DENMAN, J., and POLLOCK, B.)

REG. v. JOHN JOHNSON.

Perjury—Deputy coroner—Jurisdiction—Inquisition—6 & 7 Vict. c. 83.

On the trial of an indictment for perjury committed at an inquest before the deputy coroner, evidence was given by the prosecution that the coroner, who was also a County Court registrar, was absent on his vacation, a vacation and air and exercise having been recommended by medical advisers for his health, which had become permanently impaired. It also appeared that the coroner, during his absence, spent three or four days every week in shooting, and that by far the greater number of inquests held in the district were held by the deputy coroner.

Held, that it was a question for the judge, and not for the jury, whether the coroner was absent at the time for a lawful or reasonable cause, within 6 & 7 Vict. c. 83, s. 1.

Held, also, that the inquisition was valid, and that the deputy coroner was lawfully acting at the time (sect. 2 of same statute).

CASE reserved for the opinion of this court by Denman, J., at the last winter assizes for the county of Durham.

John Johnson was tried and found guilty of perjury, subject to the opinion of this Court upon the following case:

The perjury alleged was committed by false oaths taken before Thomas Dean, who held an inquest, as deputy coroner, touching the death of one Owen O'Hanlon.

Thomas Dean was called and produced an appointment, dated 1866, of himself as deputy coroner for Darlington Ward. This appointment was duly signed and sealed by William Dale Trotter, the then present coroner for the said ward, and properly countersigned as required by law.

The inquest was opened on 11th Oct. 1872, and continued by adjournment from time to time on several days up to and after the 7th Nov., the day of the perjury in question.

The said Thomas Dean, upon cross-examination, and the said coroner, who was also examined, proved that since 1866 by far the largest number of all the inquests held in Darlington Ward had been held by the said Thomas Dean, as deputy coroner. That on the 11th Oct., when the inquest in question commenced, the said coroner, who was also an attorney in practice, and Registrar of the County Court, and held other offices, was absent from his home and usual place of business as an attorney, having left home on the 24th Sept. previous, in order to take a vacation until the 14th Oct., such absence and vacation, and air and exercise, having been recommended to him by medical advisers as necessary for his health, which had

become permanently impaired from an operation which he had undergone some eighteen months previously. That between the last-mentioned dates he spent three or four days every week in shooting. That owing to his engagements as Registrar of the County Court the above period was the only time of the year during which he could obtain any vacation, that being the period appointed for the vacation of Registrars of County Courts. Mr. Trotter also stated that when the inquest in question began he was not in such a state of health as to be able properly to discharge the duty of holding an inquest of the kind and duration which that in question appeared likely to be.

Upon these facts it was contended, on behalf of the prisoner, that the proceeding before the said Thomas Dean was *coram non judice*, because it was incumbent on the prosecution, in order to show jurisdiction in a deputy coroner, to administer an oath to prove affirmatively that there was lawful or reasonable cause for the absence of the coroner (citing 6 & 7 Vict. c. 83 s. 1, proviso 2), and that the facts here did not amount to any evidence of such cause. He also contended that the question was one for the jury and not for me.

The counsel for the Crown contended, that even if the facts proved were insufficient to show that there was lawful or reasonable cause, still, inasmuch as by sect. 2 of the same Act, it is provided that inquisitions are not to be quashed by reason of their having been taken by a deputy, the oath, on which the perjury was assigned, being an oath on which a good inquisition might have been founded, could not be said to be *coram non judice*, but was one legally administered in a judicial proceeding, and therefore one on which perjury could be legally assigned.

I held, that, even assuming it to be for the prosecution to make out affirmatively in such a case, that there was lawful or reasonable cause for the absence of the coroner (which point, however, I reserved for this Court) there was in this case such lawful or reasonable cause, but I reserved for this court the question whether there was evidence upon which I could properly so hold.

The first question of law reserved for the opinion of this Court is whether it was incumbent upon the prosecution to make out that there was lawful or reasonable cause for the absence of the coroner from the inquest in question. If it was not, the conviction to stand. If it was, then the second question reserved is whether it was for me or for the jury to decide whether there was such lawful or reasonable cause. If for the jury, the conviction to be quashed unless the first question be decided in the negative. If for me, then the third question reserved is whether there was evidence upon which I might properly decide as I did. If so, the conviction to stand. If not, to be quashed unless the first question be decided in the negative.

I sentenced the prisoner to eighteen months imprisonment, and refused to admit him to bail.

The 6 & 7 Vict. c. 83, s. 1, enables a coroner to nominate and appoint from time to time a fit and proper person (such appointment being subject to the approval of the Lord Chancellor) to act for him as his deputy in the holding of inquests. Provided that a duplicate of such appointment shall be transmitted to the clerk of the peace, Provided also that no deputy shall act "except during the illness of the said coroner, or during

(a) In *Reg. v. Gumble*, ante, p. 30, a similar case to this, the court below amended the indictment, and substituted a sovereign for the word 19s. 6d., and the Court for the Consideration of Crown Cases Reserved, affirmed the conviction.

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his absence from any lawful or reasonable excuse."

SECT. 2 recites that it is expedient to make provisions for supporting coroners' inquisitions and for preventing the same from being quashed on account of technical defects, and enacts that no inquisition found upon or by any coroner's inquest shall be quashed, stayed, or reversed (*inter alia*) nor (except only in cases of murder or manslaughter) "by reason of any such inquisition not being duly sealed or written upon parchment, nor by reason of any such inquisition having been taken before any deputy instead of the coroner himself."

T. C. Foster for the prisoner.—The conviction cannot be upheld, for the inquisition was taken *coram non judice*. Before the 6 & 7 Vict. c. 83, there was no power to appoint a deputy coroner in a county. No doubt it must be assumed that the deputy coroner was appointed and his appointment approved by the Lord Chancellor, but it was not proved at the trial that a duplicate of his appointment had been transmitted to the clerk of the peace. [DENMAN, J.—No such point was raised on the trial or reserved for this court.] Then, it was not proved that the coroner was so ill as to be unable to attend, or that his absence was lawful and reasonable. On the contrary, it appeared that he was absent on his vacation, and was able to go out shooting. [MELLOR, J.—Is the degree of illness material? He was recommended by medical advisers to take air and exercise as necessary for his health. DENMAN, J.—The words of the proviso in sect. 1 are "lawful or reasonable absence." At the trial the prosecution did not rely on the illness of the coroner. Was not his absence lawful under the circumstances?] The case finds that by far the greater number of inquests were held by the deputy coroner. [KELLY, C.B.—That does not affect this particular inquest. He referred to *Reg. v. Perkin* (7 Q. B. 165).] It was a question for the jury whether the coroner's absence was reasonable or not. [MELLOR, J.—It would be very singular if it was a question for the jury whether the cause of absence was a lawful one.] The learned counsel then cited Taylor on Evid. s. 30. Next, as to the effect of the second section of the Act. That enactment was passed to cure inquisitions from formal defects. This was an objection to the authority of the judge himself, before whom the inquisition was taken.

Giffard, Q.C. (*R. Luck* with him) for the prosecution was not called upon to argue.

KELLY, C. B.—I am of opinion that the conviction must be affirmed. As to the first question, I have no doubt that it was the province of the judge to determine what was a lawful or reasonable cause for the absence of the coroner, and that the judge would have done wrong if he had left that question to be determined by the jury. But independently of that, the case is concluded by sect. 2 of the Act. The same question arises now as would have arisen if there had been a proceeding in the Court of Queen's Bench to quash this inquisition. If the inquisition is upheld it follows that the inquest must be taken to have been duly held, and that false evidence given upon it was punishable as perjury. Sect. 2 recites that it is expedient to make provision for supporting coroners' inquisitions, and then enacts that no inquisition shall be quashed, stayed, or reversed by reason of a number of things specified, and then

proceeds, "nor except in cases of murder or manslaughter by reason of any inquisition having been taken before any deputy instead of the coroner himself." This was a case of perjury and not of murder or manslaughter, and I am of opinion that the inquisition was a valid one within this enactment.

MELLOR, J.—I am of the same opinion. I consider that *prima facie* the inquisition must be held to have been lawfully holden before the deputy coroner. But it was said that upon the evidence given it was a question for the jury, and not for the judge, whether there was a lawful or reasonable cause for the absence of the coroner. I think that where the question arises incidentally at the trial like the admissibility of secondary evidence where it is necessary to show that searches and all reasonable efforts have been made to find the missing document, it is a question to be determined by the judge. At the trial the jurisdiction of the deputy coroner before whom the perjury was committed was disputed on the ground that there was no lawful or reasonable cause for the absence of the coroner. That question was an incidental matter arising at the trial which it was for the judge to decide. But, further, this inquisition is protected by sect. 2 of the statute.

PIGOTT, B.—I rest my judgment on the second ground that the inquisition is protected by sect. 2, which must be taken to uphold everything which led to the inquisition. I do not, however, differ from the other members of the court on the first point.

DENMAN, J.—It is not necessary to hold that in cases of inquests held by a deputy coroner he must be presumed *prima facie* to be acting legally, and assuming it to be competent to the prisoner's counsel to contend successfully if he can establish it, that if the deputy coroner is not acting in the absence of the coroner from lawful or reasonable cause, there must be an acquittal. I will consider this case. The prosecution took upon itself at the trial to make out that the deputy coroner was duly appointed. The deputy coroner was cross-examined, and the facts stated in the case elicited. It was then said that no evidence of the perjury could be given as the deputy coroner was not properly acting, and no lawful or reasonable cause was shown for the absence of the coroner himself, and that whether the absence was lawful or reasonable was a question for the jury, and not for the judge. I held that it was a question for the judge, and that there was upon the evidence a lawful or reasonable cause for the absence of the coroner on this inquest. When the statute says that when a deputy coroner shall be acting owing to the lawful absence of the coroner, it seems clear that the question, what is a lawful cause of absence is a question for the judge. But however that may be, sect. 2 gives the go by to that question. That section assumes that there might be some objection to the acting of the deputy coroner, but says that the inquisition shall nevertheless be valid. It follows that the holding of the inquest was a judicial act, and that the false evidence was given in the course of a judicial proceeding.

POLLOCK, B., concurred.

Conviction affirmed.

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REG. v. SLOWLY AND HUMPHREY—INGOLDBY v. RILEY.

[ROLLS.

Saturday, Jan. 25, 1873.

(Before KELLY, C.B., MELLOR, J., PIGOTT, B.,
DENMAN, J., and POLLOCK, B.)

REG. v. SLOWLY AND HUMPHREY.

Larceny—Goods obtained by trick—Credit.

Prosecutor sold onions to the prisoners, who agreed to pay ready money for them. The onions were unloaded at a place indicated by the prisoners, and the prosecutor was then induced to make out and sign a receipt which the prisoners got from him, and then refused to restore the onions or pay the price. The jury convicted the prisoners of larceny, and said that they never intended to pay for the onions, and that the fraud was meditated by them from the beginning.

Held, that the conviction was right.

CASE reserved for the opinion of this Court by Byles, J.

The prisoners, at the last Winter Assizes for the county of Sussex, at Lewes, were jointly indicted for stealing onions.

The prosecutor, having a cart loaded with onions, met the prisoners, who agreed to buy all the onions at a certain price, viz., 3l. 16s. for ready money, the prisoners saying, "You shall have your money directly the onions are unloaded."

The onions were accordingly unloaded by the prosecutor and the prisoners together, at a place indicated by the prisoners.

The prosecutor then asked for his money. The prisoners thereupon asked for a bill, and the prosecutor made out a bill accordingly. One of the prisoners said they must have a receipt from the prosecutor, and in the presence of the other made a cross upon the bill, put a 1d. postage stamp on it, and then said they had a receipt, and refused to restore the onions or pay the price.

The next morning the prisoners offered the onions for sale at Hastings.

The jury convicted both the prisoners of larceny, and said they found that the prisoners never intended to pay for the onions, and that the fraud was meditated by both the prisoners from the beginning.

The prisoners' counsel insisting that under these circumstances there was no larceny, I reserved the point for the decision of the Court of Criminal Appeal. (Signed) J. BARNARD BYLES.

Willoughby, for the prisoners.—The prisoners were not properly convicted of larceny, for the prosecutor gave credit to the prisoners for the 3l. 16s., and delivered the onions to them on such credit. [KELLY, C.B.—What credit was given? The case is like *Reg. v. McGrath* (39 L. J. 7, M.C.; 11 Cox C. C. 347)]. This is a different case. There the money was obtained against the will of the owner. Here the onions were unloaded by the prosecutor. Moreover, it was proved, though not stated in the case, that the prosecutor called on the prisoners in the evening for the money. The learned counsel then cited 2 East, P. C. 669 (edit. A.D. 1805), and the cases of *Rez v. Harvey* and *Reg. v. Nicholson* there cited. Also

Rez v. Oliver, 2 Leach, 1072;

E. v. Adams, 2 Rus. on Crimes, 209;

Tooke v. Hollingsworth, 5 T. R. 231 (Buller, J.);

Reg. v. Small, 8 C. & P. 46;

Reg. v. Stewart, 1 Cox C. C. 174;

Reg. v. McKale, 37 L. J. 97, M. C.; 71 Cox C. C. 32.

Pocock for the prosecution, was not called upon to argue.

KELLY, C.B.—I am of opinion that the conviction should be affirmed. If in this case it had been intended by the prosecutor to give credit for the price of the onions, even for a single hour, it would not have been larceny, but it is clear that no credit was given or ever intended to be given. Any idea of that is negatived by the statement in the case that the prisoners agreed to buy for ready money. In all such sales the delivery of the thing sold, or of the money the price of the thing sold, must take place before the other, i.e., the seller delivers the thing with one hand while he receives the money with the other. No matter which takes place first, the transaction is not complete until both have taken place. If the seller delivers first before the money is paid and the buyer fraudulently runs off with the article, or if on the other hand, the buyer pays first, and the seller fraudulently runs off with the money, without delivering the thing sold, it is equally larceny.

MELLOR, J.—I am of the same opinion. The prisoners obtained possession of the onions by a trick, and never intended to pay for them, as the jury found. From the very first they meditated the fraud to get possession of them, which puts an end to any question of its being larceny or not.

PIGOTT, B.—The facts are that the prosecutor never intended to part with possession of the onions except for ready money. He did part with the possession to the prisoners who obtained the possession by fraud. The prisoners then brought in aid force to keep possession, and refused to restore the onions or pay the price. Therefore, the possession was obtained against the will of the prosecutor.

DENMAN, J., and POLLOCK, B., concurred.

Conviction affirmed.

ROLLS COURT.

Reported by G. WELBY KING, and H. GODFREY, Esqrs.,
Barristers-at-Law.

Monday Feb. 10, 1873.

INGOLDBY v. RILEY.

Benefit building society—Foreclosure—Decree—Future subscriptions.

A building society is entitled to a foreclosure of mortgages to members made in respect of their shares, although the deeds and rules contain only powers of sale in case of default in payment of subscriptions, &c.

A decree for foreclosure in such a case properly includes an account of all subscriptions "due and owing and payable, and hereafter to become due and owing, and payable," and an account of the mortgagor's share of profits made by the society, if the rules provide for their distribution.

No interest is chargeable upon fines imposed upon the mortgagor for default, or for acting in contravention of the rules of the society.

THE bill in this case prayed for foreclosure of several mortgages to the Planet Benefit Building and Investment Society, and the main question raised on the hearing was as to the accounts to be directed by the decree. By the 19th rule of the society it was provided that when any building shares had been allotted to any member the directors should authorise the trustees to pay such member the sum of money which he should be entitled to receive on executing a mortgage of the premises and depositing the title deeds with the

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trustees; that in case the member did not finish the building of the premises, the trustees should have power either to sell them or to finish them, adding the expense to their charge; that in case of default by the member in the payment of his subscriptions, the society, without the concurrence and consent of the member, should have power to sell.

The mortgages in question were executed in respect of certain shares held by the defendant William Riley, and it was thereby declared that they were to secure all fines, redemption, and other moneys payable by the shareholder; that the security should not be redeemed until the whole of the subscriptions, fines, redemption, and other moneys had been duly paid; and that in case of default the society might enter into possession and sell in case the moneys received were insufficient, or if the mortgagor failed to perform the covenants.

A large proportion of the premises comprised in the mortgages, being in a very unfinished state, and the mortgagor having failed to pay ground-rents, subscriptions, and premiums for insurance, the bill was filed for foreclosure accordingly.

Mackeson, Q.C., and *W. W. Cooper*, for the society, asked for a decree *mutatis mutandis* in the form directed in *Mosley v. Baker* (6 Hare 87; 3 De G. McN. & G. 1032), which, however, was a redemption suit, but included an account of all subscriptions "due and owing and payable, and hereafter to become due and owing and payable," by the defendant as a member of the society, and taking into consideration the probable duration of the society according to its rules, &c. They also referred to

Fleming v. Self, 3 De G. McN. & G. 997;

Matterson v. Elderfield, L. Rep. 4 Ch. 207.

The 14th rule of the society, provided that all shares of five years' standing should be entitled to an equable proportion of the profits, and they asked for an account in respect of such profits.

Fry, Q.C. and *Kingdon*, for the defendant *Iea*, who claimed a charge upon the premises, contended that there was no case for a foreclosure, since the mortgage deeds provided only for redemption and sale, and foreclosure formed no part of the contract between the parties. The cases cited were all cases of redemption, and it was not the course of the court to order foreclosures of mortgages to building societies. In any case the future subscriptions ought not to be included in the account, for the terms of the security do not provide for their payment in case of default. The mortgagor is certainly entitled to take profits into account.

C. C. Berkeley appeared for another incumbent.

LORD ROMILLY.—I think that although the books do not give any case of foreclosure on mortgages to building societies, there is no doubt of their right to that remedy. With regard to future payments, a mortgagee is entitled to have them secured. I have thought so ever since the decision in *Mosley v. Baker* (*ubi sup.*). It is in conformity with the plan of these societies, and I think the rule is recognised as the *curius curie* in *Matterson v. Elderfield* (*ubi sup.*). Of course the mortgagor's remedy is to pay off all he is now liable to pay; and in that case the suit would be stopped. I shall make the order, but the mortgagor must be allowed profits on shares of five

years' standing up to the time of the filing of the bill. No interest is to be charged upon any fines he may be liable to pay.

Solicitors for the plaintiffs, *Ingle, Cooper, and Holmes*.

Solicitors for the defendants, *Futvoye and Co.*; *J. Funston*; *Philip Wood*.

V.C. WICKENS' COURT.

Reported by EDWARD WINSLOW and HENRY GODFREY, Esqrs
Barristers-at-Law.

Jan. 13 and 14, 1873.

CROSSE v. DUCKERS.

Agricultural lease—Surrender by operation of law—Custom of district—Injunction.

Upon an interlocutory application the court will not decide a disputed question of title, but if it is satisfied that injury is threatened or apprehended, and the evidence that such is the case is not distinctly rebutted, an injunction will be granted.

The court will not permit a defendant to take advantage of an act done with the intent to defeat possible equitable rights of the plaintiff, and will grant an injunction accordingly; and where a defendant, alleged by the plaintiff to have held under a lease, stipulating that hay was to be eaten down on the land, removed a large quantity off the land after differences had arisen as to his tenancy, the court restrained him from selling and disposing of the hay so removed.

THE plaintiff in this case sought for an injunction, upon motion, to restrain the defendant from contravening the terms of an agricultural lease, granted to the defendant's father, by breaking up and tilling more than a certain extent of land, by sowing with wheat more than a certain acreage, and by removing from the demised land grass and hay which, under the terms of the lease, ought to have been eaten down on the land itself.

The bill stated the lease to the father of the defendant, by an agreement dated the 30th Nov. 1857, letting from year to year a farm containing about 208 acres in the parish of Malpas, in the county of Chester, at a rent of 280*l.* The tenant was not to break up or convert into tillage certain fields specified; not to have more than sixty acres in tillage or broken up in one year, nor more than twenty acres in wheat during the last year of his holding; the tenant was to cause all the hay, straw, and fodder to be eaten and consumed upon the premises, and to leave all muck, hay, straw, and fodder on giving up the tenancy, without requiring compensation from the landlord.

Thomas Duckers, the father, died on the 2nd Nov. 1865. By his will he appointed three executors, the defendant alone proving it, in April 1866. The bill then stated that he entered into possession of the farm, and that being allowed to continue his father's tenancy, he remained in such possession; that on the 17th July 1872 he received notice to quit; that he had in 1872 more than sixty acres in tillage; that he had in wheat more than twenty acres; and that he had removed to some adjoining land called the "Stack Yard," in the occupation of a Mr. Holland, about forty tons of hay during the year 1872, which hay he intended to sell or dispose of.

The defendant denied that he had entered into possession of the farm as executor of his father.

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He stated that during his father's lifetime he had resided with him, and occasionally assisted him in the management of the farm; that he applied to the plaintiff's agent for the farm, and that the agent sent him a letter in which he informed him that Mr. Crosse had written to him (the agent), saying that he should "have pleasure in continuing him as tenant, and that he had great confidence in his character and respectability." He then stated that he did not then know that his father had signed any agreement for the farm, but always thought he held only according to the custom of the country, and that he considered he was accepted as tenant on his own account. He continued to pay the same rent as his father had paid; he also sold as much produce off the farm as he pleased, and had spent money in improvements. About Christmas 1871 he was asked by the plaintiff's agent to sign an agreement for the farm, but he refused, on the ground that it did not provide for unexhausted improvements; and at a subsequent interview he stated that his father's agreement was not binding on him. Some correspondence followed this refusal, and in July 1872 notice to quit at the end of his year's holding was given. Evidence was adduced that the defendant, according to the custom of the district, and as the eldest son of his father, was entitled to the occupation of his father's farm.

Lindley, Q.C. and *H. A. Giffard* for the plaintiff.—The *onus* is on the defendant to prove that there was a change in the tenancy. The Statute of Frauds (29 Car. 2, s. 3) requires a writing to establish a surrender (*Mollett v. Brayne*, 2 Camp. 103). There is evidence of a conversation in which the defendant expressed a wish to take the farm. This does not show the intention of the defendant not to take it on the terms upon which his father held it. They also cited

Chitty on Contracts, pp. 308, 309; and *Johnston v. Huddleston*, 4 B. & C. 922.

Dickinson, Q.C. and *J. W. Chitty* for the defendant.—This is an interlocutory application, and there is a question of disputed title. There was complete surrender by the executor by operation of law. The eldest son was by custom the new tenant, and he was allowed to remain in possession:

Oakley v. Monk, L. Rep. 1 Ex. 159.

The VICE-CHANCELLOR.—That was a case of tenant for life and remainderman. Mr. Lindley, I am with you on the main question, though I do not intend now to decide finally the question of title, and whether the defendant is bound by his father's lease or not. I think that, assuming him to be so bound, there may be ground for granting an injunction as to selling the hay, but you must satisfy me that there is any reason to apprehend damage if I grant no injunction as to the rest of the notice of motion.

Lindley, in reply, said that the evidence of the defendant as to what he meant to do was not to be trusted, and the plaintiff ought not to be left in that position. He asked for the whole injunction except the mandatory part of it.

The VICE-CHANCELLOR made the order for an injunction as stated below, and then said: In deference to the argument I will state my reasons for making this order. The facts of the case are these, as I understand them. Up to 1865 Duckers, the elder, held the farm from year to year, upon certain terms to operate on going out of possession.

The agreement is stringent, but not more so, I believe, than is usual in such cases. The original lessee died leaving a son and a daughter, and of two out of three of his executors, the defendant alone proved the will. The defendant applied to Crosse to be allowed to have the farm. Crosse answered by a letter, which was communicated to the defendant, stating that he would have pleasure in allowing him to continue. In 1871 differences arose between the parties, ending in a notice to quit. The plaintiff asserts, and the defendant denies, that the agreement of 1857 was still in force. Without deciding this question, I cannot help thinking that, considering no breach had occurred in the holding, it would be a strong thing to say that the old term had been surrendered, and a new one created. It might turn out to be so at the hearing, but now I must assume that it is not so. The terms of the agreement were always found to answer sufficiently well. The intention seems to have been that the defendant should have his father's farm, and if the persons interested in the estate of the latter have anything to complain of, that is a question between him and the executor. Then, on a motion like this, assuming that there was no such surrender, and no such new terms as those contended for, some nicety arises as to the terms of the injunction. Mr. Lindley has convinced me of his right to have it extend to breaking up the land and to the sowing of wheat, and he is entitled to it. As to the hay, the facts are, that in the winter the plaintiff's agent gave notice to the defendant that the terms of his father's agreement bound him, and I must hold that he knowingly, and for the express purpose of defeating the plaintiff of his right, and for the purpose of trying the question, removed the hay on to the neighbouring land. He has placed himself in the wrong by attempting to defeat equitable rights by such devices. The order to be made will therefore be, to restrain the defendant from breaking up, or converting into tillage, any further portion of the farm situate, &c., comprised in the agreement of 1857, and from sowing with wheat more than 20 acres of the said farm, and from selling or disposing of, &c., the hay carried away by the defendant, and stacked upon the "Stack Yard," with liberty to apply as to the said hay, and an undertaking as to damages.

Solicitors: *Patterson, Snow, and Burney*, for C. S. Brooke, Nantwich; *A. D. Bird*, for *Bellyse and Son*, Nantwich.

July 12 and 13; Nov. 20, 21, 22; Dec. 4 and 9, 1872; and Jan. 29, 1873.

Re THE MANOR OF WALTON-CUM-TRIMLEY; *Ex parte* TOMLINE.

Right of foreshore—Purchase—Moneys paid into court—Adverse claims—Lord of manor—Evidence as to user—Petition.

The foreshore below high water mark may be parcel of the adjoining manor, and where, by an ancient grant of the manor, its limits are not sufficiently defined, acts of ownership are admissible as evidence that such foreshore is parcel of the manor. In a dispute between a lord of the manor and the corporation of an adjoining port as to the right of foreshore, a decision between the parties in an action tried 150 years ago, followed by a long enjoyment on the part of the winner, and long acquiescence on the part of the loser, was Held to be, *prima facie*, binding on the latter.

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THIS was a petition presented by Colonel Tomline, the lord of the manor of Walton-cum-Trimley, praying for payment out of court to him of certain purchase moneys paid in by the Harwich Harbour Commissioners under the Lands Clauses Consolidation Act 1845, in respect of lands taken by them at Landguard Point, the north-eastern extremity of the estuary of the river Orwell.

The value of the land taken had been referred to arbitration, and in order to meet conflicting claims to different parts of it, it was arranged that the arbitrators should apportion distinct sums to the parts so claimed. Accordingly, the arbitrators having awarded the sum of 2018*l.* as the gross value of the whole apportioned it as follows: First in respect of lands below high water mark, and inside Landguard Point, 808*l.*; secondly, in respect of lands above high water mark, 620*l.*; thirdly, in respect of lands below high water mark and outside Landguard Point, 12*l.*; fourthly, compensation for damages to adjoining lands, 115*l.*

All these sums were claimed by the petitioners as lord of the manor. The first was also claimed by the corporation of Ipswich; and the second by the Secretary of State for War as accruing in respect of an acquisition to land comprised in a lease granted to the War Department. The two latter sums were at first also claimed by the Commissioners of Her Majesty's Woods and Forests, by virtue of the prerogative of the Crown, but were eventually admitted to belong to the petitioner.

The whole of the sum awarded had been paid into court by the Harwich Harbour Commissioners, and this petition had consequently been presented by Colonel Tomline for the above purpose.

The principal question was one between the petitioner and the respondents, the Corporation of Ipswich, as to the title to the foreshore below high water mark, adjoining the manor of Walton-cum-Trimley, but comprised within the port of Ipswich. There was also a question between the petitioner and the War Department, as to the right to the foreshore above high water mark, the latter claiming it as an accretion to land held by them under a lease for 999 years, granted by a former lord of the manor in 1797.

This latter question mainly turned upon the construction of the parcels in the lease, the difficulty arising from some variance between the parcels themselves and the plan annexed to the lease.

The case between the petitioner and the corporation of Ipswich depended in a great measure upon the weight of evidence, which was ample and voluminous on both sides. They both claimed as grantees of the Crown. According to the case made out by the petitioner it appeared that the manor had, from at least the time of the Conquest, been in the family of the earls and dukes of Norfolk until, in the reign of Henry VIII., it passed into the hands of the Crown, and there remained until 1628, when Charles I. sold it to one Dickfield. Since that date it had never been in the Crown, and had eventually come into the possession of the Duke of Hamilton, under whom the petitioner immediately claimed. The deed of conveyance to Henry VIII. and the grant by Charles I. to Dickfield were put in as evidence, but their terms did not throw much light upon the question as to the right of foreshore, and the petitioner therefore was compelled to rest his case almost

entirely upon evidence of acts of ownership and user.

On the other hand the corporation of Ipswich produced their royal charter, dated in 1519. Besides this they put in many ancient documents tending to prove that the port had always belonged to them in such a way as to point to their ownership of the soil. Thus they proved payment of fees and rent so far back as the time of Richard I. They also produced the shorthand writers' notes of a judgment of the Court of Queen's Bench, upon the construction of their charter, in an action of ejectment brought by themselves in 1810 against a person claiming under a former lord of the manor, deciding that the charter was sufficient to and did carry the soil of the port. The rest of the evidence on this side was supplied from the books of the corporation from about the time of Queen Elizabeth downwards. These books contained evidence of various acts of ownership over different parts of the port, such as taking wreck, and royal fish, the right of fishing, and particularly of an oyster fishery now regulated by a recent Act of Parliament. They also proved in the same way numerous instances of granting or letting portions of the soil of the foreshore in or about the town of Ipswich, and in some instances lower down the river Orwell.

The additional facts of the case, and the general result of the evidence will (having regard to the above statement) sufficiently appear from the judgment (*infra*).

Lindley, Q.C. and *Rodwell*, in support of the petition, submitted that as the petitioner rested his case almost entirely upon evidence of user he was entitled, in support of his contention that the foreshore had from time immemorial been a parcel of the manor, to produce the court rolls. These would be found to contain entries relating to the taking of wreck, royal fish, &c., &c., and also to fines imposed upon trespassers by the lord of the manor.

On behalf of the respondents, objection was taken to the admission of the court rolls as evidence, on the ground that the entries were only binding on the lord and his tenants, and were no proof of the title of the lord in an issue like the present:

Calmedy v. Rowe, 6 C. B. 861;

Attorney-General v. Lord Hotham, 1 T. & R. 217.

The VICE-CHANCELLOR, however, overruled the objection, considering that it went rather to the weight than to the admissibility of the evidence.

Lindley, Q.C. and *Rodwell* further contended that the evidence as to acts of ownership and user was indisputable. There were the records of several actions for trespass still extant. In one of these (*Barker v. Cole*, unreported), brought in 1735 by the then lord of the manor against one of the servants of the respondents (The Corporation of Ipswich) a verdict was given in favour of the lord of the manor. The respondents' own books were evidence against them as to this action, for they showed payment by them of the taxed costs of the proceedings. In fact, there was a decision striking at the very root of the respondents' title allowed to remain undisputed for 150 years, so that if nothing else were wanting to oust the respondents' claim, their long acquiescence ought to be considered as binding upon them. As for the action relied on by the corporation, the *locus in quo* was in the town of Ipswich, and, consequently, a long way from the petitioner's manor.

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Moreover, the Court of Queen's Bench was in that case influenced in its decision by evidence of a more ample character with regard to user than that adduced by the respondents on the present occasion. They referred to

Duke of Beaufort v. The Mayor, &c. of Swansea, 3 Ex. 413;
Chad v. Tilsen, B. & B. 403;
Malcolmsen v. O'Dea, 10 H. L. Cas. 593;
Jones v. Williams, 2 M. & W. 326;
Rea v. Capper, 5 Price 217;
Attorney-General v. Marquis of Downshire, (ib.) 269;
Whistler's case, 10 Coke 360;
Comyn's Digest (tit. "Grant,") vol. 4 p. 409;
Re Alston's Estate, 28 L. T. Rep. 337.

Dickinson, Q.C. and *Horace Davey* for the Corporation of Ipswich contended first, that even if the foreshore had been originally a parcel of the manor, the effect of the manor becoming the property of the Crown was to merge the foreshore in the general prerogative royal, so that not being expressly mentioned, it could not pass under the grant to Ditchfield; secondly, the evidence, coupled with the grant of 1519, went to show that the foreshore had from time immemorial belonged to the corporation, as part of the soil of the port of Ipswich. They referred to

Attorney-General v. Lord Hotham (sup.)
Warwick v. Queen's College, Oxford, L. Rep. 3 Eq. 683;
Lord Hale's Treatise, 33.

G. W. Hemming for the War Department, and for the Commissioners of Her Majesty's Woods and Forests.

W. W. Cooper for the Harwich Harbour Conservancy Board.

Langley and Bedwell for other parties.

Lindley, Q.C. in reply.

Cur. adv. vult.

Jan. 29.—The VICE-CHANCELLOR.—The sums of money to which this petition relates were paid into court by the Harwich Harbour Commissioners, as the price of land near Landguard Fort, in Suffolk, which land they took under the powers of their Acts. The amount was settled by arbitration and by arrangement; the arbitrator divided it into four sums, according to the title of the various properties. One of these, a sum of 808*l.*, which was paid in as the price of lands described as "below high-water mark inside Landguard Point," is claimed by the petitioner on the one hand, and the Corporation of Ipswich on the other. Another of them, a sum of 620*l.*, which was paid in as the price of land near Landguard Fort, but above high-water mark, is claimed by the petitioner on the one hand, and the Secretary of State for War on the other. The others are admitted to belong to the petitioner. The questions as to the first-mentioned sums are entirely distinct, and must be considered separately. The first-mentioned sum of 808*l.* represents the foreshore of the river Orwell, which is a tidal river, falling into the sea someway below Ipswich. The manor of Walton-cum-Trimley may be roughly described as a heart-shaped piece of land, ending towards the south in a point called Langer, or Langerstone, and near which stands Landguard Fort. One side of the manor forms the eastern side of the Orwell for about two miles before it falls into the sea; the other side of it is washed by the German Ocean. The foreshore in question is the land between high and low water mark on the western side of the manor, and on the eastern side of the Orwell; and it is claimed by the petitioner as lord of the manor, and by the

Corporation of Ipswich as entitled to the port of Ipswich, which expression comprehends the whole course of the Orwell from Ipswich to the sea. The lord's title to the foreshore is rested on a very long enjoyment which he seeks to prove by, among other things, entries in the court rolls of the manor of Walton-cum-Trimley. The extant Court Rolls go back only to A.D. 1381. A good deal was said in the argument as to the admissibility of entries on these court rolls to prove the title of the lord of the manor. It was argued on the authority of *Calmadry v. Rowe* (sup.), that entries in the court rolls of a manor are only admissible as against strangers on such an issue as this when the fines mentioned in the entries appear to have been paid. That seems hardly warranted by what Bayley, J., said in that case; and it is to be observed from the course which *Calmadry v. Rowe* took that that particular ruling did not come before the court on the motion for a new trial. Moreover, there seems to have been a greater willingness of late years than there was when that case was decided to admit evidence on the subject of very ancient possession. That appears from the opinion of the judges, delivered by the late Willes, J., in *Malcolmsen v. O'Dea* (sup.). In the rolls now in question, which of course have their particular character (as each set of rolls has) there are: First, entries of fines paid to the lord for the salvage of boats coming on to the soil of the lord, and for moorage and for trespassers on the soil for taking from it wreck or the like, and of sums paid to the lord by the bailiff for wreck sold by him; secondly, presentments as to wreck, porpoises, and the like, come on to the soil, and their value, but not expressly mentioning any receipt. As I read them, however, they seem generally to record receipts by the lord. In some cases, however, they are expressly mentioned as receipts by the bailiff, for which he is responsible to the lord. It seems to me that in all these cases the entries are substantially of receipts, and admissible in any point of view. Thirdly, presentments of wreck come on to the lord's soil, and salvaged by a person named, who receives one-fourth of the value for his trouble, the balance coming to the lord being stated in the margin. These seem admissible on the same principle as the last-mentioned cases, but even on stronger grounds. There is in one case, at least, under the date of Oct., A.D. 1399, an entry where the whole value of some small wreck coming ashore is given to the salvors for their trouble, which seems to be governed by the same principle. Fourthly, presentments directing the bailiff to levy certain sums by way of fines for particular trespasses on the lord's soil, the names of the persons levied on being in some cases mentioned, and in others absent. It seems to me that these entries imposing a specified duty and consequent liability on the bailiff, and occurring as they do in court rolls which show actual payment by individuals of similar fines, are admissible after the lapse of centuries, as if the bailiff was actually shown to have levied them. That the lord could enforce payment from him in the absence of excuse or explanation seems clear, and that he did so is to be inferred, as it is to be inferred on the other hand that the bailiff had previously levied them on those liable to pay. Fifthly, of presentments (not followed by any express direction to the bailiff) that a specified individual has appropriated wreck, or the like of a specified

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value, which had come on to the lord's soil, and belonged to him. Those entries, put at the lowest, must, I conceive, make the bailiff responsible; and stand, therefore, on the same footing as entries of sums which the bailiff is expressly directed to levy. These illustrate the principles on which the evidence of the rolls has been dealt with, and, in fact, comprise most of the cases of any importance. There are a few presentments of "wreck come ashore" to which no value is fixed; and the entry in the margin of some is not of a particular sum, but of "respite;" or else there is no entry at all. It seems to me safer to reject those. In some cases the matter is mentioned merely as one for future inquiry. Such an entry also I treat as not evidence. What has been said as to the admissibility of entries on the rolls leaves untouched, first, the question of their weight, as distinguished from that of their admissibility; and secondly, the question whether any particular entry can be shown to apply to the property in question, or to other property, so analogous to it in position and character that evidence bearing on the one title may be received as supporting the other. How far that analogy would extend in the present case was discussed at the Bar. It seems to me that for the purpose of an issue like the present everything that bears on the enjoyment of the foreshore or the Orwell boundary of the manor is admissible evidence, but that nothing else is so admissible. The contest here is between subjects claiming foreshore adversely to each other; not, as is most usual, between the Crown on one side and a subject on the other. Each party makes a case which would be valid against the Crown; but the cases exclude each other. The manor in question, notwithstanding the composite name, and the fact that Felixtowe, first mentioned as a priory, is in the later documents sometimes called a manor, appears to be a single manor divided for some purposes into three portions, called respectively Walton, Trimley, and Felixtowe. The history seems to be as follows: It formed part of the possessions of the Bigots, Earls of Norfolk, which came to Edward I. by means of the well-known cessions and re-grant to the last Earl of Norfolk of that family; was bestowed by Edward on his son Thomas, called De Brotherton, and remained in his descendants (with immaterial interruptions at the beginning of the reign of Henry IV. and Henry VII.) till A.D. 1542, when the then Duke of Norfolk and his son the Earl of Surrey (who represented one line of the descendants from Thomas de Brotherton) gave it to Henry VIII. in exchange for other property. From that time it remained in the Crown, till A.D. 1628, when Charles I. sold it, and the title has since been that of an ordinary estate. The Corporation of Ipswich is a very ancient one, holding rights and franchises under grants earlier than King John's time. Its right to the port of Orwell, from the town to the ocean, is recognised as an ancient right in A.D. 1340 (13 Edw. 3), and that the right to the port comprehended in this case the ownership of the soil and foreshore is expressly acknowledged by a charter of the third year of Henry VIII. (A.D. 1571). At that time it should be observed that the manor was not in the Crown. The evidence, into the details of which I will not go, for it was carefully and accurately analysed at the Bar, shows, I think, after all allowances and deductions, an enjoyment and

exercise by the lord of the manor from A.D. 1381, for something like two centuries, of rights which are *prima facie* evidence (and would be sufficient evidence against the Crown) of the title of the foreshore in question. The then lord claimed wreck as against the Crown in respect of this particular foreshore. When Edward I. at the beginning of his reign made his well-known attempt to challenge the titles of all subjects claiming Crown rights, his claim appears to have been acquiesced in, or, at least, there is no trace of a decision against it. That is so far important as tending to show that in A.D. 1274, or thereabouts, the Corporation of Ipswich did not claim the right of wreck on the shores of Trimley; and that the Earl of Norfolk did so, since the inquisition was general, and there would probably have been notice of a claim, if made by the corporation. And, though the claim was of wreck only, it seems reasonable to conclude that it was founded on a claim to the soil of the foreshore, since the Court rolls, which begin about a century later, and probably continue the forms of the earlier rolls, always treat the right to wreck as founded on the lord's right to the soil, and not as a franchise merely. As regards the application of the entries to the disputed property, I am inclined to agree with the suggestion that presentations by the jury or homage of Trimley or Walton, or Trimley and Walton, *prima facie*, though not invariably, apply to some part of the shore in question. It is quite clear that in early times a distinction was made between the juries or homages (the words are used indifferently) of the different portions of the manor; and the strong presumption seems to be that in strictness each jury made presentments as to its own district; though where a presentment was necessary as to wreck—for instance, in Felixtowe, which was on the ocean side of the manor, and no jury or homage of Felixtowe was duly constituted to make it—a jury of Trimley, on the opposite side, would naturally do so. Any stray instance of apparent variation from the rule suggested may be accounted for in this way:—I should observe that according to the evidence, which was questioned, but which I am inclined to think accurate, the parish of Walton, which is all included in the manor (with part of that of Felixtowe), has no ocean foreshore, but the whole of the shore in question is within it. The distinction between the different homages or juries is not observed in the later court rolls, which makes them much less valuable as supporting the lord's title; and, in fact, during the last century and a half of the period intervening between A.D. 1381 and A.D. 1738, the evidence is less satisfactory, and is rather inconsistent with than capable of establishing any such enjoyment. No admissible evidence of an enjoyment by the corporation of rights over the particular foreshore in question is, so far as I can see, given by them before A.D. 1660. But it is to be observed that their books do not go back beyond A.D. 1587, though there are some grants forty years earlier which affect other parts of the soil of the harbour. Their ownership of foreshore in other parts of the harbour, and their exercise of the ordinary right of owners of the port from about the middle of the sixteenth century down to A.D. 1725 seems to me satisfactorily proved, but, as regards this particular foreshore, the only evidence before A.D. 1660

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is against them. The proceedings as to the beach at Langerstone in A.D. 1587, *prima facie* import an express and formal disclaimer by the corporation of the right which they now assert over this particular shore, and do much more than counteract any presumption of title to it at or before that time which their evidence raises. In A.D. 1660 an entry occurs in the corporation books which, I think, candidly considered, imports a taking of shingle by the corporation from the *locus in quo* for Ipswich purposes. The next specific entries are in A.D. 1727. Unquestionably, in that year the corporation claimed the specific right which they now claim, and were prepared to assert it. The consequence was, that in A.D. 1738 the same titles which I have now to decide between came into direct collision in an action of *Barker v. Cole*. Sir John Barker, then the lord of the manor, brought an action of trespass in the Common Pleas against Thomas Cole for trespasses on the piece of foreshore in question, by taking stones and sand from and placing ships upon it. Cole justified it as the servant of the corporation, whose land he alleged it to be; and the corporation, in fact, defended the action at their own cost. The result of it was in favour of the plaintiff. So far as can be inferred, the precise question which now arises was tried in that action. If there had been any miscarriage, or any reason whatever for treating the decision as otherwise than conclusive against the corporation, the question might have been raised again, in the same, or some other way. But it was acquiesced in, so far as I can see, and excluding some very vague and unsatisfactory evidence of an attempt by the corporation or its officers to assert claims over the foreshore in question, within the last thirty years, they have been contented to let the lord's title as established in the action remain unquestioned for a century and a half. For a purpose like the present, I think that conclusive, but the matter does not rest there. The lord has, I think, established that he has enjoyed the foreshore in question from that time to this without question or disturbance by the corporation; or, at any rate, without any act on their part amounting to a challenge of his title. The corporation's evidence of enjoyment amounts to very little. Some reliance was placed by their counsel, first, on two recent private Acts regulating the oyster fishery in the port, in which the Legislature certainly seems to have assumed their right to the foreshore on part of the western side of the manor, considerably north of the place now in question. The corporation seem to have brought before the Legislature their own grants, which show a *prima facie* title, and not to have noticed the opposing titles which negatived it. A recognition of title obtained by such means is, at least, not to be carried beyond its strict limits; and, in fact, those acts in no way displace Colonel Tomline's title to the particular foreshore in question. The other Acts, which are those empowering the Harwich Harbour Commissioners, recognise the rights of the Corporation of Ipswich to certain tolls which they abolish. They are really and only material in showing that the corporation's claim was not brought forward on that particular occasion. As negating the title of Colonel Tomline (an absent party) they are of no force whatever. On the whole, it seems to me that the petitioner must succeed. A decision between the parties in an action tried 150 years ago, followed by long

enjoyment on the part of the winner, and long acquiescence on the part of the loser, is *prima facie* to be held binding on the latter. It is not an estoppel, indeed, but it is the strongest possible evidence against him. Thinking, as I do, that as between the two rival titles, that of the lord is much more satisfactorily established than that of the corporation, I might possibly have still doubted if *Barker v. Cole* were out of the way. But the decision in that case, given, no doubt, when many materials were accessible which are now lost, seems to me to remove all question; and I willingly follow it, by holding that the petitioner is entitled to the 808L. The second question arises between the petitioner and the Secretary of State for War, in the following manner: Near the southern end of the manor a fort, now called Landguard Fort, was built before the beginning of the reign of Charles I. for the protection of the harbour. The soil on which it was placed seems to have been the southern part of an extensive common, which formed part of the waste of the manor of Walton-cum-Trimley, and in granting the manor as already mentioned Charles I. reserved the site of it for the public benefit. Afterwards there were alleged trespasses by the soldiers occupying the fort on the east of the common in question, and a doubt arose, it would seem, as to the precise limits of what Charles I. reserved as site. Moreover, part of the common north of the fort was wanted for military purposes, and in A.D. 1797 Mr. Nassau, the then lord of the manor, demised to the officers of the Ordnance, for 999 years from Lady-day, A.D. 1791, at an annual rent of 10L., a portion of land particularly described in the lease. A plan annexed to the lease shows a beach distinct from the common on the ocean side of the demised land, but seems to carry the common up to high-water mark on the Orwell side. The land in respect of which the 620L. was paid in consists, as I understand the facts, of land which was covered by the sea at high water in A.D. 1791, but which is now above high-water mark; there having been during the last eighty years a great accretion at Langer Point. The Secretary for War contends that as no beach is shown on the Orwell side of the demised land, the demise must be taken to have been on that side a demise of everything up to high-water mark; and he contends that it embraces, by operation of law whatever dry land is added to what was dry at the date of the lease. I am of opinion that that contention wholly fails. The plan on the lease is not referred to in the parcels, and, in fact, I believe, is mentioned in the lease only in two places, when the reference is for another purpose; and the words of the lease seem to me to import that the lord reserved something between what he leased and the water on the Orwell side, as well as on the ocean side of it. That being so, the accretion, I think, belongs to the lord, and he is entitled to the 620L., as well as to the other sums in court. It remains to deal with the question of costs. Of course, the Harwich Commissioners are bound to pay costs according to the Act, but not costs occasioned by adverse litigation. The costs of the contention raised by the corporation must be paid by them. They have unsuccessfully tried to rehear the case of *Barker v. Cole*, and must abide by the usual consequences. The opposition of the Secretary of State for War has not, I think, increased the costs, or has increased them to some very

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trifling extent, and it will therefore, be sufficient not to give him any costs.

Solicitors for the petitioner, *Field, Roscoe and Co.*
Solicitor for the Corporation of Ipswich, *E. Bromley.*

Solicitors for the War Department and Commissioners of Woods and Forests.

Solicitors for other respondents, *Miller, and Smith; Currie, and Williams.*

COURT OF QUEEN'S BENCH.

Reported by J. SHORT and M. W. McKELLAR, Esqrs.,
Barristers-at-Law.

Friday, Jan 24, 1873.

SHERIFF v. GLENTON.

Building society—Power of sale over premises demised on security—Whole amount to be held immediately payable—Implied covenant to pay—Powers and authorities.

Plaintiffs, trustees of a building society, advanced to defendant 4000l., to be repaid by monthly instalments, and defendant by deed, for securing such payments and the observance of the rules of the society, demised certain leasehold premises to the plaintiffs. It was agreed that upon nonpayment of three successive instalments, or non-observance of the rules, plaintiffs might sell the premises, and upon any sale the whole amount thereinbefore stipulated to be paid by instalments as aforesaid, and remaining unpaid, should be held immediately payable, and be retainable accordingly from the proceeds of sale, subject to such discount as the directors of the said society for the time being might think proper to allow. The defendant also covenanted to pay the instalments. Upon nonpayment by the defendant, plaintiffs exercised their power of sale, and brought this action upon the deed to recover the whole of the difference between the proceeds of sale and the amount of unpaid instalments.

Held, upon demurrer to the declaration, that these words implied a covenant to pay the whole amount upon nonpayment of three instalments.

Another deed for acquiring a further sum on the same terms, incorporated all powers and authorities given by the said deed for recovery of the moneys thereby made payable.

Held, also, that these words implied the same covenant.

THE declaration stated in the first count that by deed, bearing date 24th Feb. 1868, and made between the defendant and one George Collier, therein described of the one part, and plaintiffs therein described as the trustees of the London Permanent Benefit Building Society, of the other part, reciting among other things that the defendant and the said George Collier were members of the said society, and joint holders of 160 shares therein, numbered, and became entitled at a meeting of the said society held on the 4th Feb. 1868, to receive an advance out of the funds thereof of the sum of 4000l., being the value of their said shares for the term of 150 months from the said month of Feb. 1868, to be repaid during such term by monthly subscriptions of 41l. 13s. 4d. per month, as in the said deed specified, such payments to include interest as well as principal; and for securing such payments, with all fines and other moneys which might become due and payable in respect of the said shares by virtue of the rules

and regulations of the said society, and the observance and performance of the said rules, having agreed to execute the assurance therein contained, the defendant and the said Geo. Collier demised to the plaintiffs certain leasehold premises in the said deed mentioned upon trust for securing the repayment of the said principal sum of 4000l., which the plaintiffs then advanced to the defendant and the said Geo. Collier, upon their said 160 shares and the interest thereof, and fines and other moneys payable in respect thereof as therein mentioned; and it was by the said deed declared and agreed that in case the defendant and the said Geo. Collier should, amongst other things, at any time thereafter neglect for three successive monthly meetings to pay any of the said moneys or interest, or any portion of the said moneys or interest, or should otherwise at any time neglect to observe any of the rules and regulations on their part to be respectively paid and observed in respect of their said 160 shares, it should be lawful for the plaintiffs to have and exercise over, or with respect to the said demised premises, such power of sale and other powers as were expressed in the rules and regulations of the said society, and upon any sale the whole amount thereinbefore stipulated to be paid by instalments as aforesaid, and remaining unpaid, should be held immediately payable, and be retainable accordingly from the proceeds of sale, subject to such discount as the directors of the said society for the time being might think proper to allow; and the defendant and the said Geo. Collier, and each of them, did thereby jointly and severally covenant with the plaintiffs that they, the defendant and the said Geo. Collier, would duly make all payments, and observe all the rules and regulations for the time being of the said society on their part, to be respectively paid and observed in respect of the said shares or by virtue of that security, and that the said demised premises should be a security, and the powers therein contained might be exercised for the recovery and paying as well of certain moneys thereby authorised to be paid by the plaintiffs as in the said deed mentioned, as of the said subscriptions and other moneys to be paid according to the provisions of the said deed; and the plaintiff says that the defendant and the said Geo. Collier did neglect, for three successive monthly meetings, to pay divers of the said moneys and interest, and did neglect to observe divers of the said rules, and thereupon the plaintiffs did, as they lawfully might, exercise over the said demised premises such power of sale and other powers as were expressed in the rules and regulations of the said society: and thereupon the whole amount in the said deed stipulated to be paid by instalments became immediately payable to the plaintiffs, and the proceeds of the said sale were insufficient to satisfy the debt due to the plaintiffs, and all conditions have been fulfilled, and all things have happened, and times elapsed, necessary to entitle the plaintiffs to sue the defendant in respect of the matters and breaches hereinafter stated, yet the defendant has not paid to the plaintiffs the aforesaid deficiency, and a part of the said moneys and interest remains due to the plaintiffs, the same being equivalent, to wit, to thirty-four of the said monthly meetings, and the amount of the said deficiency is in arrear and unpaid to the plaintiffs.

The second count stated that by deed bearing date 9th Nov. 1868, and made between the de-

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fendant and the said Geo. Collier in the first count mentioned of the one part, and the plaintiffs of the other part, reciting the indenture in the first count mentioned, and reciting that the defendant and the said Geo. Collier were still members of the said society, and joint holders of sixty additional shares therein, and became entitled at a meeting of the said society held on 3rd Nov. 1868 to receive in advance out of the funds thereof the sum of 1500*l.*, the value of the said additional shares for the term of 150 months from the month of Nov. then instant, to be repaid during such term by monthly subscriptions of 15*l.* 12*s.* 6*d.* per month as in the said deed specified, so much of the aggregate of such subscriptions as exceeded the said principal sum of 1500*l.*, being for the interest on such principal sum, and for securing such payments with all fines and other money which might become due and payable in respect of the said moneys by virtue of the rules and regulations of the said society, and the observance and performance of the said rules, had agreed to execute the assurance thereafter contained. It was witnessed that in consideration of 1500*l.* paid by the plaintiff to the defendant and the said Geo. Collier, in full satisfaction of their said additional shares, and all benefit, claim and demand therein, the defendant and Geo. Collier, and each of them, did thereby jointly and severally covenant with the plaintiffs that the said demised premises in the first count mentioned, should thenceforth stand charged and chargeable with, and continue and be for the terms granted by the said deed in the first count mentioned, a security to the plaintiffs, not only in respect of the 160 shares in the said first count mentioned, but also in respect of the said sixty additional shares, and of all subscriptions, fines, and other moneys payable according to the rules and regulations for the time being of the said society in respect of the said shares respectively; and it was by the now reciting deed declared that all powers and authorities given by or mentioned in the said deed in the first count mentioned for recovery of the moneys thereby made payable, or for any other purpose, should extend and be applicable to the said sixty additional shares, and the defendant and the said Geo. Collier did jointly and severally further covenant with the plaintiffs that the defendant and the said Geo. Collier would pay to the plaintiffs all subscriptions, fines, and other moneys thereafter payable, according to the rules and regulations of the said society, in respect of the said additional shares, and all conditions have been fulfilled and all things have happened and times elapsed necessary to entitle the plaintiffs to a performance by the defendant of the said covenants in all things on his part, and to sue the defendant in respect of the matters and breaches hereinafter alleged; yet, although the plaintiffs exercised their power of sale over the said premises, as in the said first count alleged, and a deficiency arose thereon, yet neither the defendant nor the said Geo. Collier has paid to the plaintiffs the amount of the said deficiency, nor all subscriptions, fines, and other moneys payable according to the rules and regulations of the said society in respect of the said additional shares, and an amount equivalent, to wit, thirty-four of the said monthly instalments is in arrear and unpaid to the plaintiffs.

These counts of the declaration were demurred

to on the ground that they alleged no covenant on the part of the defendant to pay any money beyond the proceeds of the sale.

Finney argued for the defendant.—The words relied upon in the first deed, as a covenant by defendant to pay this sum to the plaintiff, are "upon any sale the whole amount thereinbefore stipulated to be paid by instalments as aforesaid, and remaining unpaid, should be held immediately payable, and be retainable accordingly from the proceeds of sale." That does not show any intention to covenant for payment beyond the proceeds of sale; it is a clause for a collateral purpose, viz., to entitle the mortgagees to take payment out of the proceeds of sale. The words held to imply a covenant in *The Great Northern Railway Company v. Harrison* (12 C. B. 576) were much stronger than these. *Courtney v. Taylor* (6 M. & G. 851) is an authority for refusing to import a covenant where the clause was inserted for a collateral purpose. There, in an indenture between A. and B., B. acknowledged that he owed so much money to A. It was held that such acknowledgment may be declared upon as a covenant to pay that sum, if an intention to enter into an engagement to pay appear upon the face of the deed, but otherwise where the acknowledgment appears to have been made solely for a collateral purpose. Further, this part of the deed relates only to the security for the mortgagor's debt; and it was held in *Marryat v. Marryat* (29 L. J. 665, Ch.) that a deed executed for the sole purpose of securing a debt will not convert a simple contract into a specialty debt; and although the deed acknowledged the debt, the court refused to imply a covenant for its payment, or to vary the position of the parties. The second count differs from the first only by its reference to the effect of the first deed being limited to the grant of its powers and authorities for recovery of the money thereby made payable. These words, "powers and authorities," do not imply a covenant to pay, even if the words of the former deed are sufficient to do so.

Reginald Brown for the plaintiff was not heard.

BLACKBURN, J.—I am afraid there is no help on this ground for the defendant. He may have been improvident, but he has made a bargain for which he is liable to the plaintiffs. The contract between them was, that in consideration of the money advanced to the defendant, he demised these premises to the plaintiffs to secure the payment of his instalments, and the plaintiffs were to have powers of sale over the premises in case of non-payment, and upon any sale the whole amount thereinbefore stipulated to be paid by instalments as aforesaid, and remaining unpaid, should be held immediately payable, and be retainable accordingly from the proceeds of sale, subject to such discount as the directors of the said society for the time being might think proper to allow. The argument for the defendant has been that the balance beyond the proceeds does not become immediately due to the plaintiffs, but that the whole amount is to be calculated as immediately payable, in order to fix the amount of discount to be allowed out of the proceeds of sale. I think, however, the necessary interpretation is that upon nonpayment of instalments the defendant promises to pay the whole. I agree that the defendant has rashly put himself into the hands of the directors, but that cannot now be helped, and he must take whatever discount they allow him. In the second count is set out an

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agreement by deed to charge the same premises as security for a further advance; and it confers upon the plaintiffs the same powers and authorities for the recovery of money as those contained in the first deed. It seems to me impossible to say otherwise than that this deed has the same effect as the other. The defendant is bound, as on the previous deed, for the whole amount. Judgment will be for the plaintiffs on both counts.

LUSH, J.—I am of the same opinion. It would be impossible to give effect to the deed by holding it to be the intention of the parties to apply only the proceeds of sale to the payment of the debt. To be held immediately payable means, in my opinion, a promise immediately to pay. The second deed incorporates all powers and authorities contained in the first, and amongst them power to the plaintiffs to hold the whole amount immediately payable.

ARCHIBALD, J.—I am of the same opinion.

Judgment for plaintiffs.

Attorney for plaintiffs, W. Rutter.

Attorneys for defendant, Finney and Son.

GIBBS v. CRUIKSHANK.

Replevin—Building society—Occupation by mortgagor—Power to distrain mortgagor's goods—Occupier under demise of mortgagor without mortgagee's consent.

On a mortgage of premises to secure repayment of money advanced by a building society, it was agreed that upon non-payment the trustees of the society might distrain for the amount in arrear as for rent in arrear upon a common demise. The mortgagor took possession of the premises with consent of the trustees, but afterwards let them to the plaintiff for three years at a quarterly payment, without the consent of the trustees, and the plaintiff had no knowledge of the mortgage. The mortgagor's payment and the plaintiff's rent were in arrear, and the trustees distrained upon plaintiff's goods:

Held, on appeal from a County Court in an action of replevin, that the trustees of the society were not justified in distraining.

THIS was an action of replevin, tried at the Brentford County Court.

The defendants, George Cruikshank, John Taylor, and Wm. Tweedie are now, and were during the month of July last, the trustees of the Temperance Permanent Benefit Building Society; and the defendant, Henry J. Phillips, is the secretary of the same society.

In the month of July last the goods of the plaintiff were distrained under the following warrant:—

Warrant to Distrain.

To Mr. George Osborne, of 35, Kingsgate-street, Holborn, our bailiff:

Distrain the goods and chattels of Thos. Parsons in or upon the premises situate at No. 15, Amyand-terrace, Twickenham, S.W., in the county of Surrey, for £38 11s. 10d., being the amount due to us for rent in arrear for the same on the 1st July 1872; and for your so doing this shall be your sufficient warrant and authority.

Dated 9th July 1872.

For Geo. Cruikshank, Jno. Taylor, and Wm. Tweedie, trustees of the Temperance Permanent Benefit Building Society,

By order of the Managing Committee,

H. J. PHILLIPS, Sec.

This warrant was issued in the alleged exercise of a power of distress contained in an indenture of mortgage, dated 17th Dec. 1868, and expressed to be made between the said Thos. Parsons, therein after called the said mortgagor, of the one part, and the defendant Geo. Cruikshank, George Charles Campbell, gentleman, and the defendant, John Taylor, trustees of the said society, and thereafter called "the said trustees," of the other part; whereby the said Thos. Parsons assigned to the said trustees, their executors, administrators, and assigns, the said messuage and premises known as 15, Amyand-terrace, Twickenham, for a term of years by way of mortgage for securing the discharge by the said Thos. Parsons, his heirs, executors, administrators, and assigns, of the sum of 541l. 9s., and of all fines interest and other sums which might become payable by him or them to the said society. And by the said indenture of mortgage it is agreed that if three of the monthly subscriptions therein provided for shall be in arrear and unpaid, the said trustees may at any time thereafter, and from time to time in their absolute discretion, do all, any, or either of the following acts; that is to say, *inter alior*, distrain for the amount of any monthly subscriptions and fines which shall be in arrear and unpaid, and of any payments made by the said trustees under the powers thereby conferred upon them as for rent in arrear upon a common demise. And that the receipts of the said trustees shall discharge lessees, tenants, occupiers, purchasers, and other persons paying rents, profits, purchase and other moneys, to such trustees, or to the said society from the same, or from seeing to the application thereof. And that no lessee, tenant, occupier, purchaser, or other person, shall be bound to inquire whether default has been made as aforesaid; or whether any money remains on the security of those presents, or whether the conditions of sale were proper or otherwise as to the propriety or regularity of any demise or sale, or be affected by notice, actual or constructive, to the contrary. And in the said indenture of mortgage is contained the following covenant:

And the said mortgagor for himself, his heirs, executors, administrators, and assigns, hereby covenants with the said trustees, their executors, administrators, and assigns, that he the said mortgagor, his heirs, executors, administrators, or assigns, will, during the continuance of this security, duly and punctually pay to the proper officer, and at the office for the time being, of the said society, the monthly subscription of 5l. 1s. 8d. on the first Monday in the month of January next, and the monthly subscription of 5l. 1s. 8d. on the first Monday on each succeeding calendar month until the whole of the said sum of 541l. 9s., and interest at the rate of 5l. per cent. per annum from the day of the date of these presents shall have been duly paid to the said society, or discharged in accordance with the rules and bye-laws of the said society in that behalf.

And by the said indenture of mortgage it is agreed that the trustees for the time being of the said society shall, during the continuance of that assurance, have all the powers and authorities of the said trustees, as if the trustees for the time being had been specially named therein instead of the said trustees.

The said mortgage security is still in force. When it was executed the mortgagees were in possession of the said messuage and premises thereby assigned, but shortly afterwards they directed their agent to deliver the key to the mortgagor,

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who then took possession of the said premises.

On the 25th Aug. 1871 the said Thomas Parsons, without the consent or knowledge of the trustees of the said society, or of the defendant, Henry J. Phillips, let the said messuage and premises to the plaintiff for three years, at the yearly rent of 45*l.*, payable quarterly. So far as appeared the plaintiff had no knowledge of the mortgage.

When the warrant to distrain was signed, and when the distress was made, one quarter's rent was due from the plaintiff to the said Thomas Parsons, and the sum of 38*l.* 11*s.* 10*d.* was due from the said Thomas Parsons to the said society for monthly subscriptions and fines payable under and by virtue of the said indenture of mortgage. More than three of the monthly subscriptions in the said indenture of mortgage provided for were in arrear and unpaid; but the last payment by the said Thomas Parsons to the said society was a sum of 10*l.* 3*s.* 8*d.* paid on the 11th April 1872.

At the hearing before the County Court judge, the defendants admitted that the distress was made by their authority.

No notice was given by the mortgagees or the defendants to the said Thomas Parsons, of their intention to treat him as their tenant.

The judge decided in favour of the plaintiff.

The question for the opinion of the Court of Queen's Bench is whether the defendants, or any of them, were entitled to make the distress.

Morten (with him *Herschell*, Q.C.) argued for the defendants.—A tenant at will can devise for three years without terminating the will. [BLACKBURN, J.—What authority can you find for that?] *Partridge v. Bere* (5 B. & Ald. 604) decided that a mortgagor in possession of the premises mortgaged is tenant to the mortgagees. [BLACKBURN, J.—Merely tenant at sufferance, unless the mortgagee consent to his remaining in possession. But here you must rely only on the terms of the deed, which make the right to distrain a merely personal agreement between the mortgagees and mortgagor. No tenancy has been created between the mortgagees and either the mortgagor or the plaintiff.] There is a power to distrain as if for rent in the deed; and in *West v. Fritch* (18 L. J. 50, Ex.), although the agreement for a tenancy was more full than this, the fact was that the payments had been made for interest instead of rent; it was held that the relationship of landlord and tenant existed between the parties, and that the former had the right to distrain for arrears. [BLACKBURN, J.—That was a clear agreement to pay rent.] But it was not acted upon. The cases upon the subject are collected in the notes to *Keech v. Hall* (1 Sm. L. C. 533). In one of them, *Pinhorn v. Souster* (8 Ex. 763), where the court held that a tenancy at will was created by the mortgage deed, in respect of which the mortgagee might distrain, it was further held that such tenancy was not put an end to by assignment of the mortgagor's interest without notice to the mortgagee.

Foard, for plaintiff, was not heard.

BLACKBURN, J.—It is impossible in this case to imply an agreement to place the parties in the position of landlord and tenant. There is in the mortgage deed a mere personal promise to pay on Parsons' part, and a licence to seize Parsons' goods on his failure to pay. There was no rent;

I am therefore quite clear that the County Court judge was right:

LUSH and ARCHIBALD, JJ., concurred.

Judgment for plaintiff.

Attorneys for plaintiff, *Wilkinson and Howlett*.

Attorneys for defendants, *Shaen, Roscoe, and Massey*.

Saturday, Jan. 25.

GUARDIANS OF THE HOLBORN UNION (apps.) v. THE VESTRY OF ST. LEONARDS, SHOREDITCH (reaps.)

Rating—Exemption—Workhouse—"Used and occupied for the purposes" of the poor of a particular parish—22 Geo. 3, c. 56—*Poor Law Amendment Act* (4 & 5 Will. 4, c. 76)—*Union Chargeability Act* (28 & 29 Vict. c. 79).

By 22 Geo. 3, c. 56, it was provided (in effect) that the workhouse of the parish of St. Luke should not be liable to be rated to any greater amount than it was at that time assessed at, "during such time and so long as the same shall be used and occupied" for the purposes of the poor of St. Luke's parish. In 1869 the parish of St. Luke was added to the Holborn Union, and since that time the workhouse has been, with others, for the common use of the union, and (under the powers conferred on the Poor Law Commissioners by s. 26 of 4 & 5 Will. 4, c. 74), the poor of the union have been so classified that many of the poor of St. Luke's parish are maintained in its own workhouse, whilst some of the poor of St. Luke's parish are maintained in the workhouses of other parishes of the union, and some of the poor of other parishes are maintained in the workhouse of St. Luke's parish. Notwithstanding this, and notwithstanding that the Union Chargeability Act 1865 (28 & 29 Vict. c. 79) charges all the cost of the relief of the poor upon the common fund of the union,

Held, that the workhouse of St. Luke's parish still continues to be "used and occupied" for the purposes of the poor of St. Luke's parish, within the meaning of the original Act, and that its exemption from a higher rateability, conferred by that Act, still continues.

THIS was an appeal by the guardians of the poor of the Holborn union against a rate made on the 23rd Jan. 1872 by the vestry of the parish of St. Leonard Shoreditch, acting in the execution of the "St. Leonard Shoreditch, Act 1858" (21 & 22 Vict. c. 132), whereby the workhouse and its appurtenances hereinafter mentioned are, by the description of "the building situate in the City-road and Shepherdess-walk, used as a workhouse for the reception of the poor of the Holborn Union, the infirmary offices, officers' residences, outbuildings, yards, and appurtenances belonging thereto (the vestry hall excepted)," rated to the poor-rate for the said parish of St. Leonard Shoreditch. Against this rate notice of appeal to the General Quarter Sessions of the peace for the said county of Middlesex was duly given by the said guardians of the Holborn Union to the said vestry, after which notice given the following case was, by consent of the said parties, and by order of Mellor, J., dated the 8th April 1872, stated for the opinion of the Court of Queen's Bench:

CASE.

1. The said workhouse hereinafter called the Workhouse of St. Luke, was, under the provisions

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of the statutes of 22 Geo. 3, c. 56 (public), and 48 Geo. 3, c. 97 (local and personal), built for the parish of St. Luke, in the county of Middlesex, on land situated in the said parish of St. Leonard, Shoreditch. By the said Act of 22 Geo. 3, c. 56, entitled, "An Act more effectually to enable the inhabitants of the parish of St. Luke in the county of Middlesex to purchase, hire, or erect a workhouse within or near the said parish;" it was among other things enacted by sect. 1 that the rector, churchwardens, and overseers of the poor for the time being, and the vestrymen of the said parish and their successors for ever, should be appointed trustees for the purposes of the said Act, and by sect. 11 that it should be lawful for them or any seven of them to purchase or hire lands, grounds, tenements, and hereditaments within the said parish of St. Luke, or within the said parish of St. Leonard, Shoreditch, and to take a conveyance thereof to them and their successors upon lease or for ever for the purposes in the said Act mentioned; and in the said sect. 2 it was further enacted that "the said lands, or grounds, tenements, or hereditaments, so to be leased or purchased from and immediately after the same, shall be conveyed or leased to the said rector and churchwardens and their successors, or any workhouse or other buildings which shall be erected or built thereon, for the reception and employment of the poor of the said parish of St. Luke, shall not be liable to or be charged with any greater parochial or parliamentary taxes, rates, or assessments (during such time, and so long as the same shall be used and occupied for those purposes), than to such amount as such lands, and grounds, tenements, or hereditaments, were assessed before the same became vested in the rector and churchwardens as aforesaid.

2. The aforesaid Act of 48 Geo. 3, c. 97 intituled, "An Act for making more effectual provision for maintaining, regulating, and employing the poor of the parish of St. Luke, in the county of Middlesex," repealed the said Act of 22 Geo. 3, c. 56, and by sects. 10, 11, and 12, provisions were made for the election of forty-eight vestrymen, to be with the rector and churchwardens and overseers of the poor of the said parish, for the time being guardians of the poor of the parish. Sect. 74 enacted "that all and every messuages or tenements, poor houses, workhouses, edifices, buildings, lands, hereditaments, moneys, and securities for moneys, rates, assessments, and arrears of rates and assessments, goods, chattels, and effects, which by virtue of the said recited Acts or one of them, the persons acting in the execution thereof, and their successors, or any other person or persons whomsoever, were entitled unto or possessed of, in trust for the parishioners or vestrymen of the said parish, or which were vested in such persons and their successors or other person or persons whomsoever, for and towards the relief, maintenance, use, and benefit of the poor of the said parish, or for any other purpose whatsoever, in which the said parish is interested, shall from and immediately after the passing thereof, be vested in, possessed by, paid, delivered, and belong to the guardians of the poor, acting in the execution of this Act, and their successors as fully, effectually, and beneficially, and in as large and ample a manner and form to all intents and purposes whatsoever, as they the said persons acting in execution of the said recited Acts or any of them, and their successors, or other

person or persons were entitled to, or possessed of such messuages or tenements, poorhouses, edifices, buildings, lands, hereditaments, moneys and securities for moneys, rates, assessments, and arrears of rates and assessments, goods, chattels, and effects, or as the same respectively were vested in such persons acting in execution of the said recited Acts, or any of them and their successors, or other person or persons, but subject nevertheless to be used, possessed, applied, and disposed of, only upon the trusts, and for the uses and purposes, and in the manner by and in this Act directed, declared, and appointed."

3. The effect of this section was to preserve the exemption from increased rating given by sect. 2 of 22 Geo. 3, c. 56, notwithstanding the repeal of that statute (*Reg. v. St. Leonard's, Shoreditch*, 13 Q. B. 964), and it is consequently admitted for the purposes of this case, that the said workhouse down to the year 1858 has not been liable to be rated on a greater rateable value than that of the land on which the workhouse stood at the time of its purchase under the provisions of the said statutes of 22 and 48 Geo. 3, as hereinbefore mentioned, that is to say, on the rateable value of 19l.

4. In 1836 part of the parish of St. Andrew, Holborn, the parish of St. George the Martyr, and the liberty of Saffron-hill, Hatton-garden, Elyrents, and Ely-place, were united under the name of the Holborn Union, for the administration of the poor laws. Afterwards part of the parish of St. Sepulchre, Furnival's-inn, and Staple-inn were added to the Union, and finally, in 1869, the parish of St. James's, Clerkenwell, and the said parish of St. Luke were, by order of the Poor Law Commissioners, also added to the said union.

5. Upon such union the said workhouse of St. Luke and the workhouses of the other parishes comprised in the union, became and still are for the common use of the union, and the Poor Law Commissioners have, under the powers of the Poor Law Amendment Act (4 & 5 Will. 4, c. 76, s. 26), issued rules, orders, and regulations for the classification of the poor of the united parishes, and for their reception, maintenance, and employment in the various workhouses of the united parishes, without reference to the particular parishes in the union to which the poor may belong.

6. By the Union Chargeability Act 1865 (28 & 29 Vict. 79), so much of the above-cited sect. 26 of 4 & 5 Will. 4, c. 76, as required that each of the parishes in a union should be separately chargeable with the expense of its own poor, whether relieved in or out of the workhouse of such union, was repealed, and all the cost of the relief to the poor is now charged upon the common fund of the union.

7. In addition to the workhouse of St. Luke, there are within the union two workhouses belonging to other of the united parishes and two supplemental workhouses belonging to the union, and though many of the poor of St. Luke's parish are maintained in its own workhouse, a portion are, according to the classification, distributed in the workhouses of the other parishes, and many of the poor of the parish of St. Andrew, Holborn, and St. James's, Clerkenwell, are maintained in the workhouse of St. Luke. The poor children from all the parts of the union are maintained and educated in schools belonging to the union at Mitcham, in Surrey.

8. By the St. Leonard Shoreditch Act 1858 (21 & 22 Vict. c. 132), s. 59, the said vestry of the parish of St. Leonard, Shoreditch, are required to make every rate under the said Act by an equal pound rate on the yearly value of all tenements in the parish rateable according to the general statutes and laws from time to time in force relating to the poor in England, and the rates are to be levied on the persons and in respect of the tenements so rateable, and to be assessed upon the net annual value of the tenements, according to those general statutes and laws. By sect. 60 of the said Act it is enacted as follows: "Subject to the provisions of this Act, the rates from time to time made by the vestry under this Act shall have the like incidents in all respects, and to all intents and purposes as the incidents, according to the general statutes and laws from time to time in force relating to the poor in England of the rates for the relief of the poor of any union or parish."

Since the workhouse of St. Luke's has been used for the common purposes of the union, viz., in 1870, an infirmary was built on part of the site of the old workhouse and added to the old buildings. The cost of this infirmary was defrayed out of the common fund of the union.

The guardians of the Holborn Union make out annual accounts for the purpose of ascertaining the sums which the different parishes within the union are bound to contribute, and in these accounts each parish is credited with the value of the workhouse belonging to such parish.

Such workhouses, except that of St. Luke's, are situate in the respective parishes to which they belong, and no deduction from the value is made in respect of the rates. The parish of St. Luke's is credited with the sum of 1020*l.* per annum as the value of its workhouse, an amount also arrived at without making any deduction in respect of the rates.

9. At the beginning of the present year, 1872, the said workhouse of Luke's, with the infirmary mentioned in the last paragraph, was by the overseers of St. Leonard's, Shoreditch, acting under the powers of the Valuation (Metropolis) Act 1869 (32 & 33 Vict. c. 67), inserted in the valuation list for their parish at the gross value of 1800*l.* per annum, and at the rateable value of 1200*l.*

10. To this valuation the guardians of the Holborn Union objected before the assessment committee of the said parish of St. Leonard's, and specified the correction they desired to be made in the valuation list, that is to say, that the said workhouse should be assessed at the rental of 19*l.* instead of 1800*l.* The assessment committee refused to make the alteration asked for, and the overseers of St. Leonard's parish, on the 23rd of Jan. made the rate now appealed against according to the rateable value appearing in the valuation list, that is to say, a rate of 60*l.*, being the sum of 1*s.* in the pound on the rateable value of 1200*l.*

11. It is contended by the respondents that the workhouse is now liable to be rated according to its rateable value within the meaning of the words "rateable value" given in sect. 4 of the Valuation (Metropolis) Act 1869.

12. The Acts of Parliament, rules of the Poor-Law Commissioners, and the rate herein mentioned, may be referred to on the argument of this case.

13. The appellants contend that the workhouse ought not now to be rated on a greater rateable

value than that of the land on which the workhouse stands at the time of its purchase under the provisions of the said statutes of 22 and 48 Geo. 3, that is to say on the rateable value of 19*l.*

14. If the court shall be of opinion that the said workhouse is liable to be rated at its gross and rateable values as defined by the Valuation (Metropolis) Act 1869, then the rate appealed against is to be confirmed.

15. But if the court shall be of opinion that the privilege of exemption from increased rating conferred and preserved by the said statutes of 22 and 48 Geo. 3 still remains, then the said rateable value of 1200*l.* is to be reduced to the said sum of 19*l.*, and the said rate of 60*l.* to the sum of 19*s.*; and it is agreed between the said parties that a judgment in conformity with the decision of the Court of Queen's Bench, and for such costs as the said court shall adjudge, may be entered on motion by either of the said parties at the sessions next or next but one after such decision shall be given.

The appellant's points were: First, that the exemption conferred upon the workhouse of St. Luke by the Acts 22 and 48 Geo. 3 still continues; secondly, that the exemption was not taken away by the St. Leonard Shoreditch Act 1858 (21 & 22 Vict. c. xxxiii.) any more than by the prior Act of 53 Geo. 3 c. xii., which was held by this court not to remove the exemption, in *R. v. St. Leonard's Shoreditch* (13 Q.B. 964) that the mode of using the workhouse under the rules of the Poor Law Commissioners does not affect the right to exemption, and that the right to exemption is properly claimed in the present proceedings, under sect. 54 of the Metropolis Valuation Act (32 & 33 Vict. c. 67).

H. Matthews, Q.C. (with him *Murphy*), urged the above points, and contended that the workhouse of St. Luke's parish was still "used and occupied" for the purposes of the poor of that parish, within the meaning of the Act originally granting the exemption. A number of the paupers of that parish in the workhouse, about a half of the entire inmates, are paupers of St. Luke's parish; and the fact that the cost of maintaining the entire poor of the union comes now from a common fund, by virtue of sect. 1 of the Union Chargeability Act 1865, which provides that "from and after the 25th March 1866, so much of the 26th section of the 4 & 5 Will. 4 c. 76, as requires that each of the parishes in a union formed under the authority of that Act shall be separately chargeable with and liable to defray the expense of its own poor, whether relieved in or out of the workhouse of such union, shall be repealed; and all the cost of the relief to the poor, and the expenses of the burial of the dead body of any poor person under the direction of the guardians or any of their officers duly authorised, in such union thenceforth incurred, and all charges thenceforth incurred by the governors of such union in respect of vaccination and registration fees and expenses, shall be charged upon the common fund thereof." [BLACKBURN, J.—The question really is whether the workhouse was to be exempt so long as it is used for poor law purposes, or only so long as it is used for the poor of the parish of St. Luke.] Whether the enactment means used "exclusively" for the use of the poor of St. Luke? What has occurred only amounts to an exchange of house room between two parishes. The evidence that rent is paid in respect of this use of the workhouse

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does not make any difference. [QUAIN, J., referred to *Reg. v. The Overseers of Fulbourn* (6 B. & S. 451), in which the Lunatic Asylum Act 1853, having granted similar exemption to land or buildings acquired for the purposes of the asylum "while used for such purposes," profits were derived from the use as a garden and a farm of fifty acres of the land, and the committee of visitors, acting under the powers contained in sects. 42 and 43 of 16 & 17 Vict. c. 97, admitted other pauper lunatics than those belonging to their county, and also private lunatics, thereby realising considerable profits, and it was held that the building and land were "used for the purposes of an asylum" within the meaning of the Act, and that the committee of visitors were not rateable in respect of the profits.] In that case Cockburn, C.J., referring to the argument of counsel, that the asylum was taken out of the stat., because the committee received foreign pauper lunatics, that is those not belonging to the county and borough for whose benefit it was originally intended, and also private patients, said: "I do not see that because the committee of visitors have exercised such a power, the asylum being more than sufficient for the habitation of the pauper lunatics properly belonging to them, it is less an asylum within sect. 35." In *Congreve v. The Overseers of Upton* (4 B. & S. 857), the committee of a lunatic asylum having under the same Act appropriated for their chaplain (who was not required to be resident in the asylum), a residence on ground purchased since the passing of the Act, but detached from the asylum buildings, and appropriated for their medical superintendent (who was required to be resident in the asylum) a house, reasonably fit for a person in his station of life, and his family, being on land purchased when the asylum was first erected, adjoining to it, but not being within the curtilage, and he discharged a portion of his official duties in that house, it was held that the chaplain was rateable to the relief of the poor like any other occupant, according to the Parochial Assessment Act, but that by force of sect. 35 the medical superintendent was liable to be rated only according to the value or rent of the land at the time it was purchased.

Castle (with him *Philbrick*) for the respondents. —The workhouse is no longer "used and occupied" for the poor of St. Luke's parish. There are no longer any poor of the parish of St. Luke; they have now become poor of the union to which the parish of St. Luke's has been joined. This change has been effected by the Union Chargeability Act 1865. The object of the Act is to take away altogether the separate corporate existence of the parish as to the maintenance of its poor, and to merge all in the union. [QUAIN, J.—Sect. 13 expressly provides that "except as herein provided, no alteration shall be made in respect of the settlement of poor persons in parishes."] The workhouse in order to maintain its title to exemption must be not only used, but also "occupied" for the purposes of the poor of St. Luke's parish. The cases cited are distinguishable on this ground, that they continued to be occupied as before; the taking in of additional pauper lunatics was only an accidental circumstance, the trustees continuing in unaltered occupation of the premises. But the Union Chargeability Act destroys the integrity of the parish, and substitutes for the parish another and entirely different body. Each parish was

formerly an entirely distinct body from every other. In *Reg. v. The Wallingford Union* (10 A. & El. 259), where the guardians of a union, formed under 4 & 5 Will. 4, c. 76, s. 26, comprehending the parishes of M. and others, built a workhouse in M. for the employment of the poor, it was held that the guardians were rateable in the parish of M. as occupiers of the workhouse, though it was built on land which, from the nature of the former occupation, had not previously been rated; and Lord Denman, in the course of his judgment, said: "One parish is not more a separate body from another than the parish of St. Mary-the-More in Wallingford is from the Union which annexes it to twenty-eight parishes." The occupation is therefore entirely changed in the present case, and the workhouse is no longer entitled to the old exemption. In *Reg. v. The Overseers of Fulbourn* (*ubi sup.*), the power to admit the pauper lunatics of another county was given by the same Act of Parliament which gave the exemption. In the present case it is not so.

BLACKBURN, J.—I think that in this case, when we understand what the point is, we must give judgment that the rate should be reduced to the lower amount. The whole question turns upon the construction of the old Act of 22 Geo. 3, c. 56, the only material one for present purposes, by sect. 11 of which it was enacted that it should be lawful for the persons mentioned in the first section, or any seven of them, to purchase or hire lands, grounds, tenements, and hereditaments within the said parish of St. Luke, or within the said parish of St. Leonard, Shoreditch, and to take a conveyance thereof to them and their successors, upon lease or for ever, for the purposes in the said Act mentioned; and that the said lands or grounds, tenements or hereditaments, so to be leased or purchased, from and immediately after the same shall be conveyed or leased to the said rector and churchwardens, and their successors, or any workhouse or other buildings which shall be erected or built thereon for the reception and employment of the poor of the said parish of St. Luke, shall not be liable or be charged with any greater parochial or parliamentary taxes, rates or assessments, during such time and so long as the same shall be used and occupied for these purposes, than to such amount as such lands and grounds, tenements, or hereditaments were assessed to before the same became vested in the rector and churchwardens as aforesaid." Taking that enactment as unaltered by subsequent legislation what does it mean? certain lands were then purchased, and were rated to the poor at an annual value of about 19l. As this land was taken by the parish who were about to improve it and enhance its rateable value, thereby increasing its rateability for the purpose of all taxes, the Legislature said that it should be exempted from liability to be rated to any greater amount than that at which it was assessed at the time, so long as it should be used and occupied for the purposes mentioned. Not a word is said about the necessity of its being continued to be occupied by the trustees, nor indeed as to how it was to continue to be occupied; but merely that, so long as it should continue to be used and occupied for the purposes stated in the Act, it should be rated at the lower rate. Subsequent legislation took these lands out of the hands of the trustees, and transferred them to a body of guardians, and the case cited from the 13 Q. B. (*l. v.*

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St. Leonard, Shoreditch) shows that that transfer made no difference, though the ownership in the lands was thereby changed. Then came further legislation, which united the parish with others in a union, and there is a provision in the statute forming the parishes into a union that compensation is to be made to the parishes in respect of their valuable property which should be used for the general purposes of the union. By virtue of this Act the guardians of the Holborn Union now occupy the workhouse, and the result is that it is used for the relief of the poor of St. Luke's parish, and the relief of the poor of the Union generally. In fact about half the paupers in the workhouse are poor of the parish of St. Luke. It is true that the paupers are now supported out of a general fund, but the poor of the parish of St. Luke are not, on that account, a whit less the poor of that parish, and the workhouse is still a workhouse used, though not exclusively used, for the poor of that parish. The only question is whether, on a fair construction of the meaning of the Act, the workhouse can be said to be used for the poor of St. Luke's parish, when only about one half the inmates belong to that parish. When we look at the object which the Legislature had in view in exempting workhouses generally from increased rateability, and look to the nature of the employment to which the workhouse is in the present case put, an employment closely analogous to that to which it was originally put, we must see that it is still employed for the purposes mentioned in the Act. My opinion is strengthened by the two cases cited, that of *Congreve v. The Overseers of Upton* (*ubi sup.*) and *Reg. v. The Overseers of Fulbourne* (*ubi sup.*). In the Act of Parliament in each of these cases the words used were similar to those used in the present Act, and the land had been taken for the county asylum. In *Congreve v. The Overseers of Upton* I delivered the judgment, and pointed out, what I still think is quite correct, that the question does not depend upon who is the occupier of the lands purchased for the purposes of the Act, but upon the purposes for which they are occupied; and we were of opinion in that case, that in the case of the chaplain, who did not occupy a residence within the asylum, his house was not used for the purposes of the asylum within the meaning of the Act, but that the house of the medical officer, who was obliged by the Act to be resident in the asylum, was so used for the purposes of the asylum. And in *Reg. v. The Overseers of Fulbourne*, we were of opinion that the fact of the Act containing a clause enabling the committee to admit the pauper lunatics of another county did not alter the matter. I do not think it makes much difference that it was a clause in the same Act, which gave in that case the power to admit the lunatics of another county, whereas the power to admit paupers of another parish is given by a different Act in the present case. In *Reg. v. The Overseers of Fulbourne* private patients were taken in as well as lunatics of another county, and it was held, notwithstanding, that the building and land were used for the purposes of an asylum within the meaning of the Act. Here we must take it as a fact that the workhouse is still used for the purposes of the poor of St. Luke's parish, though it is partly used also for the purposes of the poor of other parishes. The question of its exemption does not depend upon who is the occu-

pier. The appellants sufficiently use it for the purposes mentioned in the Act to entitle them to the benefit of the exemption originally given to them. The Legislature may take away that exemption if it pleases, but it is not to be got rid of by a side wind.

LUSH, J.—I am of the same opinion. The question is whether the workhouse is or is not used for the purpose of the poor of the parish of St. Luke. The Act of Parliament does not say that it should be exclusively used for that purpose, but that the exemption should continue so long as it should be "used and occupied" for the purposes mentioned. It is true that by the 48 Geo. 3, c. 97, appointing a new body instead of the former, it is enacted that all messuages, tenements, workhouses, &c., vested in the former body shall from and immediately after the passing of that Act "be vested in, possessed by, paid, delivered, and belong to the governors of the poor acting in the execution of this Act and their successors, &c., but subject nevertheless to be used, possessed, applied, and disposed of only upon the trusts and for the uses and purposes, and in the manner by and in this Act directed, declared, and appointed." It was held by this court many years ago that by the use of the word "only" this would not have the effect of abolishing the exemption. But it has been argued that by reason of the Union Chargeability Act the workhouse is no longer used for the purposes of the parish, but of the union, because that Act provides that henceforth "all the costs of the relief to the poor and the expenses of the burial of the dead body of any poor person under the direction of the guardians or any of their officers duly authorised, in such union thenceforth incurred, and all charges thenceforth incurred by the guardians of such union in respect of vaccination and registration fees and expenses, shall be charged upon the common fund thereof;" and because that common fund is contributed to by the various parishes not in proportion to the number of the paupers in each parish. But that does not make the paupers of the different parishes paupers of the union. It has no effect on the statute granting exemption to the workhouse of St. Luke's parish, for it does not make the poor of that parish less paupers of St. Luke's parish than before. Then we come to the next question—whether the workhouse is used "for the reception and employment of the poor" of St. Luke's parish, now that it has become property used in common with other parishes by the union, sect. 26 of the Poor Law Amendment Act (4 & 5 Will. 4, c. 76), providing that "it shall be lawful for the commissioners, by order under their hands and seal, to declare so many parishes as they may think fit to be united for the administration of the laws for the relief of the poor, and such parishes shall thereupon be deemed a union for such purpose, and thereupon the workhouse or workhouses of such parishes shall be for their common use." The workhouse is now not used exclusively for the poor of St. Luke's parish, but also for the use of the poor of other parishes of the union. But the original Act does not say that the workhouse must be used exclusively for the poor of St. Luke's parish; and I cannot help taking notice of the fact that at the time that Act was passed it was competent to the overseers to take in poor of other parishes. If they had done so, then, according to the decision in *Reg. v. The Overseers of Fulbourne* (*ubi sup.*) on the Lunacy

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Acts, the workhouse would still continue to be used for the poor of St. Luke's parish. Are they in a different position because they are now bound to take in the poor of other parishes? I think not. The workhouse being still used for the poor of that parish, though used also for the poor of other parishes, I think the reason for the original presumption still remains, and that nothing has been done to alter the position of the workhouse in this respect.

QUAIN, J.—I entirely concur in the opinions expressed by the other members of the court. The question in the case is reduced to a very simple one. The exemption having been held to continue in existence after the Act of 48 Geo. 3, c. 97, the question is whether it has been got rid of by reason of the parish of St. Luke's being united with others into one union. The words giving the exemption in the original Act are clear enough. It is to continue so long as the workhouse shall be "used and occupied" for the purposes mentioned in the Act. It does not contain the word "exclusively" like the Act exempting the land and buildings occupied by scientific or literary societies (6 & 7 Vict. c. 36), but uses the same expression as is used in the Act exempting lunatic asylums (16 & 17 Vict. c. 97). It is admitted that up to the time the union was formed, the exemption existed, and when the parish was added to the union, it might have been expected that some provision would be made relating to the subject. No such provision, however, was made, and we must, therefore, see what the effect of the Poor Law Amendment Act (4 & 5 Will. 4, c. 76) is upon the point. What this Act does is to collect various parishes into one for the purpose of administering the funds of all, power being given to the Poor Law Commissioners to make a classification of the workhouses amongst the parishes, which they have done, in their classification placing some of the paupers of one parish in the workhouse situated in another. This they have done by virtue of the power conferred on them by the Act of Parliament. Stopping here for a moment, I cannot see how such a classification alters the manner in which the workhouse should be assessed. Then, does the Union Chargeability Act (28 & 29 Vict. c. 79) make a difference? It provides (sect. 1) that "from and after the 25th March 1866, so much of the 26th section of the 4 & 5 Will. 4, c. 76, as requires that each of the parishes in a union formed under the authority of that Act shall be separately chargeable with and liable to defray the expense of its own poor, whether relieved in or out of the workhouse of such union, shall be repealed; and all the cost of the relief of the poor, &c., in such union thenceforth incurred, and all charges thenceforth incurred by the guardians of such union in respect of vaccination, and registration fees and expenses, shall be charged upon the common fund thereof." Then there is a section (13) which expressly provides that "except as herein provided, no alteration shall be made in respect of the settlement of poor persons in parishes," a section which expressly preserves all the other rights of parishes. The only difference made by the Act is that instead of each parish paying a sum for its own poor, it pays a sum in respect of the rateable property in the parish; and that seems to me to make no difference as to the question in this case. It does not destroy the exemption originally granted to the workhouse. That workhouse is

still used for the purposes of the poor of the parish of St. Luke, though other paupers are also admitted to it under the powers of the Act of Parliament. It seems to me that the decision on the Lunacy Act (*Reg. v. The Overseers of Fulbourne*) is a decision in point; and that it makes no difference that the provision enabling the committee to admit foreign lunatics was contained in the same Act which gave the exemption, whilst that is not so in the present case, power being only given by a subsequent Act to the Poor Law Commissioners to classify the paupers of the union. For these reasons I concur in the judgment pronounced by my learned brothers.

ARCHIBALD, J.—I am of the same opinion, and I concur generally in the grounds for their judgment expressed by the other members of the court. I will only add that the words in the original Act "during such time and so long as the same shall be used and occupied for those purposes" must be taken to mean in substance, not so long as they shall be continued to be occupied, as a private concern might be, but so long as they shall continue to be occupied for those purposes, according to the law in force relating to the relief of the poor. Otherwise it might be contended that the slightest alteration of the law relating to the relief of the poor would have the effect of doing away with the exemption, which could not be the case. I think the Union Chargeability Act makes no alteration in this respect, and that the workhouse is still, in substance, used for the relief of the poor of the parish of St. Luke. I think the case is within the authority of *Reg. v. The Overseers of Fulbourne*.

Judgment for the appellants.

Attorneys for respondents, Mills and Lockyer.

COURT OF COMMON PLEAS.

Reported by H. F. POOLEY and JOHN ROSE, Esqrs.,
Barristers-at-Law.

Monday, Jan. 13, 1873.

PICKERING v. STARTIN.

35 & 36 Vict. c. 33 (*Ballot Act 1872*), ss. 2, 13, 28, B. 27, 41—*Municipal election—Voting papers—Counterfoils—Petition—Amendment of.*

A petition against a municipal election having been filed on the grounds of treating, bribery, and intimidation, the petitioner found on inspection (1) that the returning officer had neglected to insert in the counterfoils of twenty-nine of the voting papers used at the election the number of the voters appearing on the burgess roll; (2) that certain "tendered" ballot papers were used as ballot papers, and were put into the ballot box and afterwards counted in favour of the respondent. Thereupon the petitioner desired to amend his petition by adding two paragraphs alleging the above facts in contraventions of the Ballot Act 1872, rendering the election void. On motion for a rule enabling him to make such amendments, and cause shown, Held, that as the questions intended to be raised by the paragraphs were of importance, and might seriously affect the election, the amendments should be allowed.

MOTION for a rule calling on the respondent to show cause why a petition filed on the part of John Pickering, under the Corrupt Practices Municipal Election Act 1872, against the return of Thomas Startin, as town councillor of the St.

Martin's ward in the borough of Birmingham, should not be amended by adding certain paragraphs.

It appeared from affidavits used in support of the motion that at an election of town councillor for the borough aforesaid the respondents were rival candidates, and the former, obtaining 1200 votes as against 1197 given for the latter, was returned by a majority of three. About 1800 electors abstained from the poll. On the 23rd Nov. 1872 a petition was filed by the unsuccessful candidate, alleging the election to be void on the ground of treating, bribery, intimidation, &c. On the 5th Dec. cross motions were made by the parties under the Ballot Act 1872 to the judge of the Birmingham County Court for an order to be directed to the town clerk for the production and inspection of the documents relating to the election. The judge, after taking time to satisfy himself as to the expediency of making the order (see *LAW TIMES*, vol. liv., p. 117), granted inspection of the ballot papers and rejected ballot papers only, but directed the sealed packet of counterfoils to be opened by the town clerk in the presence of both parties. On inspection it was found that 29 of the counterfoils belonging to the voting papers used at the election had on them no number inserted from the burgess list, and also that "tendered" ballot papers had been placed in the box instead of being separately counted. The petitioner therefore now sought to add to his petition the two allegations following, viz.:—First, that the presiding officer at the No. 5 polling station, appointed for the said election neglected to insert in the counterfoils of twenty-nine of the voting papers used at the said election the number of the voters appearing on the burgess roll, according to the directions of the Ballot Act 1872, and the said election of the said Thomas Startin was null and void. Secondly, that certain tendered ballot papers were used by the presiding officer at the polling station No. 1, and that the said tendered ballots were used at the said election as ballot papers, and were put into the ballot box contrary to the said Ballot Act 1872, (a) and were afterwards

counted by the returning officer in favour of the said Thomas Startin, and the said votes so given were null and void and ought to be struck off the poll, and the said election of the said Thomas Startin was null and void.

Tindal Atkinson, in support of the motion.—The Ballot Act 1872, by sect. 2 enacts imperatively that each ballot paper shall have attached a counterfoil, and that, "at the time of voting the ballot paper shall be marked on both sides with an official mark, and delivered to the voter . . . and the number of such voters, or the register of voters, shall be marked on the counterfoil. . . ." True, the section does not proceed to say the votes when there is no such number on the counterfoil shall not be counted as in the three other cases specified by the clause; but, nevertheless, it is evident that the Legislature directed this register number to be put on the counterfoil for the purposes of scrutiny, for otherwise there would be no means of ascertaining whether personation or bribery had taken place. Therefore the number is a material requirement, and the absence of it avoids the election without any counting whatever, as the voter cannot be identified. [Brett, J.—The provision seems but directory to the returning officer; would one solitary counterfoil unnumbered vitiate the election?] It would. By rule 41

candidate to whom the majority of votes have been given, and return their names to the Clerk of the Crown in Chancery. The decision of the returning officer as to any question arising in respect of any ballot paper shall be final, subject to reversal on petition questioning the election or return. . . ."

Sect. 13. "No election shall be declared invalid by reason of a non-compliance with the rules contained in the first schedule to this Act, or any mistake in the use of the forms in the second schedule to this Act, if it appears to the tribunal having cognisance of the question that the election was conducted in accordance with the principles laid down in the body of this Act, and that such non-compliance or mistake did not affect the result of the election."

Sect. 28. "The schedules to this Act, and the notes thereto and directions therein, shall be construed and have effect as part of this Act."

First schedule, Part I. Rules.

Rule 27. "If a person, representing himself to be a particular elector named on the register, applies for a ballot paper after another person has voted as such elector, the applicant shall, upon duly answering the questions and taking the oath permitted by law to be asked of and to be administered to voters at the time of polling, be entitled to mark a ballot paper in the same manner as any other voter, but the ballot paper (in this Act called a tendered ballot paper) shall be of a colour differing from other ballot papers, and instead of being put into the ballot box, shall be given to the presiding officer, and endorsed by him with the name of the voter, and his number in the register of voters, and set aside in a separate packet, and shall not be counted by the returning officer. And the name of the voter and his number on the register shall be entered on a list, in this Act called the tendered voters list."

Rule 41. "No person shall, except by order of the House of Commons, or any tribunal having cognisance of petitions complaining of undue returns or undue elections, open the sealed packet of counterfoils after the same has been once sealed up, or be allowed to inspect any counted ballot papers in the custody of the Clerk of the Crown in Chancery. Such order may be made subject to such conditions as to persons, time, place, and mode of opening or inspection as the House or tribunal making the order may think expedient; provided that, on making and carrying into effect any such order, care shall be taken that the mode in which any particular elector has voted shall not be discovered until he has been proved to have voted, and his vote has been declared by a competent court to be invalid."

(a) 35 & 36 Vict. c. 33 (The Ballot Act 1872), s. 2, enacts that, "In the case of a poll at an election the votes shall be given by ballot. The ballot of each voter shall consist of a paper (in this Act called a ballot paper) showing the names and description of the candidates. Each ballot paper shall have a number printed on the back, and shall have attached a counterfoil with the same number printed on the face. At the time of voting the ballot paper shall be marked on both sides with an official mark, and delivered to the voter within the polling station, and the number of such voter on the register of voters shall be marked on the counterfoil, and the voter having secretly marked his vote on the paper, and folded it up so as to conceal his vote, shall place it in a closed box in the presence of the officer presiding at the polling station (in this Act called 'the presiding officer') after having shown to him the official mark at the back."

"Any ballot paper which has not on its back the official mark, or on which votes are given to more candidates than the voter is entitled to vote for, or on which anything, except the said number on the back, is written or marked by which the voter can be identified, shall be void and not counted."

"After the close of the poll the ballot boxes shall be sealed up, so as to prevent the introduction of additional ballot papers, and shall be taken charge of by the returning officer, and that officer shall, in the presence of such agents, if any, of the candidates as may be in attendance, open the ballot boxes, and ascertain the result of the poll by counting the votes given to each candidate, and shall forthwith declare to be elected the candidates or

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[C. P.]

"care shall be taken that the mode in which any particular elector has voted shall not be discovered until he has been proved to have voted, and his vote has been declared by a competent court to be invalid;" therefore, if we had a register number on the counterfoil we could ascertain whether the voter had voted, and, if so, could obtain a scrutiny which the rule debars us from until the voter is found out. The respondent relies on sect. 13, which enacts that "no election shall be declared invalid by reason of non-compliance with the rules;" but that provision is limited to the rules, and expressly guards against contravention of the "principles laid down in the body of the Act." [KEATING, J.—Assume a number to have been on the counterfoil, all it would show would be that the voting paper had been used by a person representing himself to be A. B. on the register.] Then, however, we could go to A. B., and ascertain if he had voted or been personated. [BRETT, J.—Suppose it could have been ascertained that all the twenty-nine persons had voted, and voted for the respondent, and were entitled to vote, would the election be void?] Yes, for the omission of the register number vitiates the whole proceedings. [BOVILL, C.J.—Sects. 28 & 13 tend to show that the object of the statute was to prevent technicalities avoiding the election.] But these are not mere formalities; they are essential requisites. Secondly. The other amendment is under rule 27 of schedule 1. On the inspection it was found that the tendered papers had not been put into a separate parcel, but had been placed in the ballot box and counted, and must, therefore, be struck out. Unless we have an allegation in the petition we cannot raise the point. The tendered vote is not to be counted. [BRETT, J.—Not on a scrutiny! if so, why is it tendered? Suppose a case of personation, and that the returning officer has put the voting paper, and also one tendered by the right person into the box, which is to be struck off?] Both. [BRETT, J.—But the tendered vote would be good on scrutiny. Next, suppose the officer has handed out a "tendered" paper, and the right person has voted therewith?] That would be good on scrutiny, but, *prima facie*, a case of suspicion, casting on the respondent the onus of proof. We are entitled to the amendments in order to raise the question.

Reginald Owen, for the respondent, showed cause in the first instance.—The application is too late; but, if not—first, there can be no such amendments; secondly, the court will not allow an amendment if merely technical; thirdly, the court has no power to make these amendments. The Corrupt Practices (Municipal Elections) Act 1872 (35 & 36 Vict. c. 60), sect. 12, enacts that Municipal Elections may be questioned by petition, and the present petition can only be upon the last ground stated in that section, viz., that the respondent "was not duly elected by a majority of lawful votes." Sect. 13 of 35 & 36 Vict. c. 31, and also Rule 57 of Michaelmas Term last (L. Rep. W. N. 7 Dec. 1872), directing that "no proceeding under Corrupt Practices at Municipal Elections Act 1872 shall be defeated by any formal objections" are to the same effect. [*Per curiam*—What is the meaning of "lawful votes" in sect. 12 of the Corrupt Practices Act?] Perhaps its exact meaning would be difficult to define, but it does not tend to make a vote unlawful for a mere technicality. This omitting to mark the counterfoils as pre-

scribed in the latter part of sect. 2 is but an irregularity, and the clause does not declare that the votes shall not be counted when there is such omission, whereas it does enact that the votes shall be void if the provisions which are in the earlier part of the section are disregarded. So in Rule 36 the four matters invalidating voting papers are enumerated, and want of mark on the counterfoil is not included. [BOVILL, C.J.—Rule 36 only refers to matters which the officer is able to count, and Rule 37 says that "He shall not open the sealed packet of tendered ballot papers," &c.] The Legislature evidently did not deem the want of a mark on the counterfoil of such importance as to require a provision that it should invalidate the proceedings. Certain matters in sect. 13 are conditions precedent, others are merely directory. It rests on the petitioner to show that the irregularities he complains of have affected the result of the election. There is nowhere in the Act any express declaration that they shall invalidate the election. [BRETT, J.—The first part of sect. 13 is directly in your favour, and is it to be said that the latter part does away with the effect of the former?] No; and it can never have been intended that a petitioner going before the election tribunal, and suggesting some slight irregularity should cast the whole burden of proof on the respondent, or at least put him to the trouble and expense of disputing the point. [BOVILL, C.J.—He would however get costs.] Moreover there are provisions for the punishment of the returning officer for any real misfeasance. The "tendered" papers were used in mere mistake as ordinary ballot papers, and save that the colour differed, there was no distinction between them. [BOVILL, C.J.—That was only an irregularity.]

BOVILL, C.J.—The question submitted to the court by this application is whether the petitioner should be allowed to bring before the barrister appointed to try the election petition these two matters which have been now discussed. If we could see our way clearly to say that the amendments asked for raise a question which would have no influence on the result of the petition, it would, we think, be the duty of the court to refuse them. But it appears to me that the questions intended to be raised are of grave and serious importance, requiring the facts of the election to be clearly ascertained. It may be that in the result no such question may arise: on the other hand it may be that very serious points may present themselves. The provisions of the rule and the 13th section do not intend that any mere formal and technical defect should invalidate the decision, unless it should affect the result thereof. But it is impossible for us, upon these affidavits, to go into the question. There is, however, enough to satisfy me that there are *bona fide* points to be raised on matters deserving serious investigation, and, under these circumstances, I think the amendments should be allowed. The objection that the application is too late is disposed of by the facts and by the course the County Court judge adopted, which certainly seems a good practice, in the absence of any reason shown to the contrary, viz., to refuse inspection of the votes until the petition is filed. The order for inspection was not made until the 25th Nov.; the inspection did not take place until the 14th Dec.; the petitioner comes here in sufficient time; and I think the amendment must be allowed.

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KEATING, J.—I am of the same opinion, and for the reasons given by the Lord Chief Justice.

BRETT, J.—I am of the same opinion, that questions are raised which the parties are entitled to raise, and therefore the amendments ought to be allowed. *Rule absolute.*

B. Brown applied for the costs of the amendment.

BOVILL, C.J.—Costs of both sides to form costs of the petition, and to be in the discretion of the barrister trying the same.

Attorney for the petitioner, *Young, Maples, and Co.*

Attorney for the respondent, *Fearon and Co.*

Thursday, Jan. 30, 1873.

BURSLEM v. ATTENBOROUGH.

39 & 40 Geo. 3. c. 99 (*Pawnbrokers' Act*), ss. 15, 16
—Loss of pawn ticket—Notice to pawnbroker—
Statutory declaration of loss.

The plaintiff pledged three rings, inter alia, with the defendant, a pawnbroker, and afterwards, in delivering a number of pawn tickets, as a security, to B., unwittingly handed over those which related to the rings. B. absconded. The plaintiff became aware of his mistake, at once gave the defendant notice not to part with the property pawned, and, after delaying some time, obtained from him a statutory form of declaration as to the loss of the tickets. This document the plaintiff promptly executed before a magistrate, in pursuance of 39 & 40 Geo. 3, c. 99, s. 16, and, having done so, showed the same to the defendant, but did not leave it with the latter.

The rings having been subsequently delivered to a person presenting the original pawn tickets, the plaintiff brought trover against the defendant.

Held (hesitante Honyman, J.), that the defendant was not protected by ss. 15, 16, 39 of 39 & 40 Geo. 3, c. 99 (a), but was liable for the conversion of the rings.

(a) The material part of these sections is as follows:

Sect. 15. "In order to prevent any inconvenience to persons carrying on the trade and business of a pawnbroker from several persons claiming a property in the same goods, be it enacted that any person who shall at any time produce any such note (i.e., the pawn ticket) to the person with whom the goods therein specified were pledged, as the owner thereof, or as authorised by the owner thereof to redeem the same, and require a delivery of the goods mentioned therein to him, such person shall be deemed to be . . . the real owner, and the . . . pawnbroker shall be and is hereby directed and required . . . to deliver such goods to the person who shall so produce the said note to him, and shall be, and is hereby indemnified for so doing, unless he shall have had previous notice from the real owner not to deliver the same to the person producing such note, or unless notice shall have been given to him that the goods have been or are suspected to have been fraudulently or feloniously taken or obtained, and unless the real owner proceeds in manner hereinafter provided and directed for the redeeming of goods pledged, where such note has been lost, mislaid, destroyed, or fraudulently obtained from the owner."

Sect. 16. "In case any pawnbroker shall have had previous notice as aforesaid, or in case any such note shall be lost, mislaid, destroyed, or fraudulently obtained from the owner, and the goods mentioned therein shall remain unredeemed, then the pawnbroker . . . shall at the request of any person who shall represent himself as the owner, deliver to such person a copy of the note so lost, &c., with the form of an affidavit of the particular circum-

This was an action against a pawnbroker for converting to his own use three diamond rings pawned with him by the plaintiff. The defendant pleaded first, not guilty; secondly, not guilty by statute 39 & 40 Geo. 3, c. 99, s. 32; thirdly, not possessed; and, fourthly, leave and licence.

The action was tried before Grove, J., at the Middlesex sittings in Hilary Term 1872, when the following facts appeared in evidence:

The plaintiff, having several other articles in pledge with the defendant at the time, pawned the three rings in January 1870, receiving pawn tickets for them in the usual course. In the following March he handed over these tickets by mistake, together with a large number of others, in respect of articles which the defendant had the statutory right to sell, to one Braithwaite, who was indebted to him in the sum of 100*l.*, desiring Braithwaite to pay the interest, and to re-pledge in order to prevent a sale. In June the plaintiff discovered that Braithwaite had absconded. He immediately called at defendant's office, and acquainting his head assistant with the facts, gave him notice not to part with any of his property if the tickets should be presented. In October he called to make inquiries, and learnt that some tickets had been presented, and pledges given up to the party presenting them. At the suggestion of the defendant's assistant, the plaintiff then made declarations before a magistrate of the loss of seven tickets, the tickets in respect of the three rings being among the number. Returning with the declarations duly executed, he requested copies of the seven tickets, but not being able to pay interest upon all the pledges, could only obtain copies of three tickets, and took away with him the declarations in respect of the other four, among which were the declarations in respect of the three rings. In Feb. 1871, the original tickets in respect of the rings were presented, and the rings were delivered to the party presenting them, and thus became lost to the plaintiff. Both before and after Feb. 1871, the defendant's assistant had assured the plaintiff that all the articles in respect of which declarations had been made were quite safe.

The jury having found specially, in answer to questions put to them by the learned judge, that the tickets were handed over to Braithwaite in the manner stated by the plaintiff, that it was no fault of the plaintiff that Braithwaite absconded, that the plaintiff gave notice to the defendant that he had made the declarations and showed the declarations to the defendant, and that the value of the rings

stances attending the case, printed or written, or in part written and in part printed, on the said copy . . . and the person having so obtained such copy of the note and form of affidavit shall thereupon prove his property in or right to such goods to the satisfaction of some justice of the peace . . . and shall also verify on oath before the said justice the truth of the particular circumstances attending the case . . . the caption of such oath to be authenticated by the handwriting thereto of the justice, who is hereby required so to authenticate the same, whereupon the pawnbroker shall suffer the person proving such property to the satisfaction of such justice, and making such affidavit as aforesaid, on leaving such copy of the said note and the said affidavit with the said pawnbroker to redeem the goods."

Sect. 32. "If any person shall at any time be sued for anything by him done in pursuance of this Act, or of any clause, matter, or thing therein contained, such person may plead the general issue, and give the special matter in evidence for his defence. . . ."

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[BAIL.

was 33L, a verdict passed for the plaintiff for that amount, leave being reserved to move to enter a verdict for the defendant, or a nonsuit on the ground that upon the facts proved the plaintiff was not entitled to recover upon the true construction of the 15th and 16th sections of 39 & 40 Geo. 3, c. 99. A rule having been obtained accordingly,

B. F. Williams and *R. T. Reid*, for the plaintiff, now showed cause.—The pawn tickets were lost or mislaid within the meaning of sect. 16, the intention of which is to cover all the circumstances under which the owner can be deprived of possession. The defendant's assistant having actually seen the declaration, was clearly affected with "notice" of the loss, in which case the statutory indemnity upon delivery to the holder of the ticket, does not take effect.

Giffard, Q.C. and *F. Turner*, for the defendant, supported the rule.—These tickets were neither lost nor mislaid, they were actually handed over to Braithwaite. The Act provides for loss, either permanent or temporary, and for nothing else. [BOVILL, C.J.—Say, rather, the Act provides for inability of the owner to recover, from whatever cause.] The facts are important. The plaintiff trusted Braithwaite, and gave him a complete right to deal with the tickets. The intention of the Act is that the owner should at once protect the pawnbroker, and redeem the goods, repledging if he pleases. Otherwise the pawnbroker is exposed to an indefinite risk. "Whereupon," in sect. 16, has the same meaning as "thereupon," which has been held to mean within a reasonable time: (*Vaughan v. Watt*, 6 M. & W. 492).

BOVILL, C.J.—The provisions of sections 15 and 16 of the Pawnbrokers' Act were passed for the protection of the pawnbroker from different claimants in respect of the same goods, and give him an express indemnity for delivering the goods to the person producing the pawn ticket, unless he has had previous notice from the real owner not to do so. We must assume in this case that such previous notice was given. The words of section 15 clearly contemplate, not actual redemption, which would be very hard upon poor people, but taking particular proceedings "in manner provided" by section 16. We must, therefore, look at section 16, and see whether it applies to the case, and has been complied with. Now, it has been argued that the ticket was not "lost" or "mislaid," but I think it was clearly lost, for the plaintiff had given it to Braithwaite unwittingly, and he did not know where to find it. We have then a "loss" and a notice of the loss to the pawnbroker. There is then a right to obtain the copy from the pawnbroker. This the plaintiff did. The person having obtained such copy is "thereupon" to go before a magistrate, and the plaintiff did thereupon go before the magistrate. There is a decision (*Vaughan v. Watt*, referred to by Mr. Turner) that this should be done at once, and that may very well be. Then for the protection of the pawnbroker, the magistrate is to authenticate the declaration, "whereupon" the pawnbroker is to "suffer" the party pawning to redeem the goods. Now this must be construed with reference to the rights and duties of the parties, and by the other clauses the party pawning has a right to redeem within the year, so that to compel him to redeem before the lapse of the year would be inconsistent.

I may add that the Act of last session (a) has removed the difficulty, which will not arise again.

KEATING, J.—I am of the same opinion. There was a clear case of "loss," the plaintiff did all that he was bound to do, and there is nothing in the Act requiring him to give up the declaration to the pawnbroker at once. "Thereupon" means promptly, as was decided in the case cited, but "whereupon" in this context does not.

GROVE, J.—I do not think documents are the less mislaid because they have been given to another person, than they are if they are put into a drawer and cannot be found. It is unnecessary to decide here whether the pawnbroker might not have been entitled to sell, or what might have been the result had the plaintiff done nothing besides giving notice.

HONYMAN, J.—I have come to the same conclusion, but not without hesitation. It would have been a great hardship on the pawnbroker, if the plaintiff, after obtaining the declaration, had not gone before the magistrate.

Rule discharged.

Attorney for the plaintiff, *Ashwin*.

Attorney for the defendant, *Albert Neate*.

BAIL COURT.

Reported by R. A. KINGLAKE, Esq., Barrister-at-Law.

Thursday, Jan. 30, 1873.

REG. v. COUSINS.

Quo warranto—What is a grievance.—*Illegality of election.*

Before the court will grant a quo warranto information, it requires to be satisfied that there is a substantial grievance.

Merely showing that the mode of election is one likely to cause a grievance and an injustice is not sufficient.

The court sits only to decide points in dispute and will not give advice.

RULE calling upon the defendant to show cause why an information in the nature of a *quo warranto* should not be exhibited against him to show by what authority he claims to exercise the office of guardian of the poor of the town of Plymouth, on the ground that the mode of taking the votes by the process called "scratching" at the election held on the 14th of May, 1872, when the defendant was elected a guardian, was unreasonable and bad, and rendered the election void. By the affidavit of the relator it appeared that by a public Act passed in the sixth year of the reign of Queen Anne a corporation was created in the borough of Plymouth, consisting of the Mayor and the Recorder for the time being, six of the masters or magistrates, six of the Common Council, and twenty persons to be chosen out of the parish of St. Andrew, and eighteen out of the parish of Charles, in the same borough, to be named guardians of the poor of Plymouth and to be a body politic and corporate in law, with capacity to

(a) The Pawnbrokers' Act 1872 (35 & 36 Vict. c. 93), which repeals 39 & 40 Geo. 3, c. 99, consolidates the law of pawnbrokers, and came into effect on the 1st Jan. 1873. By its 29th section this Act enacts that the declaration to be made of the loss of a pawn ticket "shall not be effectual for that purpose, unless it is duly made and delivered back to the pawnbroker, not later than the third day after the day on which the form is delivered to the applicant by the pawnbroker."

[BAIL.]

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[BAIL.]

sue and be sued in that name, to hold lands, to use a common seal, and to make rates for the relief of the poor and otherwise to act in the borough. By the same Act the twenty persons for the parish of St. Andrew's, and the eighteen for the parish of Charles, are to be chosen by the major number of votes of the inhabitants of the two parishes present at the time of the election, who are then, or were the year before, rated at sixpence by the month or more to the relief of the poor of such parish where they dwell, and the elections were to take place on the second Tuesday of May yearly. The relator was an inhabitant of the parish of Charles, and was for the year 1872 rated at more than 6d. by the month to the relief of the poor, and was qualified to vote at the election.

For many years past the elections in the parishes have been made by a process called "scratching."

On the 14th May, 1872, Andrew Harris having been elected chairman, he put it to the meeting in what way the voting should proceed, and a show of hands having been taken, the meeting resolved in favour of "scratching." Thereupon the several candidates were proposed and seconded by two electors, and a show of hands taken for each candidate, after which a poll was demanded. The names of all the candidates were then written, each on separate pieces of paper, which were thrown together into a hat, and were thence drawn one by one by the chairman and read out, while an assistant wrote them down in a list on a sheet of paper in the order in which they were drawn from the hat. All the voters present then left the vestry, and as well as other voters who arrived afterwards were re-admitted one by one. Each voter on entering was allowed to peruse the list of candidates once, and to make a scratch or mark with a pen against the name of any candidate for whom he wished to vote. When the voter had marked in this way as many names as there were persons to be elected, he retired. If he reached the bottom of the list without marking as many names as there were persons to be elected, he was not allowed to go back over the list and mark the name of a candidate for whom he wished to vote, but whose name he had passed over. The names of the voters were not taken down in any case, nor was there any means of identifying a vote upon a scrutiny, neither was any provision made for voting by electors who might be unable to read. The scratching closes as soon as a quarter of an hour elapses without any elector presenting himself to vote, and in any case at 4 p. m. On the present occasion several ratepayers protested against the scratching system, and did not vote at all.

The defendant was declared to have obtained the largest number of votes, and is now acting as one of the guardians of the poor for the borough of Plymouth. The affidavit further stated that there were upwards of 2000 ratepayers qualified as electors under the Act of Queen Anne in each of the parishes, but only 132 electors voted for the defendant, who was at the head of the poll, and only from 200 to 300 are in the habit of voting at the elections, in consequence of the unsatisfactory method of taking the votes by the system of scratching.

Kingdon, Q.C., J. O. Griffiths with him, showed cause against the rule.—This is an annual office, and there will be another election in May. The rule was

not moved until Michaelmas term. In *Reg. v. Hodson*, referred to in *R. v. Greene* (4 Q. B. 648, note), the court stated that although they would not invariably exclude an application because it was late, yet they must in such a case require good reasons for the delay. The objections to the mode of election are that there cannot be a scrutiny, but no scrutiny was ever demanded; and, secondly, that a person having gone down the list cannot go back to vote for a candidate he has passed over, but the affidavits do not show that such a case occurred. [LUSH, J.—In point of fact, the relator wants the court to lay down an abstract proposition as to the mode in which future elections should be conducted.] There is no grievance here. If no injustice is done, the court will not interfere, and the relator must clearly show that some one was prevented from voting. An irregularity I apprehend is not even always sufficient cause for the court to interfere.

Reg. v. The Churchwardens and Inhabitants of the parish of Gooles, 4 L. T. Rep. N. S. 322;

Reg. v. Rector and Churchwardens of Parish of St. Mary, Lambeth, 8 Ad. & El. 356.

He also referred to

Reg. v. The Vicar and Churchwardens of Hammer-smith, 3 B. & S. 504 (note).

H. T. Cole (with whom was Pinder), in support of the rule.—The defendant must show that he was elected in a proper manner. The affidavit does show a grievance, because the voter was not allowed to go back up the list, and if he skips too many names at first he cannot give all his votes. In *R. v. Bumstead* (2 B. & Adol. 699) a bye-law was passed for the future elections of the officers of the Patten Makers Company; and it was held to be bad, because the election was required to be in a particular mode not prescribed or sanctioned by the charter. The "scratching" mode of election is neither prescribed by common law, or by statute. [BLACKBURN, J.—You do not assert that anyone else should be elected; you simply say the election is bad.] From the mode in which the election is carried on, it is impossible to show any particular candidate is injured, but several voters withdrew and refused to vote at all. If they had voted the elections would probably have been different.

BLACKBURN, J.—There is no doubt that we must discharge this rule with costs. A proceeding in the nature of a *quo warranto* information at the instance of the Attorney-General was the means formerly used to turn a person out of his office. But the power having been much abused by the Queen's coroner and attorney, it has recently been considered that the more proper mode is to proceed by obtaining the leave of the court to file the information. In the case of a *quo warranto*, where the object of the information is to turn a person out of office, the court satisfies itself as to the fact whether or not there has been any irregularity, and if any mischief has occurred, and if the court sees that the person in office is a right and proper person, and that no harm is done, we shall exercise our discretion in the matter; and I may add in the present case that if the notice of the court had been called to the fact that no one claims to come in the place of the defendant, this rule would never have been granted. I express no opinion whether this is a proper and reasonable mode of voting or not. Should it in any future election appear that some one has passed by a name for which he intended to vote, and been prevented from voting for that person, the question would be raised, and

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then some one would really have sustained a grievance that would support a *quo warranto*; but in this case we are asked to give an opinion as to whether this mode of election is legal or not. It has been well said by Orompton, J., that this court sits to decide matters in dispute, and not to give advice. There is no harm or mischief shown to be done here, and the rule must be discharged with costs.

LUSH, J.—I am of the same opinion. It does not appear that anyone was prevented from voting. The court acted in a similar manner in *Reg. v. The Rector and Churchwardens of St. Mary, Lambeth* (8 A. & E. 356), where, although the doors were closed, it was not shown that anyone was prevented from coming in. If that had been shown it would have been a different matter. The same case applies here, for no one was prevented from voting.

ARCHIBALD, J.—It is altogether unnecessary to express any opinion as to the validity of the practice. There is nothing to show that the mode of voting was improperly exercised, or that any name was passed over inadvertently, and as no one suffered, I think on the grounds which have been before stated the rule should be discharged.

Rule discharged.

Attorneys for the relator, *Fox and Robinson*, for *Carter*, Plymouth;

Attorneys for the defendant, *Vizard, Crowder, and Co.*, for *Booker*, Plymouth.

Jan. 31, and Feb. 17, 1873.

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Quo warranto—Local Board—Returning officer a candidate—Grievance.

The court will not grant a *quo warranto* information in consequence of some informality in the proceedings at an election, unless it is shown there is a real grievance by which some person was injured or unless the informality was purposely committed.

The court before granting an information will look at all the surrounding circumstances, and then exercise their discretion as to whether the harm done is sufficient to warrant their interference.

Semble, a candidate for membership of a local board, who is chairman, and continues to act as returning officer after his nomination, is ineligible, and his election void.

On a previous day a rule *nisi* had been obtained calling upon John Ward to show cause why an information in the nature of a *quo warranto* should not be exhibited against him to show by what authority he claimed to exercise the office of a member of the Sheerness Local Board of Health, the ground of objection being that he was chairman, and continued to act as such until after the close of the nomination, and consequently that his return was void.

The facts of the case sufficiently appear from the judgment of the court.

Prentice, Q. C. (with whom was *E. L. O'Malley*), shewed cause.—The defendant acted under the authority of the 11 & 12 Vict. c. 63, where it is enacted by the 23rd section that the chairman shall before every election prepare, sign, and publish a notice which shall contain the number and qualifications of the persons to be elected, the persons by whom and the places where, the nomi-

nation papers hereinafter mentioned are to be received, and the last day on which they are to be sent, the mode of voting in case of a contest, and the days on which the voting papers will be delivered and collected, and the time and place for the examination and casting up of the votes. These notices Ward sent out on the 7th Sept., and directed the nomination papers to be returned to him. He had not at that time been nominated, and so he had a right to say to whom the papers should be sent.

[BLACKBURN, J.—If the defendant had from the time he accepted the nomination ceased to act and called upon Felkin to take his place, there would have been no difficulty and no illegality.] In *Reg. v. White*, L. Rep. 2 Q. B. 557, the mayor, being returning officer, was requested to offer himself as a candidate for re-election as a town councillor; the town council in the mean time appointed a town councillor to act as returning officer; it there was held that the election of the mayor was valid. In the case of applications made by individuals, it has always been held discretionally with the court either to grant or to refuse a rule for an information in the nature of a *quo warranto*. The promptness of the application, and even the motives of the relator, are all to be taken into consideration: (*Rawlinson's Municipal Corporations Act*, p. 360. Note to 5th edit.) Nor will the court let the rule go unless it is shown that some person has suffered by the irregularity of the proceedings, which was not the case here. In *Reg. v. the Incumbent and Churchwardens of the Parish of Goole* (4 L. T. Rep. N. S. 322) the court refused to grant a *mandamus*, commanding the election of certain churchwardens, because it did not appear by the affidavits that anyone had, by the irregular proceedings, been prevented from voting, or that any particular injustice had been done, but if any injustice had been proved to have been done, the court said the writ would have gone. In *Reg. v. the Rector and Churchwardens of the Parish of St. Mary, Lambeth* (8 A. & E. 356), the rector closed the doors and prevented people from entering. Lord Denman said, "We cannot grant this rule unless we see some one actually suffered by the act."

F. O. Crump in support of the rule.—The chairman was returning officer, and therefore was in a position in which he could not be nominated: (*Reg. v. Owens* 2 El. & El. 86; 28 L. J. 316, Q. B.) Erle, J., there says: "It is said that the mayor, as returning officer for the borough, has merely a mechanical duty to perform, and cannot make a mistake; but experience shows that great skill and consummate artifice are sometimes used at these elections for boroughs to obtain an unfair result, and the law expects that the mayor will withstand these, and will not allow the right performance of his duty to be endangered by his becoming a candidate at the election over which he presides." The nomination may act as a vote, if the number of candidates are the same as the number of vacancies, and in that case the returning officer could not escape from returning himself. [BLACKBURN, J.—You do not prove that any wrong was done in this case; we cannot assume it if the affidavits do not state it. LUSH, J.—Upon the affidavits before us we must assume that the defendant did nothing wrong.] The defendant was never eligible as a candidate. It is quite sufficient that he had an opportunity of acting improperly, and it is impossible to prove by affidavit the particular manner in which the fact of the re-

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turning officer being a candidate operated upon the voting. A case of strong suspicion should suffice to induce the court to exercise jurisdiction, and that is shown by the facts deposed to in the affidavits. This case of the chairman of a local board is stronger than that of mayor of a corporation, the mayor having nothing to do with the nomination, whereas, by the Public Health Act 1848, the chairman controls the proceedings from the commencement, and is subject to penalties for not carrying out the provisions of the Act. It will be extremely mischievous if a chairman can preside over his own election, and at the last moment turn round and declare himself a candidate and no longer returning officer. Without causing any specific grievance, he may employ the very artifice pointed at by Erle, J., in *Reg. v. Owens*. He also referred to—

Reg. v. Morgan, 25 L. T. Rep. N. S. 930;

Reg. v. White, L. Rep. 2 Q. B. 557; 16 L. T. Rep. N. S. 828;

Reg. v. Parkinson, L. Rep. 3 Q. B. 11; 17 L. T. Rep. N. S. 169.

Cur. adv. vult.

Feb. 17.—The judgment of the court (Blackburn, Lush, and Archibald, JJ.) was delivered by BLACKBURN, J.—This was a rule obtained for leave to file an information in the nature of a *quo warranto* for the office of member of a local board of health, against which cause was shown in the sittings of last term before my brothers Lush, Archibald, and myself, when the court took time to consider their judgment. We are of opinion that the rule ought to be discharged. It is convenient, in the first place, to state the facts as appearing on the affidavits. The defendant was chairman of the local board, and consequently, under the 21st sect. of the 11 & 12 Vict. c. 63, he was to perform all the duties in conducting and completing the elections for members of the local board. That section, however, contains a provision that in case the chairman, from illness or other sufficient cause, shall be unable to act, or shall be absent, or shall refuse to act, some other person who shall be appointed by the local board of health, shall exercise or perform such of the said powers and duties as then remain to be exercised or performed? It was known that three members of the local board, one of whom was the defendant, were to go out of office, and that in the event of the defendant being again nominated as a candidate, he would be incapable of acting as returning officer in his own election. On the 29th August the local board came to a resolution that the clerk of the local board of the name of Felkin should be appointed under this section to act in the event of Ward being nominated and accepting the nomination. The next step to be taken was, under sect. 23, to prepare and publish a notice of the election. Ward, as chairman, did accordingly, on the 7th Sept. publish a notice fixing the days of election for the 29th and 30th Sept., directing that the nomination papers should be delivered at his own house, and fixing the 16th Sept. as the last day on which nomination papers should be received. On the 10th Sept. a nomination paper, nominating Ward as a candidate, was delivered at his house, and we think it must be considered that he on that day accepted the nomination and became a candidate, and ought therefore from that date to have ceased altogether to act, and to have called upon Felkin to perform all the duties which yet remained

to be performed. He did not, however, immediately do so, but continued to receive the nomination papers, and on the 16th Sept. there were more nomination papers received. The 24th section requires that in such a case the chairman should cause voting papers to be filled up and insert therein the names of all the persons nominated in the order in which the nominations were received. Instead of leaving this to be done by Felkin, which would clearly have been the right course, Ward himself filled up the form of a voting paper, and sent it to the printers' with directions to send the papers when printed to Felkin. This was done, and from that time forward everything was done by Felkin. The election was duly held, and Ward was elected and returned by Felkin. There was no affidavit in support of the rule affording any evidence that the names of the candidates were not inserted in the voting paper in the order in which the nomination papers were received; and there was the positive and express affidavit of Ward that they were inserted in that order, and there was no suggestion on the affidavits that the election would have been in any respect different if Felkin had begun to act on the 10th Sept., as soon as Ward became a candidate, instead of delaying to act until the voting papers had been sent to the printers. It was, however, contended that, inasmuch as Ward did act as chairman after he had become a candidate, his election was in point of law void, however short the time was during which he acted, and however immaterial in the result his acting turned out to be. We are not prepared to express an opinion on this point, nor is it necessary, as we all agree that the point is one of sufficient difficulty to make it proper to let the writ go, in order that it might be raised on the record if the only question were whether the election was strictly legal. But that is not the only question. The power of the Master of the Crown Office as attorney for the Queen in the Court of Queen's Bench had before the Revolution been much abused, and consequently the Legislature, by stat. 4 & 5 W. & M. c. 18, sect. 2, enacted that he should not, without express order, to be given by the court in open court, exhibit or file any information. An information in the nature of *quo warranto*, though not expressly named in this statute, is within it, whatever be the nature of the franchise in respect of which the information is to be filed. Before the Reform Bill the return of members of Parliament in a very large number of boroughs depended upon the municipal corporation, which made *quo warrantos* for municipal franchises of exceptional importance, and there are subsequent statutes regulating the mode of proceeding in *quo warranto* for municipal offices, within which the present case would not fall. But the very object of requiring that the information should not be filed without express order by the Court of Queen's Bench, made in open court, was that the court might in its discretion refuse to file an information where it would be vexatious so to do; and we think that exercising our discretion in the way in which it has been for many years exercised by this court, we ought to refuse to make the order in the present case. In *Res v. Stacey* (1 T. R. 1), Lord Mansfield, speaking in 1785, says: "I remember when it was too much the practice of the court to grant *quo warranto* informations as of course, that it was held prudent never to shew cause against the rule

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for fear of disclosing the grounds on which the party went. But now, since these matters have come more under consideration, it is no longer a motion of course, and the court are bound to consider all the circumstances of the case before they disturb the peace and quiet of any corporation." We do not rely on the particular circumstances in that case as being in point, but cite it for the principle laid down by Lord Mansfield which we think has been uniformly acted upon since. We pass over the intermediate cases to *Rex v. Parry* (6 Ad. & El. 810). There in the considered judgment of the court it is said: "It was in effect asserted that, whenever a reasonable doubt is raised as to the legal validity of a corporate title, we are bound to grant leave to file the information. This proposition, however, is wholly untenable. Every case (and they are most numerous) which has turned upon the interest, motives, or conduct of the relator, proceeds upon the principle of the court's discretion, however clear in point of law the objection may have been to the party's abstract right to retain his office; yet the court has again and again refused to look at it, or to interfere upon one or other of these grounds." Later in the judgment the grounds are stated on which the court exercised their discretion in that case—"On the one hand if the rule be made absolute the dissolution of the corporation may at least be reasonably apprehended." We may at once say that this was a greater inconvenience than any to be apprehended in the present case, but what follows seems to us quite applicable to the present case. "On the other it is remarkable that the affidavits in support of the rule impute no corrupt, fraudulent, or indirect motive for the acts complained of as irregular; nor do they allege that they have produced injustice, inconvenience, or even any one result different from what would have followed the fullest compliance with the law as they lay it down. They do not go the length of suspecting that a single vote has been won or lost, or that the burgess list would have varied in a single name. In fact, neither claim nor objection as regarded the Monmouth Ward was made to the overseers' list. We do not say that the court of revision had, therefore, no duties to perform; but, in fact, they were not called upon to perform any, and the defective constitution of the court has been in all respects an immaterial circumstance." One argument much relied on in support of the rule, was that though Ward, as chairman, had performed no duty except the almost mechanical one of filling up the voting papers with the candidates' names in the order in which the nomination papers were received, yet the chairman might have had to consider the qualification of those who signed the nomination papers—a matter of a judicial or at least quasi judicial nature. Probably, had he been called upon so to do, he would have perceived the propriety of holding his hand, and calling on Felkin to begin to act; but as it is, we think in exercising our discretion, we may well adopt the view of the King's Bench, in *R. v. Parry*, and say, that as in fact he was not called upon to perform any such duty, the irregularity has been in all respects on immaterial circumstances. The next case that we would refer to is that of *Reg. v. The Rector of Lambeth* (8 Ad. & El., 356), and I refer to it principally because the office there in question was not a corporate office, and that the inconvenience

which would have been sustained from ousting the churchwarden would only have been that the quiet of the parish would be disturbed by a new election, when the former election was substantially right though irregular; yet the court discharged the rule on the ground that nothing was stated to show that the result of the election was different from what it would have been if the irregularity had not taken place. The same principle was acted upon in *Reg. v. Goole* (4 L. T. Rep. N. S. 322), and in a very recent case of *Reg. v. Cousins* (see preceding case) in this court a short time before the present rule was argued. We think therefore that seeing that the mistake committed here has produced no result whatever, that the same persons have been elected who would have been elected if the election had been conducted with the most scrupulous regularity, and that the defendant's title, if bad at all, is only bad as I may say on special demurrer, we ought, in the exercise of our discretion, to refuse leave to disturb the peace of this district by filing this information. It is worth saying that if in any future case it should appear that the chairman wilfully and contumaciously acted at all in his own election, the court might well in its discretion order the filing of an information, in order to check such a practice. Nothing that we have said is intended to apply to such a case.

Rule discharged without costs.

Attorneys for relator, Brook and Chapman (for Mole, Sheerness).

Attorneys for the defendant, Eyre and Co.

COURT OF APPEAL IN CHANCERY.

Reported by E. STEWART ROCKE and H. PRAT, Esqrs.,
Baristers-at-Law.

Thursday, Dec. 19, 1872.

(Before the LORD CHANCELLOR (Selborne) and the LORDS JUSTICES.)

Re THE CHARITABLE GIFTS FOR PRISONERS; *Ex parte* THE GOVERNORS OF CHRIST'S HOSPITAL.

Charity—Endowed Schools Act 1869 (32 & 33 Vict. c. 56), s. 30—Court of Chancery—Jurisdiction—Charitable Trusts Act 1853 (16 & 17 Vict. c. 137), s. 128—Restrictions on right of appeal—Limit of amount.

Of a number of charities for the benefit of poor prisoners arrested for debt in the city of London, four were vested in the Governors of Christ's Hospital as trustees. On the passing of the Act abolishing imprisonment for debt, the objects of these charities failed. In June 1870, the Attorney-General took out a summons, under the 28th section of the Charitable Trusts Act 1853, to have a scheme settled for the future management of all these charities, and in May 1871, an order was made by Bacon, V.C., directing an inquiry as to the property belonging to these charities, and that a scheme for their future management should be settled in chambers.

In Aug. 1870, the Governors of Christ's Hospital laid before the Endowed Schools Commissioners a scheme for the management of all the endowments vested in them, including the four charities for prisoners, which scheme provided for the application of the funds to educational purposes, but no decision upon this scheme had been come to by the commissioners at the date of the Vice-Chancellor's

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order, or at the date of the hearing of the appeal from that order :

Held (affirming the decision of Bacon, V.C.), that the fact that this scheme was pending before the Endowed Schools Commissioners, was no reason why the Court of Chancery should not exercise its jurisdiction in making an order that a scheme be settled for the future management of all the charities for prisoners, or why it should exclude the four charities in question from its order.

The provisions of sect. 28 of the Charitable Trusts Act 1853, limiting the right of appeal from an order of a Vice-Chancellor, are not applicable to a case where the aggregate income of the charities dealt with by the order exceeds 100l., though the income of each of the charities is under 100l.

THIS was an appeal from a decision of Bacon, V.C.

Of a number of charitable endowments which existed in the city of London for the benefit of poor prisoners arrested for debt, four were vested in the Governors of Christ's Hospital as trustees.

On the passing of the Debtors' Act 1869 (32 & 33 Vict. c. 62), by which imprisonment for debt was abolished, the objects of these charities failed.

Accordingly, in June 1870, the Attorney-General took out a summons in the Court of Chancery, under the provisions of the 28th section of the Charitable Trusts Act 1853 (16 & 17 Vict. c. 137), for the purpose of having a scheme settled by the court for the future management and regulation of all these charitable endowments for the relief of prisoners arrested for debt; and upon this summons Vice-Chancellor Bacon, in May 1871, made an order directing an inquiry as to the property belonging to these various charities, and that a scheme or schemes for their future management and regulation, and the application of the income thereof, should be settled.

The Governors of Christ's Hospital, who, as well as the trustees of several of the other charitable endowments, had opposed the application of the Attorney-General before the Vice-Chancellor, now appealed from this order, in so far as it affected the four charities vested in them.

By the Endowed Schools Act 1869 (32 & 33 Vict. c. 56), sect. 30, it is provided that :

"In the case of any endowment which is not an educational endowment as defined by this Act, but the income of which is applicable wholly or partially to any one or more of the following purposes—namely, *inter alia*, relief of poor prisoners for debt, or any purposes which have failed altogether, or have become insignificant in comparison with the magnitude of the endowment, if originally given to charitable uses in or before the year 1800, it shall be lawful for the commissioners, with the consent of the governing body, to declare, by a scheme under this Act, that it is desirable to apply, for the advancement of education, the whole or any part of such endowment; and thereupon the same shall, for the purposes of this Act, be deemed to be educational endowment, and may be dealt with by the same scheme accordingly."

The Act provides that any scheme approved by the commissioners must be laid before Parliament for forty days, and must be approved by her Majesty in Council before it can have any operation; and by the 52nd section of the Act, the power of the Court of Chancery with respect to educational endowments is taken away.

Shortly after the passing of this Act, the Governors of Christ's Hospital gave notice to the Endowed Schools Commissioners of their intention to propose a scheme for the management of all the

endowments vested in them, as well educational as those for the benefit of prisoners, and their actual scheme was laid before the commissioners in Aug. 1870; but as yet no decision had been come to by them upon it. This scheme provided for the application of the funds of the four prison charities to educational purposes connected with Christ's Hospital.

The Attorney-General's scheme provided that the funds of all the prison charities should be applied as one general fund for the establishment and maintenance of industrial schools.

Lindley, Q.C. and Freeing, for the appellants, were proceeding to open the appeal when

Vaughan Hawkins (with him the *Solicitor-General*, Sir George Jessel, Q.C.), for the Attorney-General, took the preliminary objection that the appellants were precluded from appealing from the Vice-Chancellor's order, by the provisions of the 28th section of the Charitable Trusts Act 1853, inasmuch as the income of each of the four charities was under 100l.

The LORD CHANCELLOR (Selborne) overruled the objection, being of opinion that the provisions of the 28th section of the Act, limiting the right of appeal, did not apply when the aggregate income of the charities dealt with by the order exceeds 100l.

The LORDS JUSTICES were of the same opinion.

Lindley, Q.C. and Freeing, then opened the appeal.—We do not dispute the jurisdiction of the Vice-Chancellor to make the order which he has made, but we say that no order ought to be made by this court with regard to the funds of these four charities until it is seen what course will be taken by the Endowed Schools Commissioners upon the scheme laid before them by the appellants. The court ought either to exclude these four charities from its order, or, if it includes them, it ought to give some special direction with regard to the scheme now before the commissioners. The Endowed Schools Act conferred jurisdiction on the commissioners with respect to educational endowments, and this court ought not to interfere with the jurisdiction given to them by the Act. [The LORD CHANCELLOR: The commissioners have as yet taken no step under the 30th section of the Endowed Schools Act with respect to these endowments, and till they have done so, the funds are not subject to any jurisdiction but that of this court.] If the commissioners should make a declaration that it is desirable to apply these funds for the advancement of education, the jurisdiction of this court to deal with them will be gone. [The LORD CHANCELLOR: Is not this an application to us to exercise our discretion in reversing an order which is perfectly right?] No doubt it is to a certain extent a matter of discretion. But the Legislature intended that the Endowed Schools Commissioners should deal with endowments of this kind, and the court should exercise its discretion, and not interfere in a case where a scheme for the regulation of the endowments has been laid before the commissioners. If the scheme had been approved by the commissioners, and laid before Parliament, and was only awaiting the approval of her Majesty in Council, this court, though it still retained its jurisdiction, would surely abstain from making any order. We submit that it ought to act in the same way under present circumstances. They referred to

The Attorney-General v. Lepine, 2 Swanst. 181.

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Re LEE'S TRUSTS.

[V.C. B.]

Without calling upon

The *Solicitor-General* (Sir George Jessel, Q.C.) and *Vaughan Hawkins*, who appeared in support of the Vice-Chancellor's order,

The LORD CHANCELLOR (Selborne) said:—We are clearly of opinion that the order which has been made in this case is perfectly right. These are four, as we understand, of a considerable number of charities which have become derelict, if I may use the expression, by reason of the cessation of imprisonment for debt. The Attorney-General, who is the officer properly charged with the duty of seeing that charities are rightly administered, has applied to this court, which is the proper authority for that purpose, to have the whole aggregate funds of the various charities mentioned in the summons properly dealt with, under the order of this court, by some proper scheme, and the Vice-Chancellor has made an order, apparently at large, leaving it open to the Attorney-General, or to any other competent party, to propose any scheme whatever which may be right. Now it is suggested that because the Endowed Schools Act, by the 30th section, gives a power to the commissioners under that Act, with the consent of the governing body of any endowment, to divert endowments of the character which these particular endowments possess, from their original destination to educational purposes, and because Christ's Hospital, not at large, but in connection with a particular scheme which they have submitted to the Endowed Schools Commissioners, have expressed a willingness to give such a consent as to four of these charities, it is suggested for that reason, that the order which the Vice-Chancellor has made is in some respect or other wrong. If it be not wrong, it is clear that we ought not to reverse it. It is suggested, not that it is absolutely wrong, but that the court ought, in the exercise of a sound judicial discretion, under these circumstances, either to have refused to include these four charities in its order, or to have included them with some special direction relative to the application which was being made to the Endowed Schools Commissioners. As to refusing to include these four charities in the order, they being charities in the same situation with all the others, except in the particular respect to which I have adverted, I for my part cannot see how the court would have been justified in doing so. If the petition had been presented as to those four charities alone, of course the court, if it had thought right, might have directed the hearing of the petition to stand over for any reasonable time, in order to see whether the matter would be taken out of its hands by the Endowed Schools Commissioners under this Act, but no one can seriously say that the fate of a great number of other charities, as to which no application to the Endowed Schools Commissioners is pending, should be kept in suspense because of the possibility of their dealing with these four charities; and, if not, it was in my judgment right, and it was the duty of the court to make such an order with respect to the whole. With respect to giving a particular direction that the court should have regard to the scheme, that, I apprehend, would be clearly wrong. The merits of the scheme were not to be decided by the court at the time, and if the court did not intend to express an opinion in favour of the scheme upon its merits, it would be improper to introduce any directions,

more especially as it is, under the order that has been made, entirely competent to the court in chambers to give every consideration which may be right or proper to the fact of the pendency of the scheme before the commissioners and to the substance of the scheme itself. There is no difficulty at all in proposing, with regard to these four charities, if that is the best way of dealing with them, that they should be dealt with in connection with the educational charities over which the commissioners have exclusive jurisdiction, subject, of course, to the concurrence of the commissioners, whose concurrence in that respect would, as to those educational charities, be necessary. Of course, any other scheme whatever may be proposed, whether the scheme would or would not have the effect of bringing them under the authority of the Endowed Schools Commissioners. The matter is perfectly at large, and the argument of Mr. Lindley, when it is carefully examined, really comes to this, that we are not to trust this court to do what is right, and to exercise a sound judicial discretion in working out this order. If the best thing is that which Christ's Hospital wish to do, the court may be trusted to concur in all proper measures in order to have the thing done. If it be not the best thing, then the fact of Christ's Hospital desiring it, honourable and respectable as that body is, can be no possible reason why this court should interfere with the ordinary course of the administration of justice, in order to assist in promoting a scheme which on the hypothesis is not the best that can be suggested. On all grounds, I cannot but think that this is an appeal which has been presented, rather in deference to the wishes of a most respectable body of trustees, than with any hope of success, and that the only thing we can do with it is to dismiss it with costs.

LORD JUSTICE JAMES.—I desire only to add, that this court has always been in the habit in these matters of placing great confidence in the discretion of the Attorney-General, as to whether he would or would not press for an order, and as to whether he would or would not press the execution of the order.

LORD JUSTICE MELLISH.—I agree.

Appeal accordingly dismissed with costs.

Solicitor for the appellants, J. J. Maberly.

Solicitor for the Attorney-General, Fearon.

V.C. BACON'S COURT.

Reported by the HON. ROBERT BUTLER and F. GOULD,
Esq., Barristers-at-Law.

Dec. 7 and 14, 1872.

Re LEE'S TRUSTS.

Mortmain—Bequest towards building and endowing a church—Church Building Act (43 Geo. 3, c. 108).

A bequest to a church diocesan building society towards building and endowing a church, but without referring to an existing site or expressly excluding the application of the money to the acquisition of land, is void, except to the extent of 500l.

JAMES PRINCE LEE, late Bishop of Manchester, by his will, after making certain specific and pecuniary bequests, gave all the residue of his estate to his wife for life, and after her decease he directed his trustees to pay the sum of 4000l. "to the Church

Diocesan Building Society, in Manchester, towards building and endowing a church in some parish in the diocese of Manchester, the patronage of which is in the gift of the Bishop of Manchester, as the new church so to be built is to be," and he appointed his wife residuary legatee and executrix, and Thomas Dudley Rider and Robert Birley executors of his will.

By the constitution of the Manchester Diocesan Church Building Society, the object for which the society was established was defined to be "solely the providing of funds and the administration of the same by grants towards procuring sites for, or in aid of, churches or chapels to be built, rebuilt, enlarged, or to be endowed, purchased, or procured under the provisions of any of the several Church Building Acts, or the ordinary ecclesiastical authority; and also toward the erection, or provision, of parsonage houses for the residence of the clergy."

The executors being in doubt whether the bequest of 4000*l.*, or at any rate all beyond the sum of 500*l.* part thereof, was not void under the Statute of Mortmain, paid the sum of 3500*l.* into court, under the Trustee Relief Act.

Mrs. Lee, the residuary legatee, now presented a petition by which she submitted that the bequest of 4000*l.* was void, except to the extent of 500*l.*, and prayed that the 3500*l.* might be paid to her for her own absolute benefit.

Amphlett, Q.C. and Bury for the petitioner.—As to 500*l.*, we admit the bequest to be good, having regard to the Church Building Act (43 Geo. 3, c. 108); but as to the 3500*l.* in court the bequest is void under the Statute of Mortmain (9 Geo. 2, c. 36), as in the will there is no reference to any existing site on which the church is to be erected, nor does the will contain any words expressly excluding the application of the bequest to the acquisition of land. They referred to—

Re Watmough's Trusts, 22 L. T. Rep. N. S. 88; L. Rep. 8 Eq. 272;

Booth v. Carter, L. Rep. 8 Eq. 757;

Pratt v. Harvey, 25 L. T. Rep. N. S. 200; L. Rep. 12 Eq. 544;

Re Ireland's Will, 12 L. J., N. S., 381, Ch.;

Hawkins v. Allen, 23 L. T. Rep. N. S. 451; L. Rep. 10 Eq. 246.

G. Williamson for the executors.

Speed for the society.—The objects for which the society was established are lawful, and this bequest, which is to be applied according to the rules of the society, is therefore valid. No intention contrary to the Statute of Mortmain can be gathered from the words of the will.

Tatham v. Drummond, 11 L. T. Rep. N. S. 324; 2 H. & M. 262;

Sinnett v. Herbert, 26 L. T. Rep. N. S. 7; L. Rep. 7 Ch. 232;

was also referred to.

The VICE-CHANCELLOR said.—The rule is well settled that in order to make a bequest of this kind valid there must be in the will words referring to an existing site on which the building may be erected, or which expressly exclude the laying out of the money in the purchase of land. No such words are to be found in this will. Under these circumstances the petitioner is entitled, after payment of costs, to the 3500*l.* in court, for her own absolute benefit.

Solicitors for the petitioner, *Williamson, Hill, and Co.*

Solicitors for the society, *Burder and Dunning.*

COURT OF QUEEN'S BENCH.

Reported by J. SHORRITT and M. W. McKELLAR, Esqrs.,
Barristers-at-Law.

Monday, Jan. 27, 1873.

REG. v. THE JUSTICES OF SOUTHPORT.

Incorporated clauses of a previous statute—Effect of repeal of previous statute—The Licensing Act 1872 (35 & 36 Vict. c. 94.)

9 Geo. 4, c. 61, ss. 27, 28, and 29, provides for appeals to quarter sessions as to licences to keepers of inns, alehouses, and victualling houses.

The Wine and Beerhouse Act 1869 (32 & 33 Vict. c. 27) is a temporary Act; and by sect. 8 all the provisions of the 9 Geo. 4, c. 61, as to appeal from any act of any justice, shall, so far as may be, have effect with regard to grants of certificates under this Act.

The Licensing Act 1872 (35 & 36 Vict. c. 94) sect. 75, repeals so much of the Wine and Beerhouses Acts as makes such Acts temporary in their duration, and the said Acts are thenceforth to be perpetual; it also repeals the Acts and parts thereof mentioned in the schedule; amongst which are sects. 27, 28 and 29 of 9 Geo. 4, c. 61, but not sect. 8 of 32 & 33 Vict. c. 27.

Held upon a rule for mandamus to compel justices to grant a certificate under 32 & 33 Vict. c. 27, that the proper remedy was by appeal to quarter sessions, the incorporated appeal clauses in the second Act not having been repealed by the repeal of the first Act.

J. Paterson, on the 14th Nov. last, obtained a rule nisi calling upon the defendants the justices of Southport to show cause why a writ of mandamus should not issue compelling them to grant certificates to James Edwardson, authorising the grant to him of licences to sell by retail beer, wine, and sweets, or British wines, to be consumed off his premises.

The said James Edwardson kept a grocer's shop at Southport in Lancashire; and before the last general annual licensing meeting he duly gave the notices required by sect. 7, of The Wine and Beerhouse Act 1869 (32 & 33 Vict. c. 27), for an application for a certificate under sect. 8 of that Act. That section is as follows:—

All the provisions of the said Act of the ninth year of the reign of King George the Fourth as to the terms upon which, and the manner in which, and the persons by whom, grants of licences are to be made by the justices at the said general annual licensing meeting, and as to appeal from any act of any justice, shall so far as may be have effect with regard to grants of certificates under this Act, subject to this qualification: that no application for a certificate under this Act in respect of a licence to sell by retail beer, cider, or wine, not to be consumed on the premises shall be refused, except upon one or more of the following grounds; viz.:

1. That the applicant has failed to produce satisfactory evidence of good character.

2. That the house or shop in respect of which a licence is sought, or any adjacent house or shop owned or occupied by the person applying for a licence, is of a disorderly character, or frequented by thieves, prostitutes, or persons of bad character.

3. That the applicant having previously held a licence for the sale of wine, spirits, beer, or cider, the same has been forfeited for his misconduct, or that he has, through misconduct, been at any time previously adjudged disqualified from receiving any such licence, or from selling any of the said articles.

4. That the applicant, or the house in respect of which he applies, is not duly qualified as by law is required.

Where an application for any such last-mentioned certificate is refused on the ground that the house in respect

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of which he applies is not duly qualified as by law is required, the justices shall specify in writing to the applicant the grounds of their decision.

The defendants, the said justices, refused to grant the applicant, the said James Edwardson, the certificate for which he applied, but the ground of their refusal was neither of the four grounds authorised by the said 8th section.

A. L. Smith showed cause on behalf of the Justices of Southport—it must be admitted that this refusal was not based upon either of the four grounds mentioned in the Act, and, therefore, it cannot be justified. *Reg. v. The Justices of Lancashire* (40 L. J. 17, M. C.) relates only to original applications. The proper remedy, however, was by appeal to the quarter sessions, in which case this rule for a *mandamus* cannot be made absolute. *Reg. v. Pilgrim* (40 L. J. 3, M. C.) was a case upon an appeal to quarter sessions under this Act before 1872. The power of the prosecutor to appeal to the quarter sessions in this case depends upon the effect of the repeal section and schedule in the Intoxicating Liquor Licensing Act 1872 (35 & 36 Vict. c. 94). By sect. 75 “the several Acts set forth in the second schedule hereto shall be repealed to the extent to which such Acts are therein expressed to be repealed, and in particular there shall be repealed so much of the Wine and Beerhouses Acts as makes such Acts temporary in their duration, and the said Acts shall henceforth be perpetual.” In the second schedule of the Act are enumerated the 9 Geo. 4 c. 61, ss. 27, 28, and 29, which are the sections giving and providing for appeals to quarter sessions. In that schedule, however, there is no mention of the 8th section of the Wine and Beerhouse Act 1869, which is above first set out. Several cases have been decided in which an intermediate Act has incorporated or re-enacted provisions of an earlier Act; and a third, a subsequent Act, repealing the first Act, without mention of the second Act, has been held not to affect the incorporated or re-enacted provisions of the second. The words of the intermediate Act in this case, sect. 8 of the Act of 1869, are, the provisions of the said Act of 1828 “as to appeal from any act of any justice, shall, as far as may be, have effect with regard to grants of certificates under this Act.” In *Reg. v. Stock* (8 A. & E. 405) this principle of interpretation was admitted rather than decided, the case being determined upon another point. The words of the intermediate Act were these, “on notice being given in the manner and form prescribed by an Act passed,” &c.; this Act alluded to having been repealed by a subsequent Act which made no reference to this one. *Reg. v. The Inhabitants of Merionethshire* (6 Q.B. 343) was as to the power of the court to award costs to a prosecutor upon an indictment for non-repair of a county bridge. By 13 Geo. 3, c. 78, s. 64, the court was granted this power in highway cases, if the defence were frivolous. Stat. 43, Geo. 3, c. 59, s. 1, enacts that all “matters and things in the said Act contained, relating to highways, shall be, and the same are, hereby extended and applied, as far as the same are applicable to such (county) bridges, and the roads at the ends thereof as aforesaid, as fully and effectually as if the same and every part thereof were herein repeated and re-enacted.” Stat. 5 & 6 Will. 4, c. 50, s. 1, repeals the first, but not the second of these two Acts; and the court held that the provision in the first Act as to costs still

applied to county bridges under the second. Lord Denman, in his judgment (p. 346), said, “The question still is whether stat. 43 Geo. 3, c. 59, which is unrepealed, does not keep alive the power given by stat. 13, Geo. 3, c. 78, s. 64. And I think it must be taken to do so.” Another point under the same three Acts as those upon which *Reg. v. Merionethshire* was decided, was considered and decided in the same way in *Reg. v. The Inhabitants of the County of Brecon* (15 Q. B. 813). [QUAIN, J., cited *Boden v. Smith*, 18 L. J. 121, C. P.] That case turned upon the words “shall be taken to apply,” and the question was whether the time limited for an action was three months or two years. By the County Rates Act (55 Geo. 3, c. 51) a limitation of three months was provided as the period within which actions must be brought for anything done in pursuance of the Act. 5 & 6 Vict. c. 97, s. 5, provides that actions for anything done in pursuance of local or personal Acts shall be brought within two years. And by 8 & 9 Vict. c. 21, which, although made a public Act, relates to Lancashire only, sect. 21 enacts that all existing powers and provisions relating to county rates shall be taken to apply to rates made under the Act. It was held that the limitation in the first Act was incorporated in the last, and that even if this last Act were to be considered as a local one, it must be taken to have repealed the second, 5 & 6 Vict. c. 97, as far as regards the period of limitation; and therefore that an action brought for seizing the plaintiff's goods for a rate under 8 & 9 Vict. c. 21, was brought too late after the expiration of three months from the seizure. That the words in the 8th section of the Wine and Beerhouse Act 1869 are sufficient to give a right of appeal, the case of *Reg. v. Justices of Surrey* (39 L. J. 49, M. C.) is an authority; there Hannen, J., held that an appeal was given in the Act 27 & 28 Vict. c. 101, by a provision in sect. 2, that the Act should be construed as one with the Highway Act 1835 (which provides for appeal to quarter sessions) taken with sect. 21, which enacts that “the like proceedings shall be had as when application is made under the Highway Act 1835.”

J. Paterson supported the rule.—The Act of 1872 was intended to be, and was, in fact, a consolidating statute; it contains, therefore, the whole law on this licensing subject. The object of the Legislature clearly was to repeal all powers of appeal to quarter sessions, and the omission to refer to this section of the Act of 1869 may have been in consequence of the temporary nature of that Act (see sect. 22). [COCKBURN, C.J.—But in the last Act of 1872, the Act of 1869 is expressly made permanent.] But that is the very same Act which repeals the power to appeal. The effect might be different if the Act of 1869 were permanent before that of 1872 was passed, but by expressly repealing powers given by a permanent Act, it may reasonably be inferred that the Legislature impliedly repealed a merely temporary incorporation of those powers. [BLACKBURN, J.—There is nothing in the Act of 1872 to show any intention to repeal the appeal to quarter sessions except the mere mention of sect. 29 of the Act of 1828 in the schedule.] Sections 37 & 38, by providing a different mode of applying to quarter sessions for confirmation of new licences, are in accordance with that intention. The cases cited on the other side are not exactly in point, either with regard to the words therein used and decided upon, or with

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regard to the relationship of the Acts in each case respectively. The Acts are in neither case exactly *in pari materia* with each other. Here, on the contrary, all the Acts cited in the schedule are upon the same subject; those Acts taken together are to be the positive legislation for the future, and are to be read as one consolidated statute.

COCKBURN, C.J.—This is an application for a *mandamus* to certain justices to grant certificates for a new licence under the Wine and Beerhouse Act 1869 (32 & 33 Vict. c. 27, s. 8.) It is admitted that these justices, at their special sessions, refused these certificates for some reason other than the only four grounds upon which a refusal is authorised by that section. The applicant, therefore, has a good complaint against the justices, but he can obtain a remedy by *mandamus* only, if he could not have proceeded by appeal to quarter sessions. It is said by the defendants that this was a matter concerning which the applicant might have appealed, and this right of appeal depends upon whether this 8th section is in any way repealed by the Licensing Act 1872 (35 & 26 Vict. c. 94). Sect. 75, repeals the Acts set out in the 2nd schedule, "to the extent to which such Acts are therein expressed to be repealed." Amongst other sections of the 9 Geo. 4, c. 61, sections 27, 28, and 29, which provide for appeals to quarter sessions, are expressly mentioned in the second schedule. The question then arises whether those repealed sections have been so incorporated in this 8th section of the Act of 1869 (which section is not repealed, and which Act is made permanent instead of being temporary, as it was before, by this same Act of 1872) as to continue the power of appeal created by those sections. The words of the 8th section are—"All the provisions of the said Act of the 9 Geo. 4, as to the terms upon which, and the manner in which, and the persons by whom, grants of licences are to be made by the justices at the said general annual licensing meeting, and as to appeal from any act of any justice, shall, so far as may be, have effect with regard to grants of certificates under this Act." Now, the authorities clearly establish this, that when provisions of an Act are re-enacted into or incorporated with a subsequent Act, the effect is the same as if the words of those provisions were actually reprinted in the subsequent Act; and a repeal of the earlier Act has no effect upon the re-enacted or incorporated provisions in the other. The only difficulty here is the form of the words used in the 8th section of the Act of 1869, and the question is whether, although not positive in terms, they do not practically and constructively incorporate the appeal provisions of the Act of 1828. I think the words "shall, so far as may be, have effect" must have the same meaning as an express incorporation of these provisions. I am the more fortified in this opinion by the case of *Boden v. Smith* where the Court of Common Pleas held that the words "the like proceedings shall be had as where application is made under the Highway Act 1835" implied the power of appeal granted by that Act. I think these words are sufficient to keep alive, with respect to the matters to which they relate, the powers of appeal created by 9 Geo. 4, c. 61, ss. 27-29, and have the same effect as if those sections were more formally incorporated. That being so, is there any intention of the Legislature to be discovered from The Licensing Act 1872, which can justify us in holding that these incorporated

provisions are repealed by that Act? I can glean no such intention from its words, but I desire to say that in all my judicial experience I never met with a more complicated and puzzling enactment than this repeal of a collection of sections of statutes. Such a repeal of parts of Acts, some of which have been re-enacted, and some modified in various ways, cannot but place anyone trying to discover the intention of the Legislature in confusion and perplexity. The whole of these licensing statutes constitute a labyrinth of chaotic legislation, and whatever may have been the object with regard to this particular matter, our only safe rule is to abide by a principle of construction which, at all events in most cases, has the merit of correcting omissions and errors in the wording of Acts of Parliament.

BLACKBURN, J.—I am of the same opinion, but I can by no means say the matter is clear. If it be desired to consolidate legislation on this subject, all these Acts named in the schedule should be swept away together and entirely, and the new enactment should repeat all the desirable provisions in positive terms. I cannot doubt myself that the fault is not all that of the draftsman, whose business generally is to make a Bill to pass through the House of Parliament. I think the fault is rather that of the Government, who prefer to leave the judges to work a new Act than risk the re-enacting of established legislation. I may observe that this Licensing Act is not the worst specimen of this kind of statute-making which I have recently met with. The Public Health Acts are, if possible, in a more confused state than the Licensing Acts. Here, however, there are fifteen statutes on the subject; the Legislature has repealed three, and from fragments of the remaining twelve we are left to find out the existing law. As to the point before us, I cannot but construe the words "shall, so far as may be, have effect," as incorporating the provisions referred to. Sect. 75, and the 2nd schedule together, of the Act of 1872, repeal these provisions as originally enacted, but omit all reference to them as incorporated in the Act of 1869. Under these circumstances, common sense, as well as authorities, would prompt us to consider this omission intentional; the more so here because in this very schedule the Legislature has expressly taken notice of incorporated provisions in some other statutes; for instance, as to 4 & 5 Will. 4, c. 85, the extent of repeal includes, among other sections, "so much of sect. 11 as incorporates or applies any repealed enactment." That is intelligible, but in the absence of any such express repeal of sect. 8 of the Act of 1869, we cannot imply such an intention. I am in extreme doubt what was intended; but if the repeal of all powers of appeal was meant, the statute has not said so.

MELLOR, J.—I am of the same opinion, but I do not quite excuse the draftsman of the Act at the expense of the Home Secretary. Here there is a departure from the usual words, and from those already approved for the expression of a particular intention. If the Act of 1869 had used the ordinary phrase for incorporating previous provisions, the re-incorporation would probably have been observed and repealed by the Act of 1872. I conclude that the words used are sufficient to incorporate the appeal clauses in the same manner as if they were repeated or formally re-enacted. The repeal, therefore, of 9 Geo. 4 c. 61 ss. 27 to 29,

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has no effect upon the 8th section of the Act of 1869. I think the rule for a *mandamus* cannot be made absolute, because the applicant's proper remedy is by appeal to quarter sessions.

QUAIN, J.—I am of the same opinion. I think sect. 8 incorporates the appeal clauses in the Act of 1869 just as if the words were repeated, and therefore with regard to certificates the power to appeal to quarter sessions is not repealed by the Act of 1872. Mr. Paterson says that might have been so, if it had not been the general scope of the Act to deal with the whole of the legislation on the subject; therefore he says if an appeal to quarter sessions with respect to certificates still exists, and appeals in all other cases are abolished, the effect of the Act is anomalous. I cannot myself see any intention on the part of the Legislature to render the proceedings the same in all cases of licensing, and the draftsman, if it had been intended to do so, might have repeated the first part of this section as well as any other.

Rule discharged without costs.

Attorneys for prosecutor, *Bailey, Shaw, Smith, and Bailey*, for *Keighley Walton*, Southport.

Attorneys for defendants, *Gregory, Rowcliffe, and Co.*, for *Welsby and Hill*, Southport.

Jan. 22 and 25, 1873.

HEYMANN v. THE QUEEN.

Indictment—Pleading—Defective averment cured by verdict—Conspiracy to remove goods in contemplation of bankruptcy—Error—Debtors' Act 1869 (32 & 33 Vict. c. 62), s. 11.

*Sect. 11 of the Debtors' Act 1869 (32 & 33 Vict. c. 62) enacts that any person adjudged bankrupt shall be deemed guilty of a misdemeanor if, within four months next before the presentation of a bankruptcy petition against him, he fraudulently removes any part of his property, of the value of 10*l.* or upwards.*

*H. was tried on an indictment charging that he and others "unlawfully and wickedly did conspire, combine, confederate and agree together contrary to the provisions of the Debtors' Act 1869, and within four months next before the presentation of a bankruptcy petition against the said H., fraudulently to remove part of the property of the said H. to the value of 10*l.* and upwards, that is to say, divers, &c., he the said H. then and there being a trader and liable to become bankrupt;" and having pleaded not guilty, was convicted and sentenced.*

Error having been brought on the ground that the indictment contained no allegation that H. ever was adjudged bankrupt.

Held, first, that the offence of conspiracy was complete as soon as an agreement had been entered into to remove the goods in contemplation of an adjudication of bankruptcy, even though no such adjudication ever took place; secondly, that after verdict it must be taken to have been proved that the agreement was entered into in contemplation of an adjudication, though this was not averred in the indictment, such defect being cured by the verdict; thirdly, that as to aiders by verdict at common law there is no distinction between criminal and civil pleadings.

ERROR upon a judgment on an indictment, tried at the Central Criminal Court, for conspiracy, contain-

ing several counts, of which only the first, second, and fourth are material.

The first count of the indictment charged that Moritz Heymann and others, named in the indictment, on the 2nd Jan. 1871, unlawfully and wickedly did conspire, combine, confederate, and agree together, contrary to the provisions of the Debtors' Act 1869, and within four months next before the presentation of a bankruptcy petition against him, the said Moritz Heymann, fraudulently to remove part of the property of him, the said Moritz Heymann, to the value of 10*l.* and upwards, that is to say, divers large quantities of lace and embroidered goods, table cloths, napkins, curtains, petticoats, dresses, handkerchiefs, neckerchiefs, shawls, and shirt fronts, he, the said Moritz Heymann, then and there being a trader and liable to become a bankrupt, against the peace of our Lady the Queen.

The second count of the indictment charged that Moritz Heymann and the said other persons conspired together that the said Moritz Heymann should within four months next before the presentation of a bankruptcy petition against him, and contrary to the provisions of the Debtors' Act 1869, unlawfully and with intent to defraud, conceal part of his property, to the value of 10*l.* and upwards, that is to say, lace and embroidery, table cloths, napkins, curtains, dresses, petticoats, handkerchiefs, neckerchiefs, shawls, and shirt fronts, to the value of 900*l.*

The fourth count of the indictment charged that Moritz Heymann and the said other persons conspired together that he, the said Moritz Heymann, should, contrary to the provisions of the Debtors' Act 1869, unlawfully and fraudulently dispose of, otherwise than in the ordinary way of his trade, certain of his property, to wit, divers large quantities of curtains and embroidered goods, table cloths, napkins, 400 pieces of embroidery, sixteen dresses, eighty-six handkerchiefs, sixteen dozen neckerchiefs, thirty shawls, large quantities of shirt fronts, and other goods which he, the said Moritz Heymann, had before then obtained on credit, and had not paid for.

Heymann pleaded not guilty. He was convicted on the first, second, and fourth counts of the indictment, and was sentenced on each count to be imprisoned for eighteen calendar months.

The grounds of error assigned were that the indictment was not sufficient in law; that the object of the conspiracies charged in the above-mentioned three counts of the indictment was to commit offences under sect. 11 of 32 & 33 Vict. c. 62, sub-sects. 4, 5, and 15, which section is limited to persons who have been adjudged bankrupt, whereas in none of these counts was it alleged that the defendant had been adjudged bankrupt; that there was no allegation that any creditor of the defendant entitled to petition had presented a petition against him to the Court of Bankruptcy; that there was no allegation that defendant and the other persons knew at the dates of the alleged conspiracies that the defendant was a person to whom sect. 11 of the Debtors' Act applied.

Sect. 11 of 32 & 33 Vict. c. 62 enacts that:

Any person adjudged bankrupt, and any person whose affairs are liquidated by arrangement in pursuance of the Bankruptcy Act 1869, shall in each of the cases following be deemed guilty of a misdemeanor, and on conviction thereof shall be liable to be imprisoned for any time not exceeding two years, with or without hard labour; that

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is to say . . . if after the presentation of a bankruptcy petition against him or the commencement of the liquidation, or within four months next before such presentation or commencement, he conceals any part of his property to the value of ten pounds or upwards, unless the jury is satisfied that he had no intent to defraud: if after the presentation of a bankruptcy petition against him, or the commencement of the liquidation, or within four months next before such presentation or commencement, he fraudulently removes any part of his property of the value of ten pounds or upwards: if within four months next before the presentation of a bankruptcy petition against him, or the commencement of the liquidation, he, being a trader, pawns, pledges, or disposes of otherwise than in the ordinary way of his trade, any property which he has obtained on credit, and has not paid for, unless the jury is satisfied that he had no intent to defraud.

Sec. 19 of the same Act provides that:

In an indictment for an offence under this Act, it shall be sufficient to set forth the substance of the offence charged in the words of this Act specifying the offence, or as near thereto as circumstances admit, without alleging or setting forth any debt, act of bankruptcy, trading, adjudication, or any proceedings in or order, warrant, or document of any court acting under the Bankruptcy Act 1869.

Bealey for the plaintiff in error.—The counts upon which the defendant was convicted do not disclose an indictable offence. Sec. 19 of the Debtors' Act 1869 does not apply to this case, as the indictment here is an indictment at common law for a conspiracy to commit offences under that Act, not an indictment for any offence under that Act. The facts, therefore, must be alleged with all the particularity required to constitute the offence charged in the indictment. Now there is no allegation that any bankruptcy petition was ever presented against the defendant, or that any adjudication ever took place. In *Rez v. Jones* (4 B. & Ad. 345) the indictment, after stating that a commission of bankruptcy had issued against the defendant by virtue of which the commissioners adjudged him to be a bankrupt, charged that he and other defendants conspired to conceal a part of his personal estate. After verdict this indictment was held defective for not showing that the defendant had actually become a bankrupt. "It does not state enough," said Parke, B., "to show that the defendant conspired to do any unlawful act; it ought to have alleged not merely the issuing of a commission of bankruptcy, but that there had been a trading by Jones, and a petitioning creditor's debt, and that he became bankrupt." "The indictment," said Taunton, J., "ought to contain averments of all matters necessary to constitute the offence; it is not sufficient merely to allege matter which makes it probable that an offence has been committed. It was not enough to show in this case that a commission issued, or that the commissioners adjudged the party to be a bankrupt. He must actually have become bankrupt." In *Rez v. Mason* (2 T. R. 581) it was held that an indictment charging the defendant with obtaining money by false pretences was insufficient, if it did not show what the false pretences were; and that if the defendant were convicted on it the court would reverse the judgment upon a writ of error. In *Reg. v. Peck* (9 A. & El. 686) it was held that a count for conspiring to deceive and defraud divers of Her Majesty's subjects who should bargain with defendants for the sale of goods, of great quantities of such goods without making payment, remuneration or satisfaction for the same, with intent to obtain profit and emolument to defendants, was bad, as not showing that the conspiracy was for a pur-

pose necessarily criminal; also that a count charging that defendants, being indebted to divers persons, conspired to defraud them of the payment of such debts, and in pursuance of such conspiracy executed a false and fraudulent deed of bargain and sale, and assignment of certain goods from two of themselves to a third, with intent thereby to obtain emolument to themselves, was bad for omitting to show in what respect the deed was false and fraudulent. [MELLOR, J.—These cases have been virtually overruled by later ones.] The case of *Sydes v. The Queen* (11 Q. B. 245), in which the court held good, on writ of error, an indictment charging that defendants "unlawfully, fraudulently, and deceitfully, did conspire, combine, confederate, and agree together to cheat and defraud" the prosecutor "of his goods and chattels," certainly seems inconsistent with *Reg. v. Peck* (*ubi sup.*). [BLACKBURN, J., referred to *Nash v. The Queen* (4 B. & S. 935), where an indictment under the Bankruptcy Act 1861, s. 221, alleged that the defendant, having been adjudged bankrupt by the Court of Bankruptcy for the London district, being then the court duly authorised and competent to adjudicate as aforesaid upon his examination in the said court, with intent to defraud and defeat the rights of his creditors, did not fully and truly discover to the best of his knowledge and belief all his property, to wit, all his personal property in money and in goods, and did not, as to part of his property (not being part fully and *bond fide* before sold or disposed of in the way of his trade or business, and not laid out in the ordinary expense of his family), fully and truly discover to the best of his knowledge and belief as aforesaid, how, and to whom, and for what consideration, and when he had disposed of, assigned, or transferred such part thereof, to wit, &c.; and it was held on error that, supposing the indictment bad for want of certainty, the objection was cured by 7 Geo. 4, c. 64, s. 21, as the offence was sufficiently described in the words of the statute.] Sec. 21 of 7 Geo. 4, c. 64 applies only to offences created by statute, not to such an offence as the plaintiff has been found guilty of. It enacts that "where the offence charged has been created by any statute, or subjected to a greater degree of punishment, or excluded from the benefit of clergy by any statute, the indictment or information shall, after verdict, be held sufficient to warrant the punishment prescribed by the statute if it describe the offence in the words of the statute." The indictment in the present case, being at common law, is bad for not stating all the ingredients of the offence, and, amongst others, that a petition had been presented against the plaintiff in error, and that he had been adjudged a bankrupt. [BLACKBURN, J.—To complete the offence that would be necessary; but the offence of conspiracy may be complete though the crime contemplated is never committed. Why should it not be a conspiracy to conspire to remove goods within four months of a contemplated bankruptcy by the owner? That may be so; but in the present case the indictment contains no allegation that the parties conspired in contemplation of bankruptcy. [BLACKBURN, J.—In Com. Dig. Pleading, C. 87, we find that "if a declaration omits that which was necessary to be proved, otherwise the plaintiff could not recover, this shall be aided by a verdict for the plaintiff." So 1 Wms. Saund. 260 n. 1: "Where there is any defect, imperfection, or omis-

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sion in any pleading, whether in substance or form which would have been a fatal objection upon demurrer, yet if the issue joined be such as necessarily required on the trial proof of the facts so defectively or imperfectly stated or omitted, and without which it is not to be presumed that either the judge would direct the jury to give, or the jury would have given, the verdict, such defect, imperfection, or omission is cured by the verdict by the common law." All this is said only of the pleadings in civil actions. [BLACKBURN, J.—I know of no distinction in this respect between civil and criminal pleadings. Is there any authority for making a distinction?] In 1 Chitty's Crim. Law, p. 172, we read: "It is further laid down that an indictment ought to be certain to every intent, and without any intendment to the contrary: and that it ought to have the same certainty as a declaration; for all the rules that apply to civil pleadings are applicable to criminal accusations. The last observation, indeed, does not sufficiently express the degree of precision required; for technical objections have been more frequently admitted to prevail in criminal than in civil proceedings, and it was expressly laid down by Lord Mansfield (1 Leach 134) that a greater strictness is required in the former than is necessary in the latter; and in the first a defendant is allowed to take advantage of mere formal exceptions." Archbold's Pleading and Evidence in Criminal Cases, p. 53 (17th edit.), was also referred to.

Bromby, in support of the conviction, was told that the court would consider before the 25th instant whether it would be necessary to hear him.

Jan. 25.—BLACKBURN, J.—This was a writ of error argued before the Lord Chief Justice, my brothers Mellor, Quain, and myself, on the last Crown paper day. We intimated at the conclusion of the argument for the plaintiff in error, that we should say to-day whether we thought it necessary to hear any arguments in support of the conviction; and we have come to the conclusion that it is not necessary to do so. The indictment was for conspiracy, and it is not necessary to cite any authority to show that the offence of conspiracy is complete as soon as there is an agreement to do a thing which would be, if done, though not a crime, such a matter as would bring the agreement to do it within the definition of conspiracy. Here the prisoner has been convicted upon an indictment on several counts, but all the objections raised apply to the first count, and the reason for our decision as to that count will apply to our judgment upon the other two. The first count charges that Moritz Heymann and the other persons mentioned in it, on the 2nd Jan. 1872, "unlawfully and wickedly did conspire, combine, confederate, and agree together, contrary to the provisions of the Debtors' Act 1869, and within four months next before the presentation of a bankruptcy petition against the said Moritz Heymann, fraudulently to remove part of the property of the said Moritz Heymann to the value of 10*l.* and upwards, that is to say, divers large quantities of lace and embroidered goods, &c., he the said Moritz Heymann then and there being a trader, and liable to become bankrupt, against the peace of our Lady the Queen." On this there is a plea of not guilty and a verdict of guilty. Sect. 11 of the Debtors' Act 1869 (32 & 33 Vict. c. 62), enacts that "any person adjudged bankrupt and any person whose affairs are liquidated

by arrangement in pursuance of the Bankruptcy Act 1869 shall in each of the cases following be deemed guilty of a misdemeanor. . . . If after the presentation of a bankruptcy petition against him, or the commencement of the liquidation, or within four months next before such presentation or commencement, he conceals any part of his property to the value of 10*l.* or upwards, unless the jury is satisfied that he had no intent to defraud; if after the presentation of a bankruptcy petition against him, or the commencement of the liquidation, or within four months next before such presentation or commencement, he fraudulently removes any part of his property of the value of 10*l.* or upwards, &c." It is quite clear that if an agreement were come to, or a conspiracy entered into such as alleged in the first count of the indictment, with a view to a prospective and contemplated bankruptcy, the offence of conspiracy would be at once complete, whether an adjudication of bankruptcy did or did not follow. The objection here taken on behalf of the plaintiff in error is that the count does not say that the agreement or conspiracy was in contemplation of, or with a view to, an adjudication, and if we were determining such a question on demurrer, I am not prepared to say that that might not be a good objection. But there is a general rule as to pleading at common law—and I think it right to say that there is no distinction, where questions of this sort arise, between the pleadings in civil and criminal proceedings—that where an averment which is necessary to support a particular part of the pleading, has been imperfectly stated, and a verdict on an issue involving that averment is found, and it appears to the court after verdict that unless this averment were true the verdict could not be sustained, in such a case the verdict cures the defective averment, which might have been bad on demurrer. The authorities upon this subject are all stated in 1 Wms. Saund. 260, n. 1 (last edit.). If the confederacy in the present case were entered into in contemplation or expectation of a future bankruptcy, there is no doubt that the offence of conspiracy was committed. The count avers that the plaintiff in error and the others mentioned in it unlawfully and wickedly conspired, combined, &c., contrary to the provisions of the Debtors' Act 1869, and within four months next before the presentation of a bankruptcy petition against him, fraudulently to remove part of his property; but it does not state expressly that this was done in contemplation of a bankruptcy petition, but only that it was done within four months next before the presentation of such a petition. We think that the verdict of the jury upon the issue of not guilty could not have been arrived at, unless it were proved that the fraudulent removal of the goods was in contemplation or expectation of an adjudication in bankruptcy; and if the confederacy was entered into in contemplation of an adjudication, the offence of conspiracy was at once complete as soon as the parties had agreed, whether, in fact, any adjudication followed or not. The objections, therefore, taken on behalf of the plaintiff in error, fail, and our judgment will, therefore, be for the Crown.

Judgment affirmed.

Attorney for prosecution, *A. G. Ditton.*

Attorney for plaintiff in error, *H. Sydney.*

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REG. v. CASTRO; *Re* ONSLOW AND WHALLEY.

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Jan. 20, 21, and 29, 1873.

REG. v. CASTRO.

Contempt of court—Speeches at public meetings—Pending trial—Collection of funds for defence—Vituperation of judge and attacks upon witnesses—Privilege of members of Parliament—Fine and imprisonment.

The defendant had been committed for perjury by the judge who tried an ejectment in which he was claimant, and in which the issue was the question of his identity with a certain baronet alleged by the defendants to be dead. The jury, during the defendants' case, had expressed themselves satisfied that the claimant was not the person he swore he was, and he elected to be nonsuited. The grand jury at the Central Criminal Court found true bills against him for perjury and forgery; the prosecution removed the indictments by *certiorari* into this court; and it had been fixed, upon application of the Attorney-General, that the trial should take place at Bar next Easter term. The defendant and his friends, amongst whom were two members of parliament and one barrister-at-law, had held public meetings for the purpose of obtaining money for the defence at the forthcoming trial, and remarks had been made by the defendant and the three friends mentioned, imputing perjury and conspiracy to the witnesses for the defence at the trial of the ejectment, and prejudice and partiality to the Lord Chief Justice of this court, who, they said, had proved himself unfit to preside at the trial of the indictments. They also asserted the innocence of the defendant, and the injustice of his treatment.

Held, that the trial of these indictments was a proceeding of the court then pending; that, although the remarks at the meetings might be the subject of a criminal information, yet the parties who made them might also be prosecuted summarily for contempt of court; that these remarks indicated an attempt by means of vituperation to deter the Lord Chief Justice from taking any part in the trial, and also by attacks on the witnesses themselves to influence the public mind and prejudice the jury; that they unwarrantably interfered with the even and ordinary course of justice; that it was no excuse that the motive or purpose for which the meetings were held was justifiable, nor that the attempt to interfere with the course of justice was ineffectual; that the proceedings were a gross contempt of court; and that it was the duty of the court to put a stop to them.

The members of Parliament who made these remarks, when summoned to answer for contempt, apologised, and submitted themselves to the court. They were, therefore only fined 100*l.* each; but it was held that the court would not allow the privilege of the House of Commons to prevent punishment by imprisonment of its members for a contempt in the administration of justice, if the occasion required it.

The barrister-at-law, whose offence was more aggravated than that of the others concerned, was sentenced to three months' imprisonment, and a fine of 500*l.*

The court, not desiring to prejudice the defendant in his defence at the forthcoming trial, merely bound him and one surety over in recognisances of 500*l.* each, to be forfeited if the defendant attended any more public meetings of the kind complained of.

Monday, Jan. 20, 1873.

Re ONSLOW AND WHALLEY.

UPON the application of the prosecution, Mr. Guildford Onslow, M. P. for the borough of Guildford, and Mr. Whalley, M. P. for the city of Peterborough had been summoned to answer a charge of contempt of court by endeavouring to prejudice the course of justice upon the trial of indictments which have been removed from the Central Criminal Court, but have not yet come to be tried. The defendant had been claimant in an ejectment, *Tichborne v. Lushington*, in the Court of Common Pleas, the only issue in which was the identity of the claimant with the person he alleged himself to be, viz., Sir Roger Charles Doughty Tichborne, Bart. The circumstances of the action are to be found reported in the case of *Tichborne v. Mostyn* (L. Rep. 8 C. P. 29; 26 L. T. Rep. 554.) The trial lasted 103 days, and during the case for the defence the jury expressed their opinion in opposition to the claimant's alleged identity, and the claimant elected to be nonsuited. Bovill, C. J., who tried the case, then committed the claimant for perjury, and upon his Lordship's suggestion the prosecution was undertaken by the Treasury. Subsequently true bills for perjury and forgery were found against him by the grand jury at the Central Criminal Court; and those true bills, which are the indictments in this case, were removed upon *certiorari* by the prosecution into this court. The trial of the defendant for perjury has, upon the application of the Attorney-General, been fixed to be held at Bar, and to be commenced during next Easter term. Defendant, who is on bail, has, with his friends, been addressing public meetings in various parts of the country, convened by them for the purpose of obtaining funds in aid of the defence at the forthcoming trial.

Two of these public meetings were held at St. James' Hall, in the county of Middlesex, on the 11th and 12th Dec. last. Mr. Onslow, Mr. Whalley, and the defendant were present on both occasions. On the 11th Dec. Mr. Whalley, who was in the chair, addressed the meeting, and introduced Mr. Onslow, who then addressed the meeting and spoke in these terms:

It may be as well that I should explain to you that our object in addressing the British public had its origin on these grounds. We were refused in the House of Commons replies to questions we put to the Ministers. Our mouths were shut in that House, and knowing, as we do, that we are supporting the right man in a good and honest complaint, we have nothing left but to appeal to public opinion. We don't ask you to say whether he is or is not Sir Roger Tichborne; but we ask you to say and believe that he is an Englishman, and, as an Englishman, that he is justly entitled to fair play, which is the birthright of every one of our countrymen. (Cheers.) Now, I maintain that in the late trial he did not receive the fair play he is entitled to. The long-winded speech of the Attorney-General, lasting 21 days (hisses), was never replied to, and we have a perfect right to assume that had Sergeant Ballantine been permitted to reply he would have turned the minds of the jury and of the public as much as they were turned by the Attorney-General. (Cheers.)

Mr. Onslow concluded a long speech by saying that in the great undertaking in which they were engaged they had obtained information, and would bring forward witnesses on the trial, that would, if the claimant were treated with the justice he had a right to demand, lead to his honourable and triumphant acquittal.

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At the second meeting held on the next day, at which a Mr. Skipworth was in the chair, Mr. Whalley spoke thus:

There are then, gentlemen, in this case two questions. In the first place is this man truly Sir Roger Tichborne? (Loud cries of "Yes, yes.") In the second place is that fact known? Now, mark and observe this, because these are words which I speak with a due sense of responsibility to those whom I meet in social life, to the House of Commons, where I have and shall again pledge all that I have worked and laboured for during twenty years on the strength of my convictions—is that fact, if fact it be, known to the Attorney-General? has it been known to him throughout this prosecution? is it known to Her Majesty's Government or to Mr. Gladstone, or, which is the same thing, have they given 100,000*l.*, or whatever other money they have given, out of your pockets, have they given that money to prosecute this man and to convict him of offences without taking the ordinary and proper means at their command for ascertaining the fact whether he be really guilty of perjury or not?

And again:

I have charged the Tichborne family, I have charged directly and in print the Doughtrys, the Radcliffes, and the whole lot of them together, with knowing that he is the man, and combining in a conspiracy against him. (Loud cheers.) Now, ladies and gentlemen, you will naturally say how can we listen to such a Don Quixote as that? What a fool that man must be to throw himself into a quarrel that in no manner concerns him, merely as to the question whether this gentleman or somebody else is entitled to certain estates in Hampshire, and here it is, ladies and gentlemen, that I come to the real question which concerns you and me, and the hundreds of thousands of men that I have addressed throughout the country. Here we come now to the public question. Gentlemen, the time has not come when either I should be justified in speaking or you would be prepared to listen to those possibilities of conspiracy in a matter of this kind, which I do believe, it is my hope, my expectation, the very object for which I exert myself in this case, will in due time become more fully developed and understood by the people of this country. What is the nature of this conspiracy? What is the origin? What are the grounds on which, six years ago, these people met in a drawing-room in London, and said we will defy the laws of England, we have these estates, here is the man, it is not expedient that this man should have these estates, we will keep them, we are strong enough in Parliament, strong enough on the Judicial Bench, strong enough in society to defy the laws of England. (Cheers.) Gentlemen, I am not prepared to enter into that to the extent I feel it. I say that I live in the hope that the time will come when it will be quite legitimate to address you on the nature of that conspiracy against Sir Roger Tichborne which I state here to-night, in accordance with a challenge which I gave three months ago at the last public meeting in London, in Oxford Hall, to this effect—That I should be prepared to meet the Attorney-General or any of the six counsel most eminent at the Bar, or any other advocates that he might put forward, and to satisfy any intelligent London audience that it was not consistent with the facts of this case, as I should present them to you, that he did not know throughout that trial that he was prosecuting that the claimant was Sir Roger Tichborne, and that he and the Government afterwards at his advice do now at this moment know, or that they have the means of knowing, that it is so; that in sustenance of their conspiracy for the purpose of retaining these large estates in the hands of the Arundel family, the leading family, as we know, in a certain influential circle of society—for the purpose of retaining these estates in that family, and sustaining the whole course of their conduct from first to last, that they do know, or, as I say, have the means readily of knowing, that they are attempting to prosecute to conviction, to penal servitude, or again to Newgate, a man whom they knew to be innocent of the charge brought against him.

Mr. Onslow afterwards made a long speech at the same meeting, of which the drift was to urge the audience to make subscriptions for the defence, and in the result Mr. Whalley moved a resolution:

That this meeting declares its opinion, in common with the country at large, that the prosecution of the claimant at the public cost was uncalled for, and, in the absence of explanation, which had been refused, wholly unjustifiable, and demands public reprobation; and that the support and sympathy of the British public are justly due to the claimant. This resolution was carried.

Upon the reports of these speeches, verified by affidavit, *Hawkins*, Q.C. (with him *Bowen*) had on behalf of the Crown moved for and obtained the summonses herein. Both gentlemen now appeared in court accordingly.

Sir J. B. *Karslake*, Q.C. (with him A. L. *Smith*) on behalf of Mr. Onslow, read an affidavit filed by him, in which he stated, among other things, that for many years of his life he lived on terms of intimacy and friendship with the late Sir James Tichborne and Lady Tichborne, his wife, and upon the death of the latter he attended her funeral at Tichborne Park. Sir James Tichborne and he were natives of the same county, and they saw a good deal of each other at different times. After the arrival of the claimant in this country in 1866 he became acquainted with him, and was in communication with Lady Tichborne on the subject of his identity, and he knew from her that she identified him as her firstborn son, the issue of her marriage with Sir James Tichborne, and as far as he could judge, he believed she had no doubt whatever on the subject. He was earnestly entreated by her ladyship before her death not to abandon or desert her son, the said claimant, and he faithfully promised that he would never do so, and, honestly believing, as he had always done and still did, that the person identified by her is her son, he had endeavoured to the best of his ability and power during all the proceedings in the Court of Chancery and in the Common Pleas, to assist him in establishing his claim to the title and estates. It is a matter of notoriety, he said, that, ever since the claim was first made by the claimant to the present moment, his identity has been made the topic of conversation and discussion among all classes in the House of Commons, in the clubs, in society, and in almost every part of the kingdom: and finding that the result of the trial had had the not unnatural effect of creating a very strong prejudice against the claimant (the greater because many statements which had been made, but not proved by witnesses, were assumed to be true), he did attempt to counteract the feeling of prejudice, with the view and object, so far as he could attain them, of preventing the result of the trial from operating unjustly against the claimant in the criminal proceedings taken against him. After the release of the claimant from prison (Lady Tichborne, from whom during her life he received 1000*l.* a year since his return, having died) the claimant was wholly without funds to meet the expenses of his defence. He attended meetings in parts of the country with the object of obtaining funds for the purpose of defraying the expenses of his trial. The meetings of the 11th Dec. and the 12th Dec. 1872, mentioned in the affidavits filed upon obtaining the rule in this case, were meetings called for such purpose as aforesaid. In the observations which he made, his desire, intention, and object were to counteract the feeling of prejudice existing against the claimant, so that he might, if possible, go into court to meet his trial for the criminal offence alleged against him unprejudiced by the result of the trial at

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Nisi Prius, and the comments which had been made upon him in the course thereof. He said that although now it was obvious to him that such observations, made with the sole object and purpose aforesaid, might be considered to have the effect of reflecting upon the character of witnesses and the conduct of the prosecution, it did not occur to him that such was or might be the effect. He had not the slightest intention of prejudicing or interfering with or preventing the course of justice, and it was with great regret that he had taken a course unwittingly which could be looked upon as indicative of having ever entertained any such intention. The affidavit thus concluded: "I repeat that at the time I made the observations complained of I had no intention whatever of interfering with the course of justice in the trials which are now pending. I made such observations under the circumstances and with the objects only above stated by me. As soon as I read the report in the public papers, of the motion to this honourable court, I saw that I had been betrayed into taking a course which laid me open to the imputation of having, in trying to remove prejudice operating against the claimant, created prejudice against the prosecution, and thereby, pending a trial, improperly commented upon matters connected with it; and I desire to express my unfeigned regret at having taken such a course, and to apologise in all sincerity to this honourable court for the conduct for which I am arraigned." So far as the counsel had been able to look into the subject, he found, he said, that where a matter was actually pending in a court it had always been deemed improper to comment upon the evidence which was or would be given on the hearing; and that if the effect of the comments were or might be to reflect upon the administration of justice, or to prejudice the fair trial of the case, then there was technically a contempt of court. In the present case the proceedings, no doubt, were so far pending that indictments had been found against the claimant which were standing for trial in this court; and so far as he could form an opinion from the authorities (though there was no express authority precisely in point), it might be considered that the proceedings were pending. If, however, he should be wrong in that view, and if in point of law the case was not pending, he hoped his admission would not prejudice the case of Mr. Onslow. The course he proposed to adopt, and which had been suggested to him by Mr. Onslow rather than suggested by himself to his client, was to explain the circumstances under which that gentleman came to use the words complained of, and this he had done in his affidavit. He desired to urge that from the course the trial of the action had taken, it had come to a close before the evidence had been fully gone into, and many things had been stated by the Attorney-General which, it was believed by his client, would not have been capable of proof, and Mr. Onslow had made his comments under the impression that the case, had it been concluded regularly, would have turned out very differently. No doubt, however, in the course of Mr. Onslow's speech allusions were made to the coming trial, and he felt bound to admit that there were observations made which technically amounted to a contempt, inasmuch as they might tend to prejudice the fair trial of the case. Therefore they would come within the rule he had adverted to, assuming that the court would

be of opinion that the case was pending. [COCKBURN, C. J.—On that point we entertain no doubt.] That being so, of course the case would come within the principle of several recent decisions in the Court of Chancery on this very case, with reference to observations in the press. And he expressed on the part of Mr. Onslow his regret that he should have been betrayed into these observations. [COCKBURN, C. J.—There is a question, Sir John, which I think it proper to put, and which is important. Are we to understand that Mr. Onslow, in expressing that regret, which has been so happily expressed by you on his behalf, intimates to the court his clear intention and resolution not again to take part in any such proceeding?] Most undoubtedly; and he made that statement at Mr. Onslow's direction.

Digby Seymour, Q.C. (with him *Morgan Lloyd* and *Macrae Moir*), on behalf of Mr. Whalley, read an affidavit, in which that gentleman entered at great length into the facts of the ejectment. The affidavit concluded as follows: "And I further say that I attended the said meetings with the sincere and honest conviction that the same were lawful public meetings, convened for a legitimate object, and that I had a full right to discuss the matters contained in the speeches delivered by me at such meetings. It never occurred to me that anything said at the said meetings would unduly influence the jury that might be empanelled to try the said indictments, nor in any other way prevent a fair and impartial trial." The counsel observed that he was not aware of the course which was to be taken by Sir J. Karslake, who had acted without any communication or concert with him; and while he fully concurred with him in the language he had employed, he felt it his duty to point out to the court that there was this distinction between the present case and any other, that here the parties were commenting upon a former trial which was concluded. [COCKBURN, C. J.—But with attacks upon the conduct and character of witnesses who were to be called again as witnesses. LUSH, J.—He suggests that what they had done once they would be likely to do again.] Mr. Whalley states that his only object was to promote an appeal on behalf of the defence. [COCKBURN, C. J.—But if the obvious effect was to prejudice the fair trial of the prosecution, the purpose would not be material.] It might be material in a case of mere constructive contempt such as this. In all the other cases there had been attacks upon particular witnesses in a trial or hearing still pending. [COCKBURN, C. J.—So there are here, for particular persons who are expected to be called as witnesses are charged with perjury.] This was explained as having reference to the former trial. [COCKBURN, C. J.—The question of identity being the same in the civil as in the criminal trial, those witnesses who gave their evidence in the former trial against the claimant would be called again in the ensuing trial to give their evidence against him. If the meeting had been convened only for the purpose of providing funds for the approaching trial, perhaps that might not in itself have been reprehensible. But if, speaking with reference to the approaching trial, those witnesses who it is known will be called to give evidence are denounced as conspirators, and as intending to give perjured evidence—is it to be doubted that this is a contempt? Is not this the test? Suppose a person

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afterwards called as a juror on the coming trial had been present at the meeting and heard these persons charged as perjured conspirators, would it not have been calculated to prejudice his mind?] If Mr. Whalley used language tantamount to that, he could not of course vindicate it; but he denied that he had any idea of his language having such an effect. He was stating his reasons why persons should subscribe to the defence. That takes it out of the charge as to contempt. [BLACKBURN, J.—That is quite contrary to the law, as I have always understood it.] In all the previous cases on the subject there had been attacks upon witnesses for their evidence on the very proceedings then pending; for instance, in the Chancery cases there had been attacks upon persons who had made affidavits in the case being heard. Surely there is a broad distinction between those cases and the present? [MELLOR, J.—Even if there had been no direct allusion to the coming trial, can any man doubt that the statement that the witnesses in the former trial were in a conspiracy to deprive a man of his estates by means of perjury, would have had an effect upon the public mind as to the coming trial, in which, of necessity, the question would be the same and the witnesses must be the same?] Mr. Whalley had a lawful object in view, in the course of urging which he had fallen into the use of this language. His object was only to promote subscriptions for the defence. [BLACKBURN, J.—I have no doubt in all the cases of newspaper contempts which have occurred, the object was not to do injustice, but to promote the sale of the paper; but has that ever been considered an excuse? LUSH, J.—Can any motive excuse the assertion at a public meeting that the witnesses on a coming trial are in a conspiracy to commit fraud by means of perjury?] He commented upon the evidence they gave at the former trial in order to show that they were combined together to defeat the claimant. [LUSH, J.—With a view to show that they were likely to give false evidence on the coming trial.] Not necessarily so. They might or might not be called at the next trial. These remarks might be the subject of a criminal information. [BLACKBURN, J.—But even if so, it is no reason why a party should not be prosecuted for a contempt.] It might be a reason why the Court should not interfere summarily for a contempt that there was a remedy by way of criminal information. [MELLOR, J.—If Mr. Whalley had confined himself to pointing out the great odds against the claimant, arising from the wealth and social position of the family opposed to him, and had urged this as a reason for assisting him with subscriptions, avoiding all calumnious imputations upon those who were against him, his case would have been very different, and I should have felt very reluctant to visit him with any penalty. But he has not been content with this, and has imputed to the witnesses against him that they were in a conspiracy to defeat and convict an innocent man by means of perjury.] His object, however, was legitimate. [COCKBURN, C.J.—The motive or the object could not excuse a contempt of court. BLACKBURN, J.—Unduly to interfere with a fair trial is not the less a contempt because it is done to get subscriptions for one side.] This is a “constructive contempt,” and is, therefore, to be regarded with some jealousy. [BLACKBURN, J.—Where is the distinction between an actual con-

tempt and a “constructive” contempt?] The distinction is very obvious: one is a direct attack upon the Court, and the other is only an indirect attack upon some of the parties or witnesses. [BLACKBURN, J.—Lord Cottenham said in *Mr. Lechmere Charlton's case* (2 Myl. & Cr. 316, 342), “It is immaterial what means are adopted, if the object is to taint the source of justice, and to obtain a result of legal proceedings different from that which would follow in the ordinary course. It is a contempt of the highest order.”] That was a very different case from the present. But even adopting that definition here, that was not Mr. Whalley's object. This was a constructive contempt, and a novel case, and would carry the doctrine of contempt further than any case which has yet occurred. Mr. Whalley disclaimed any intention to pervert the course of justice, or interfere with a fair trial; and if he had been guilty of a contempt, it had been unwittingly, and in the conscientious discharge of what he believed to be a public duty. He apologised to the Court, and promised not to attend any such meetings in future.

Hawkins, Q.C. (with him *Bowen*) appeared for the prosecution, and read extracts of the speeches made at the public meetings. He left the matter in the hands of the Court.

COCKBURN, C. J. addressed Mr. Guildford Onslow and Mr. Whalley:—I have to express the unanimous opinion of the court (Cockburn, C.J., Blackburn, Mellor, and Lush, JJ.) that in the proceedings set forth in these affidavits to which you have been called upon to give an answer you have been guilty of a gross and aggravated contempt of the authority of the court. We are far from saying that when persons believe that a man who is under a prosecution on a criminal charge is innocent, they may not legitimately unite for the purpose of providing him with the means of making an effectual defence; and any expressions intended only as an appeal to others to unite in that object, though, perhaps, not strictly regular, would not be fit matter for complaint and punishment. We quite agree that it would be harsh and unnecessary to interfere with the expression of opinion honestly entertained, and expressed only for a legitimate purpose. But it is no excuse to urge when—at a meeting held for the purpose of providing funds—language is used which amounts to an offence against the law—and a contempt against the court—that the motive or the purpose for which the meeting was held was justifiable. And when we find that at a former trial the jury before whom the claimant gave his evidence declared that they disbelieved that evidence, and that the learned judge, who presided at the trial, directed his prosecution, and that a grand jury—the proper and constitutional tribunal—have found true bills against him on the serious charges of forgery and perjury—that such a man should be paraded through the country and exhibited as a sort of show at public assemblies as the victim of injustice and oppression, and that at these meetings—in violent and inflammatory language—witnesses who had given evidence against him on the former trial should be held up to public odium as having been guilty of conspiracy and perjury; that the counsel engaged against him, and even the judge who presided at the trial, should be reviled in terms of opprobrium and contumely; and, what is still more immediately to the present purpose, that the events of the pending

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prosecution should be discussed and the evidence assumed to be false; and that all this should occur, not merely in the provinces, but in the metropolis, almost in the precincts of the court and within the very district from which the persons are to come who are to pass in judgment between the Crown and the accused in the coming trial—how can we shut our eyes to the fact that there is here an outrage upon public decency and a great public scandal, and that the even and ordinary course of justice has here been unwarrantably interfered with? This court, therefore, cannot, under such circumstances, hesitate to exercise the authority which it undoubtedly possesses, for preventing the public discussion of any trial pending in the court. It has been attempted to be contended on your behalf that the meetings in question were convened solely for the purpose of obtaining money in order to enable the accused to carry on his defence, and with the additional purpose of removing any prejudice which the result of the former trial may have produced against him. But that can be no excuse if the language used amounts to an unwarrantable interference with the course of justice. And when we find that gentlemen of your station and position, gentlemen of education, members of the Legislature, have condescended to lend themselves to proceedings of this character, and to hold such language as you have used on these occasions, we can only contemplate your conduct with astonishment and regret. When it is said that all this was done without any consciousness that it was an offence against the public justice of this court, though it must have the effect of creating prejudice with reference to the approaching trial, I can only accept that apology as really derogatory to the understanding of those who make it. There cannot be the slightest doubt in the mind of any sensible man that such a course of proceeding must interfere with public justice. If it is open to those who take the part of the accused to discuss in public the merits of the prosecution in his interest; then it must be equally open to those who believe in his guilt to take a similar course on the other side. And then we may have, on the occasion of a political trial, or any case exciting great public interest an organized system of public meetings throughout the country, at which the merits or the demerits of the accused may be discussed and canvassed on the one side and the other, and thus, by appeals such as you have not hesitated to make to public feeling in this case, the course of public justice may be interfered with and disturbed. It is clear that such comment upon a proceeding still pending is an offence against the administration of justice and a high contempt of the authority of this court. Nor can it make any difference in point of principle whether the observations are made in writing or in speeches at public meetings, and we can have no hesitation in applying to the one case the same rule as to the other. We think, therefore, that the counsel for the Crown have done no more than discharge their duty in bringing this case under our notice; and we must deal with it in such a way as to repress, if possible, such improper proceedings in future. We are glad to find that on this occasion, though attempts have been made to distinguish this case from others in which the court has interfered in the exercise of its summary authority, yet both parties have through their counsel submitted

themselves to the court, and have given a clear and distinct pledge that they will take no part in such objectionable proceedings again. If there had been any hesitation in giving such a pledge, or the slightest appearance of it, and if there had not been the most submissive attitude assumed, the court would have thought it necessary to use to the full extent the power and authority it possesses, and would have inflicted a substantial fine and also a sentence of imprisonment in addition. We are happily spared the necessity of taking the latter course in consequence of the very proper line you have both of you adopted. But we wish it to be understood that in the fine we are about to impose we have gone to the extreme of moderation, and that if on any future occasion proceedings of this kind shall be resorted to, the full power of the court, which it immediately possesses to restrain and prevent such proceedings by the infliction of adequate punishment, will be certainly inflicted with a stern and unhesitating hand. The mischief in the present case, so far as the positive effect of these proceedings is concerned, has been very trifling indeed, thanks to the good sense of the metropolitan press in forbearing from giving publicity to these offensive and objectionable proceedings. But your intention was not the less reprehensible, nor your conduct the less open to severe censure. However, under all the circumstances we think that, considering the position you have taken and the pledge you have given, a pecuniary penalty of moderate amount—moderate with reference to the circumstances of the case and the aggravated character of the offence you have committed—will satisfy the exigencies of the case. But that leniency which we now exercise will be appealed to in vain if any other person shall be found guilty of a similar offence. The sentence of the court upon you is that for this contempt you do each pay a fine of 100*l.* to the Queen, and that you be imprisoned until the fine be paid.

Upon consulting the other judges, the LORD CHIEF JUSTICE almost immediately added:

To persons of your position it is not necessary to apply the latter part of this sentence. The sentence of the court, therefore, is that you do each pay a fine of 100*l.* to the Queen.

Jan. 21.—COCKBURN, C. J. to-day made the following remarks with regard to this matter:—I find that an impression has gone forth that, in remitting that part of the sentence pronounced yesterday which imposed imprisonment until the fine was paid, I was influenced by the anticipation of some difficulty as to the imprisonment of members of Parliament by reason of some privilege which members of Parliament possess. This is an entire mistake, imprisonment being only imposed as a means of insuring payment of the fine. I was reminded by my brother Blackburn that payment might be enforced without having recourse to imprisonment, and it at once occurred to me that it was unnecessary—looking to the position of these gentlemen—that imprisonment should be imposed until the fine was paid, especially as there were other means of enforcing payment. On that ground alone, that part of the judgment was recalled. I had intended to intimate in the judgment which, with the concurrence of the court, I pronounced, that if in the case itself there had not been a perfect submission to the court on the part of the defendants, and the clearest and most positive

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pledge that there would be no renewal of the conduct complained of, the sentence of imprisonment would have been added to the pecuniary penalty. The possibility of any collision with the House of Commons had not appeared to us as ever likely to occur, especially as in the case of Mr. Lechmere Charlton, who was committed by order of the Court of Chancery, the House of Commons declined to interfere on behalf the privilege of their members; and I am sure that the House of Commons would not desire to interpose the privilege of its members to prevent punishment by imprisonment for a contempt in the administration of justice. I was anxious that there should be no misunderstanding on a matter of such importance as this, and, therefore, I have thought it necessary to correct an impression which seems to have prevailed as to the grounds on which we proceeded in remitting that part of our judgment to which we have referred.

Attorney for the prosecution, the Solicitor to the Treasury.

Attorney for Mr. Onslow, *E. Bromley*.

Attorney for Mr. Whalley, *F. Moojen*.

Wednesday, Jan. 29.—*Re SKIPWORTH AND THE DEFENDANT.*

COCKBURN, C. J. had on the 22nd inst. handed to the Attorney-General in court some Brighton newspapers, which had been sent him, and which, he said, contained reports of proceedings reflecting grossly upon the court, and repeating the contempt for which Messrs. Onslow and Whalley were fined.

The Attorney-General undertook that careful attention should be given to the matter; and at his desire, on Saturday the 25th, *Hawkins, Q.C.*, moved, before BLACKBURN, MELLOR, LUSH, and QUAIN, JJ., that Mr. Skipworth, a barrister-at-law, be summoned to answer for a contempt of court.

It appeared from the affidavits verifying newspaper reports, that Mr. Skipworth, who was chairman of the meeting held on 12th Dec. and referred to in the previous matter, was present in the Court of Queen's Bench, on the 21st inst., when Messrs. Onslow and Whalley were fined; and on the same day he went to Brighton, and there in the evening, with the defendant, the claimant in the ejectment, attended another public meeting, convened to collect funds for the defence. Mr. Skipworth took the chair, and was received with great applause. He said:—

Ladies and Gentlemen,—It is encouraging to me to have such a reception after the degrading spectacle I have witnessed in the Court of Queen's Bench to-day. It was nothing less than this—that two honourable members of Parliament had been brought up as criminals for advocating truth and justice. ("Hear, hear," and applause.) Yes, it was a sad spectacle. Has England come to this? No less than a great infringement of our liberties! If they had a just cause on the other side this would never have been done. (Cries of "Never!") What do they mean? Will they rob a man of every friend he possesses? I will go on to advocate the cause of my friend Sir Roger Tichborne. I live quietly upon my own estate. I have my home and family and friends; I have my affairs to attend to; but when duty calls me forth I obey the call, and when I see such degradation as I witnessed to-day, these honourable men brought up and treated as criminals, and obliged to apologise in the most degrading way, and fined for doing their duty to their fellow-countrymen, I remember that I was chairman of that meeting their conduct at which was called in question. The Lord Chief Justice in his judgment professed how mild and moderate he was to them as they had apologised, and that if anybody else should offend

in the same way he should be treated with the utmost rigour of the law, not only with a fine but with imprisonment. ("Shame, shame.") I hurl this intimation back with the contempt with which he treated these honourable men. I care not for his intimidation. I will stand here with my friends in defence of him—in defiance of his vulgar threats. (Cheers.) I am not going to be intimidated when my honest duty to my country calls me forth. I could see there was no chance of justice being done by those four judges. It was like appealing to stone walls. I could see that their minds were made up to convict my friends. And why was this, but to prevent free public discussion in this country? I would have cut my hand off before I would have acknowledged that I had been doing wrong and apologized when there was nothing to apologize for. I would let them send me to prison rather than have acknowledged what was untrue. Better the dungeon than such a degradation. What is life worth without liberty and honour? (Cheers.) If this man be Sir R. Tichborne, then there is a conspiracy to keep him out of his estates. And I say that Lord Chief Justice Cockburn was not the fit person to try anything in connexion with the case. I am sorry to say that he has so long prejudged the case that he is unfitted to try the case as an impartial judge.

BLACKBURN, J. observed that in the papers handed down by the court, there were even more aggravated expressions alleged to have been used by the defendant in the prosecution.

Hawkins, Q.C.—That is so. And his speech as reported is verified by affidavit. But I would rather myself abstain from entering into the matter against him, as I do not desire on the part of the prosecution to do anything which might prejudice his trial. [BLACKBURN, J.—The Court will hear the language used, and will then say what shall be done.] My application is only against Mr. Skipworth.

The defendant spoke at the meeting as follows:

I call upon the Lord Chief Justice to come forward and answer for contempt of court. . . . In prejudicing me before trial. I go further; for I am determined to go to the bottom of it. Four years ago he prejudiced me as a rank imposter at his club. I know of other occasions, but I cannot prove them. I can prove, however, that subsequently, within the last two months, at a party where a lady, a friend of mine was, he turned round and in an angry tone said it was a disgrace to mention me in decent society. I have a right to call upon him to answer for contempt of court. I do not suppose they will grant the rule, but he may rest assured that I will apply for it. I maintain that he had no right to sit upon that bench. At St. James's-hall my friends, Mr. Onslow and Mr. Whalley, attended and said that he was not a fit person to sit upon my trial. So much have I heard that I mean to petition Parliament against his sitting on my trial. I shall be able to prevent it; but if I am not I will go into court without counsel or attorney, or witnesses, and let him crush me as he thinks proper. If the Lord Chief Justice is to sit upon my case I will offer no evidence, but will throw myself upon the country.

BLACKBURN, J.—We think that, though Mr. Hawkins, representing the prosecution, does not ask it, we ought to issue an order not only against Mr. Skipworth but also against the claimant—by whatever name he may be known. It is a mistake to suppose that such proceedings as these, by way of attachment, are taken to vindicate the dignity and honour of the court, or to punish any attacks upon ourselves. If that were the only object, there would probably be hardly ever a case which we should not treat with contempt. But the court has the power, by summary process, to interfere, and prevent anything that may unduly interfere with the administration of justice in cases pending before it. It is because if such cases were left to the slow process of the general law by indictment or otherwise, the mischief would be done, that we have the power of interfering summarily, and it is our duty to exercise that power. Now, upon the

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present occasion enough has been brought before us to show us distinctly that there is an organized and persevering system of agitation which seems to be an interference with the proper course of justice, and which there is reason to believe will not be put a stop to until this person, the claimant, or defendant, is brought before us. And, therefore, though it is not asked on the part of the prosecution, we think it right to make the order that both these persons shall attend here on Wednesday morning next.

To-day Mr. Skipworth and the defendant appeared in answer to the summons issued against them. Neither of them was represented by counsel.

The affidavits filed by the prosecution were read at length by the officers of the court; who also read an affidavit filed by Mr. Skipworth. The affidavit of Mr. Skipworth, after giving the history of the case, proceeded to state:

The meetings complained of were given out to be called for the purpose of raising money for the Tichborne Defence Fund, but I did not attend them on that account alone, but for the purpose of enlisting sympathy in the case. At these meetings no improper language was used, except under excitement caused by hostile interruptions. The meetings took place, too, by reason of the enormous interest taken in the case throughout the country, and often upon invitation and at the express desire of respectable persons. And all these meetings were unanimous in declaring a belief in the Claimant.

As to the part he had taken in these meetings, Mr. Skipworth went on to say:

I have had no other object than to promote the cause of truth and justice. If I had made any improper statements—of which I am not aware—it has been through inadvertence, and not intentionally. The remarks I have made upon any of the judges or law officers of the Crown were meant in the way of honest comment and fair criticism upon their public acts and conduct. I had not the slightest intention of bringing the Court into contempt, but my sole object has been to uphold the interests of justice, which I believed to be in jeopardy.

Mr. Skipworth went on to say that he was in court, and heard the sentence passed on Mr. Onslow and Mr. Whalley; and he thought that under the circumstances there had been a degradation and dishonour to the law which he felt called upon to protest against. The remarks I made (he said) at the Brighton meeting as to the Lord Chief Justice not being a proper judge to try the case, were based upon notorious and well-known facts, he having repeatedly denounced the claimant as an impostor; and on this account, Mr. Skipworth said, "I considered it improper that he should preside." "I put it to the meeting, not in the spirit of aspersion or contempt, but as an observation fairly called for by the position of the case; and, though I was excited by a hiss to say 'I hiss the Lord Chief Justice,' that expression escaped me on the spur of the moment; and, being sensible upon reflection that the expression was improper, I withdrew it. But I cannot forego my right to comment upon the conduct of a judge with reference to a case before him. With regard to the charge of attending this particular meeting, I must say that though I was not bound by the submission and the pledge given by the two members of Parliament, I avow that I attended that meeting in defiance of the threat held out by the court, and that it was with the distinct intention of setting that threat at defiance; for I considered that such a threat ought not to have been uttered from the bench, and it was my object to prevent the stigma

and reproach attaching to the country of our being a nation of cowards, and to show that there was at least one man who had a spark of public spirit in his breast sufficient to inspire him to resist the attempt made to extort pledges—which there was no legal right to exact—not to attend meetings admitted to be lawful." In conclusion, Mr. Skipworth submitted that he could not but consider the course now taken against him unjust, cruel, and oppressive.

The defendant, when called upon by the court, said that he was not aware that he had committed any contempt, and if he had done so, it was not his intention. He submitted that what he had stated was true, and he ought to be tried upon this charge against him by a jury, now especially, as the chief complaint against him was on account of what he had said about the Lord Chief Justice. [BLACKBURN, J.—You are not charged with a contempt in the sense of having insulted any member of the court, but with an attempt to obstruct the ordinary course of justice, and using undue influence to prejudice a trial.] He contended that all he had said related to the previous trial, at which his counsel had no opportunity to reply, and in consequence the accusations made against him by the Attorney-General on behalf of the defence had received no answer. Besides, all the newspapers, he said, were continually making attacks upon him. He appealed to the court whether an article heaping abuse upon him in the *Saturday Review* of the previous week, was fair or just. [BLACKBURN, J.—As you appeal to us, we are bound to answer you, and to say that we think it is not just, and that we entirely agree with you in thinking that it was a most improper article, for the very reason you are now brought before us to answer for what you have done, and we only hope that no one will offend again.] He then went on to read articles in which he had been attacked, and urged that as his counsel had not been heard in reply, he had no other means of meeting these attacks than speaking at public meetings. Therefore, it was, he said, that he had gone from town to town trying to meet and to answer these charges, and to appeal to his fellow-countrymen against the attacks of the press. He urged that he had a right to do so, and that the Court had no right to interfere with him. He urged, again, that this was the more just because his trial had been put off for twelve months in order to enable the Government, with all the aid of the Government funds, to get up a stronger case against him by means of advertising for evidence and other methods in Australia. He urged further that these meetings had been going on for many months without being in any way objected to, and had lately been brought before the Court of Chancery without any objection: He urged, again, that when, in 1870, he brought the *Echo* before the Court of Chancery for prejudicing the case before the hearing and before the trial, the Vice-Chancellor let its proprietors off with payment of their costs, and he had to pay his own. After that, of course, he made no further attempt to obtain redress in court, and now he was charged with "contempt" of Court because he tried to get redress by appealing to the public himself. He had attended eighteen of these meetings, and had held at all of them the same language, and had never been interfered with before in any way. He protested that he had only asserted the right of a free-born Englishman in defending himself, and he urged that had the

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Government done their duty and behaved fairly he would never have been driven to this. Finally he appealed to the Court on the ground that if they sent him to prison or inflicted a fine which he could not pay they would prejudice his defence in the prosecution now pending against him, and deprive him of the means of making his defence.

Hawkins, Q.C. (with him *Bowen*) appeared for the prosecution, and briefly submitted the matter to the Court.

BLACKBURN, J.—These persons have been called upon to show cause why they should not be committed for contempt of court, and the first question is whether they have been guilty of a contempt. The word "contempt" has caused persons who are not lawyers to suppose that it means a proceeding to protect the personal dignity of the judges from insult to them as individuals, and sometimes, no doubt, persons have been committed for such personal attacks, although, so far as their protection as individuals is concerned, that is a subordinate object, and the cases are very rare in which judges would consider it worth their while to interpose on that ground. But there is another and more important object for which it may be necessary to interpose. Any case which is pending, either in a civil or criminal court, ought to be tried in the ordinary course of justice, and in the present case there is an indictment against one of the persons before us which is now standing for trial. That case ought to be fairly tried; but it may happen that proceedings occur such as have now called upon us to interfere. Sometimes the course taken has been by attacking the judge, sometimes by attempting to induce him to alter his opinion or to take a course different from that which he would otherwise take; more commonly, there is an attempt to influence the trial by attacking the witnesses or appealing to public feeling so as to prejudice the trial. In all these ways great mischief may be done, interfering with the due and ordinary course of justice. When the attempt is by an act which is itself punishable, as conspiracy, libel, or assault, the party might, of course, be indicted for it; but the effect, though sufficient for the purpose of punishment, might be made greater for the purpose of prevention; the mischief might be done, and the administration of justice would be perverted or prejudiced. For that reason, from the earliest times, the Superior Courts of Law and Equity have exercised the jurisdiction of prosecuting such attempts by summary proceedings for contempt, and having that power, it is our duty, when the occasion arises, to exercise it. In the present instance, as *Mr. Hawkins* has stated, he did not desire to proceed against the defendant; but we thought that as there had been an attempt to interfere with the course of justice, it was our duty to interpose against him, and we, therefore, ourselves ordered him to attend. And I am bound to say that he has defended himself here with great propriety, and, making allowance for the want of legal knowledge, he has taken every point in his favour which the ablest counsel could have done. Nevertheless, he has not succeeded in showing us that he has not been guilty of a contempt. He has urged that the matter ought to be tried by a jury, but the question is not now whether he is innocent or guilty on the indictment on which he will be fairly tried hereafter. The attempt to prejudice the trial is the

offence with which he is now charged. We are not to inquire whether what he has stated be true or false, but whether the course he has taken be such as to show that he intended to influence the trial and prejudice the question by appeals to public feeling. All such attempts amount to contempt of court, and we hardly think it necessary to cite any authorities on the point. We need only mention one, *Mr. Lechmere Charlton's case* (2 Myl. & Cr. 316). Lord Cottenham, after citing authorities, said in that case, p. 342, "All the authorities tend to the same point; they show that it is immaterial what measures are adopted, if the object is to taint the source of justice and to obtain a result of legal proceedings different from that which would follow in the ordinary course. It is a contempt of the highest order, and although such a foolish attempt as this cannot be supposed to have any effect, it is obvious that if such cases were not punished, the most serious consequences might follow. If I consulted my own personal feelings upon the subject, I should pass by these letters as a foolish attempt at undue influence; but if I were to adopt that course, I should consider myself guilty of a very great dereliction of my high duty. The order must therefore be made absolute for the committal of *Mr. Lechmere Charlton* to the Fleet." These words indicate the kind of contempt which has been attempted in the present instance, where there has been an attempt by means of vituperation to deter the Lord Chief Justice from taking any part in the trial, and also by attacks upon the witnesses themselves, to influence the public mind and prejudice the jury. *Mr. Skipworth* has, in so many words, said that he intended to do so, and that he will do it again. Such a course, we are all of opinion, amounts to a contempt of court. We have then to consider whether it is the less so because it is foolish and ineffectual. It is true that it is utterly ineffectual. Before these meetings had been heard of, it came to be a question whether the case should be tried before a single judge or at bar—that is, before the full court, or several judges of it, when each judge takes part in the proceedings, and, possibly, as has actually happened, they may have different opinions and express them. That occurred in the trial of the Seven Bishops, and the judges expressed different opinions and gave conflicting directions to the jury, the result of which was an acquittal. Such is the nature of a trial at bar; and it is within my personal knowledge that before any application was made on the subject, the Lord Chief Justice stated that he thought it right, as it was likely to be a case of much magnitude and importance, that more than one judge should sit to assist him in the trial. Afterwards the Attorney-General, as was his privilege, prayed a trial at bar, and that was at once acceded to. It was, however, the personal desire of the Lord Chief Justice that the case should not be tried by himself alone, but by several judges at bar. That being so, we find that meetings are held at which the object appears to have been, by means of vituperation, to deter the Lord Chief Justice from sitting at the trial. They will, however, have no such effect. There is not and never has been the slightest doubt in my mind, nor in the mind of any member of the court, that it would be a great dereliction of duty on the part of the Lord Chief Justice, or at least a culpable

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weakness on his part, if he were to yield to this influence and refrain from sitting on the trial of the case. There is not, however, the slightest idea of doing so. The Lord Chief Justice is of opinion that it is his duty to sit on the trial, and we are all of the same opinion. In the course of these proceedings various observations have been made reflecting upon him, or upon other persons, but principally as to what the Lord Chief Justice is supposed to have said on various occasions on the subject; but it is not right that a judge in the high position of the Lord Chief Justice should be exposed to such attacks and expected to come forward to deny, to explain, or to refute them. A judge in his position cannot be expected to come forward to vindicate himself from such imputations. As I am not to sit upon the trial, I may permit myself to say that I am sure it will be conducted with perfect impartiality. These attacks, then, have failed in their object, but it is not the less incumbent upon us to visit them, for in future cases the influence exerted might be more formidable and require the strongest measures to repress it. We may imagine the case of a popular person indicted for sedition or treason, and appealing to public sympathy and support. It might require considerable nerve to resist such attempts, and if we were to pass over the present instance, when the more formidable case arose, in which our successors might find themselves obliged to interpose, they might find themselves seriously embarrassed by the precedent we should have set. Besides, it would be a great public scandal if these proceedings were allowed, and it is essential that they should be stopped. That being the view we take of our duty upon this occasion, there can be no doubt that both these persons have attended public meetings with the intention of influencing the ordinary course of justice and prejudicing the trial, and we can come to no other conclusion than that they have been guilty of a contempt of court. The second question that arises is what should be their sentence. I would observe that under ordinary circumstances the Lord Chief Justice would preside here, and his absence is not to be supposed as at all inconsistent with anything I have said. But we have to determine the amount of punishment for an offence which has partly consisted of personal attacks upon the Lord Chief Justice; and where that is the case there is the risk that his feelings might be thought vindictive, and the still greater risk that his anxiety to avoid it might lead him to be too lenient, and therefore it was desirable that he should avoid this difficulty by being absent on the occasion. In a court of equity, where there is only a single judge, it would not be possible to avoid it; but here it is so, and therefore he has not thought fit to take any part in fixing the amount of punishment. Having said so much, we proceed to consider what should be the sentence in this case. And first, as to Mr. Skipworth, I cannot see anything in his favour. He has deliberately come forward, as he avows, to influence the trial of the case; he declares the claimant to be innocent, and tries to persuade the public that he is so. Up to last Monday week he might have supposed he was doing nothing wrong, but on that day he was present in court and heard Mr. Onslow and Mr. Whalley declared guilty of contempt. Having heard that judgment, he went down to Brighton and held a public meeting, at which he denounced the Lord Chief Justice, and

spoke in terms not very complimentary to the rest of the court. I am reminded by my brother Mellor that Mr. Skipworth is a barrister and ought to know better; but, though a barrister, it is evident that he is no lawyer. For such an aggravated offence we must impose a sentence of fine and also of imprisonment, and the first question is as to the amount of the fine, which must not be excessive, but still must be sufficient to be deterrent, and within those limits the amount is within our discretion. Upon the whole, we think that the amount ought to be 500*l*. To that we must add a term of imprisonment, and that also must be sufficient to prevent the mischief of interference with the trial which is to be held in April next. We think, therefore, that the term of imprisonment must be three months. Then, as to the other defendant on the indictment—no doubt he has attempted to influence the course of justice, and, therefore, has been guilty of a contempt, but there are differences and mitigating circumstances in his case. One great difference is this—that he is a party in the case, to whom some latitude must be allowed; and although we think he has gone beyond that limit, still it is a consideration to be borne in mind. Again, it is to be considered that he was assailed by attacks in the Press calculated to prejudice his trial, and if he had confined himself to answering those attacks, though he might still have been guilty of a contempt, it would have been one of which this court might have been reluctant to take notice. There is another consideration to which he has very justly adverted—that we must take care in passing sentence upon him not to do anything that might prejudice him in his defence. If we were to impose a fine or inflict imprisonment it might have that effect, but it is necessary that these proceedings should be stopped. Taking these things into consideration, we are of opinion that the proper course would be that he should give security, himself for 500*l*., and another for 500*l*., that he will be of good behaviour and not be guilty of any contempt of court for the period of three months; otherwise he must be imprisoned until then.

MELLOR, J.—I entirely concur in what my brother Blackburn has expressed upon the matter. I entertain no doubt whatever of the character of the contempt, or that it is one which it is our duty to repress; and I agree with the reasons he has given, and also in the distinction he has drawn between the cases of the two persons now charged before us.

LUSH, J.—I am of the same opinion, and have nothing to add to the observations of my brother Blackburn.

QUAIN, J.—I also entirely agree with my brother Blackburn.

BLACKBURN, J. then formally passed the sentence of the Court accordingly.

Monday, Jan. 27, 1873.

REG. v. JONES.

Quo warranto—User of office—Declaration of defendant's own election.

It appeared, upon a rule for a quo warranto, that the defendant had presided at a vestry meeting convened for the purpose of electing a member of a burial board, under 15 & 16 Vict. c. 85, s. 12, that he and others were proposed and seconded;

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that he declared himself elected; that the clerk wrote to the clerk of the Burial Board informing him of the defendant's election; and that at the next vestry meeting, when defendant again presided, the minutes of the previous meeting, one of which was a memorandum of the defendant's election, were unanimously confirmed. Defendant stated in an affidavit that he had declined to attend any of the meetings of the board, and he had not at any time acted or claimed the right to act as a member of the Board:

Held, that this was not a sufficient user of the office to found an application for an information in the nature of a *quo warranto*.

THIS was a rule nisi calling upon Philip Jones to show cause why an information in the nature of a *quo warranto* should not be exhibited against him to show by what authority he claims to exercise the office of a member of the Kingston-upon-Thames Burial Board, on the following grounds: first, that the majority of votes was given to the relator, Cleaveland Phillips, and not to the said Philip Jones; secondly, that the return by the chairman, the said Philip Jones, of himself was a bad return; thirdly, that his vote was bad; fourthly, that the votes of the deputy vestry clerk and of the paid auditor were bad; fifthly, that the adjournment of the meeting of the 18th July last was illegal and improper.

By 15 & 16 Vict. c. 85, s. 11:

In case of such resolution as aforesaid—(i.e., a resolution of vestry to provide a burial ground), the vestry shall appoint not less than three nor more than nine persons, being ratepayers of the parish, to be the Burial Board of such parish; of whom one-third, or as nearly as may be one-third (to be determined among themselves) shall go out of office yearly, at such time as shall be from time to time fixed by the vestry, but shall be eligible for immediate reappointment.

By sect. 12:

Any vacancies in the Board may be filled up by the vestry when and as the vestry shall think fit.

A special vestry meeting of the parish of Kingston-on-Thames was duly held on the 18th July last, in accordance with a request from the Burial Board of the said parish, for the purpose of electing a member of the said Burial Board in the place of another member lately deceased.

The said Philip Jones was voted to the chair, which he occupied during the meeting; and he acted as returning officer.

The said Cleaveland Phillips, and Philip Jones were each proposed and seconded for the vacant office, and the said Philip Jones as chairman and returning officer took a show of hands for the said Cleaveland Phillips and also for himself. He declared himself to be elected by a majority of votes, and on the same day the clerk to the vestry wrote to the clerk of the said Burial Board, informing him that at this vestry meeting "it was resolved that Mr. Philip Jones be elected a member of the Burial Board, and to fill the vacancy" aforesaid. The said Cleaveland Phillips immediately gave notice to every one concerned that he claimed to be elected instead of the said Philip Jones, on the ground amongst others that the said Philip Jones could not return himself, and that he voted for himself; but the said Philip Jones never disclaimed to be a member of the said Burial Board, and has since received all notices of meetings of the said Board.

It appeared from the affidavit of the defendant the said Philip Jones, that he was churchwarden

of the parish, and accustomed to preside at the vestry meetings in the absence of the vicar. He denied that he voted for himself, and asserted that he was returned by a majority of the members of the vestry present. He stated that at the subsequent meeting, when he was again in the chair, the minute of the previous meeting, to the effect that he was duly elected member of the Burial Board, was unanimously confirmed. His affidavit also contained the following:—"I have declined to attend any of the meetings of the said Burial Board, and I have not at any time acted or claimed the right to act as a member of the said Burial Board."

Field, Q.C. and *Pearce*, showed cause against the rule.—This paragraph of Mr. Jones' affidavit is sufficient to show that a *quo warranto* will not apply to this case. It was held in *The King v. Whitwell* (5 Term Rep. 85), that there must be an user as well as a claim of a franchise in order to found an application for an information in the nature of a *quo warranto*. Stating that the defendant who was elected to an office had tendered himself to be sworn in is not sufficient. Here the defendant has not gone even so far as that.

J. Brown, Q.C. and *Foard* supported the rule:—The defendant publicly declared himself duly elected, and the clerk to the vestry over which he had presided, wrote, informing the Burial Board of his election. Further he himself states that the minute of his election was in his presence unanimously confirmed. According to *The King v. Tate* (4 East, 337), a swearing in, though defective in law, yet being such whereby the party claimed at the time to be a free burgess of a corporation, was sufficient user of the office to warrant an information in nature of *quo warranto* against him, and not like a mere claim of the office. The circumstances of this case constitute more than a mere claim of the office by the defendant; they amount to an acceptance.

BLACKBURN, J., cited *The King v. Ponsonby* (2 Brown's Cases in Parliament, 311.)

BLACKBURN, J.—When one considers the nature of a *quo warranto*, it is clear that the writ is applicable only to a person in the exercise of an office or franchise. Every information alleges that the defendant at a certain place, on a certain day, did use and exercise, and from thence continually afterwards to the time of exhibiting this information hath there used and exercised, and still doth there use and exercise, without any legal warrant, royal grant, or right whatsoever, the office of, &c., and for and during all the time last above mentioned hath there claimed, and still doth there claim to be, &c. (Corner's Crown Practice, form No. clix.) These allegations could not be made concerning the acts of the defendant here. *The King v. Tate*, is in my opinion quite right, but there is no such user here.

MELLOR and QUAIN, JJ. concurred.

Rule discharged.

Attorney for relator, R. C. Hanrott.

Attorney for defendant, G. C. Sherrard.

Wednesday, Jan. 29, 1873.

REG. v. THE POSTMASTER-GENERAL.

Mandamus—Rating of telegraph posts and wires—Assessment—*The Telegraph Acts* 1868 and 1869 (31 & 32 Vict. c. 110; 32 & 33 Vict. c. 73.)

A vestry applied by mandamus to compel the Post-

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master-General to pay poor rates upon the rateable value of telegraph posts and wires, as fixed by an assessment committee. The Postmaster-General had tendered a smaller amount, proportionate to an assessment fixed by the Commissioners of the Treasury, which the vestry had refused.

Held, that by the Telegraph Acts 1868 and 1869, no duty is cast upon the Postmaster-General to pay the rates imposed by those Acts; and that there is no remedy by mandamus against him to enforce the payment of rates fixed by an assessment committee.

A RULE nisi for a mandamus had been obtained by Poland, on behalf of the vestry of the parish of Marylebone, to compel the Postmaster-General to pay the sum of 104*l.* 3*s.* 4*d.*, the amount at which the telegraph wires in the said parish had been rated by the assessment committee for the payment of poor rates.

The property assessed consisted of telegraph wires and the posts supporting them. There had been no assessment before 1868, in which year all the telegraphs became the property of the Post Office Department of the Government. It was, however, admitted that they might have been assessed, and were properly assessable. The Postmaster-General had notice that the property was assessed at 500*l.*, and that the rates due amounted to the sum for which the rule had been obtained. The Postmaster-General gave notice of appeal against this rate, but did not prosecute the appeal. Subsequently he tendered to the vestry 4*l.* 3*s.* 4*d.*, the proportionate rate upon an assessment of 20*l.*, which was the amount fixed as the assessment of the poles and wires in the Marylebone parish by the Commissioners of the Treasury. The vestry refused this tender and obtained the rule now argued.

The Attorney-General (Sir J. D. Coleridge, Q.C.) and Boven showed cause:—The two questions are: first, whether this court has jurisdiction to afford a remedy by mandamus against the Postmaster-General? secondly, whether the assessment committee is the proper authority for determining the rateability and assessment of this property? Under the Telegraph Act 1868 (31 & 32 Vict. c. 110), which is an Act to enable Her Majesty's Postmaster-General to acquire work and maintain electric telegraphs, it is declared expedient, in the preamble, that the Postmaster-General be empowered to work telegraphs in connection with the administration of the Post-office; and by sect. 4 "It shall be lawful for Her Majesty's Postmaster-General, and he is hereby authorized, with the consent of the Lords Commissioners of Her Majesty's Treasury, from time to time out of any moneys which may be from time to time appropriated by Act of Parliament, and put at his disposal for that purpose, to purchase for the purposes of this Act the whole, or such parts as he shall think fit, of the undertaking of any company; and any undertaking, and all other property purchased under the powers of this Act, shall be vested in and held by Her Majesty's Postmaster-General in his corporate capacity, and his successors, provided always that no such purchase be made and that no agreement, other than the agreement confirmed by this Act for any such purchase, be binding, unless the said agreement be accompanied by a minute from the Commissioners of Her Majesty's Treasury, in which the grounds of the agreement shall be set

forth, shall have lain for one month on the table of both houses of Parliament without disapproval;" and by sect. 22, "All land, property, and undertakings purchased or acquired by the Postmaster-General under this Act shall be assessable and rateable in respect to local, municipal, and parochial rates, assessments, and charges, at sums not exceeding the rateable value at which such land, property, and undertakings were properly assessed, or assessable at the time of such purchase or acquisition." It appears from this statute that the Postmaster-General is empowered to act only under the directions of the Commissioners of the Treasury; it was clearly shown in the case of *Reg. v. The Lords Commissioners of the Treasury* (L. Rep. 7 Q. B. 387; 26 L. T. Rep. 64), argued last year, that all payments by the Treasury are subject to the review of Parliament; and it was held that this court had no jurisdiction over the Treasury by mandamus. This Act of itself should therefore be sufficient to establish the first point, but the Telegraph Act 1869 (32 & 33 Vict. c. 73), makes the matter clear. The preamble, after reciting the agreements entered into by the Postmaster-General under the Telegraph Act, 1868," and the sums of money fixed for the payment of transfers effected by him, states that "it is necessary to give authority to the Commissioners of Her Majesty's Treasury to raise the funds which will be required to enable the Postmaster-General to carry into effect the arrangements hereinbefore mentioned, and the other purposes of the recited Act and this Act." By sect. 13, power is given to the Commissioners of the Treasury to raise money by certain modes therein mentioned, and the interest upon such securities shall be chargeable upon and payable out of the consolidated fund or the growing produce thereof. By sect. 14: "The amount so raised, or the stock so created shall be placed to an account at the Bank of England in the names of the Commissioners for the Reduction of the National Debt, and shall be appropriated by the said commissioners in such manner and transferred to such parties as shall be directed by the Postmaster-General for the purposes of the Telegraph Acts, under such regulations as shall be prescribed by the Commissioners of Her Majesty's Treasury;" by sect. 19, "The gross revenue received by the Postmaster-General for the transmission of messages by means of electric telegraphs shall be paid into the Exchequer to the account of the Consolidated Fund; and the expenses incurred, with the sanction of the Commissioners of Her Majesty's Treasury, in working, maintaining, or extending telegraphs, shall be paid out of moneys to be voted by Parliament." By sect. 20, "There shall be laid before both Houses of Parliament on or before the 31st day of March in every year an account showing the gross amount received during the previous year ending the 31st day of December, the amount of expenses incurred during the year, and the balance remaining applicable to pay the annuities, or the interest falling due upon the securities issued under the authority of this Act; and as a sinking fund for the redemption of such securities, and the surplus remaining after deducting the amount of such expenses, and of such annuities and interest, shall be issued out of the Consolidated Fund, or the growing produce thereof, to the Commissioners for the Reduction of the National Debt, to be

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applied in reduction of debt to an amount equivalent to that created by the annuities or securities issued under the provisions of this Act;" and by sect. 21, "A copy of all regulations which may be made by the Postmaster-General, with the consent of the Commissioners of Her Majesty's Treasury under the said Telegraph Acts, shall also be laid before both Houses of Parliament." Now when the object and provision of these Acts are looked at, it will be seen that the whole control of the telegraphs was intended to be kept under Parliament. The money to be employed in any way in acquiring the telegraphs is to be voted by Parliament, and the expenses incurred in maintaining them is also to be voted by Parliament. And in paying away the money so voted for expenses, the Postmaster-General can only act under the authority of the Commissioners of the Treasury, whose servant in that respect he is, so that the present case comes distinctly within the authority of *Reg. v. The Lords Commissioners of the Treasury*, before cited, where it was held that no *mandamus* could issue to compel the payment of money by the Commissioners of the Treasury. [MELLOR, J.—But are rates "expenses" within the meaning of the 19th section? BLACKBURN, J.—Yes, it was held that rates were expenses of maintenance in *The Mersey Docks v. Cameron*, 11 H. of L. 443.] It might be that, had the Postmaster-General actually received the money for the payment of these rates and refused to part with it, the case would then fall within *Rex v. The Lords Commissioners of the Treasury* (4 A. & E. 286, 976), which was distinguished in the other case referred to, but he has not a sixpence beyond the 4l. 3s. 4d., which has been tendered and refused, nor can he have more, for by the terms of the Act, he is bound to pay over the whole of the gross income he receives to the Treasury. [BLACKBURN, J.—But what remedy has the parish? The 22nd section of the first Act clearly entitles the parish to payment of the rates. Do you contend that the Treasury Commissioners are themselves to be sole judges, as to the amount of the assessment upon which the rates are to be paid? Yes. That is the second point. It is clear that the Government intended to keep the whole management of this Act under their control; many of the properties were of small or no value at the time they were acquired, inasmuch as they were in the hands of different struggling or needy companies, but they became at once of great value when by the transfer to the Government they formed parts of one large and important property; and where there had previously been no assessments of such parts the Government did not intend that the parish authorities, who would probably be influenced by the increased value, should proceed to assess; but that the fixing of such assessment, together with the other part of the management of the Act should be retained in their own hands. But this question does not arise if the first point is decided in the defendant's favour.

Sir J. Karslake, Q.C. and Poland (in support of the rule).—This is Crown property, but it is made rateable by statute. The question is, How are the rates to be recovered, and from whom? The 24th section of the first Act provides that if Parliament puts no moneys at the disposal of the Postmaster-General for the purpose of carrying out the provisional agreements then entered into with the dif-

ferent companies, the Postmaster-General shall thereupon pay to the several companies "all reasonable costs and expenses incurred by them in relation to any proceedings taken under this Act." If no money is voted, then he is to pay the expenses. The Act does not say where the money to pay such expenses is to come from, but it does say that he shall pay; it casts a statutory duty upon him. It is submitted the 22nd section is in effect the same. True, it does not in words say the Postmaster-General "shall pay," but it says the property acquired by him under the Act shall be assessable. He is the occupier of the property, and as such is *primâ facie* liable for the rates. The 22nd section says the rates are to be paid. It follows that the Postmaster-General is the proper person to pay these rates, and to say he has no funds is no more an answer to this claim than it would be to a claim by a company for expenses under the 24th section. The duty exists equally under both sections. [BLACKBURN, J.—But if we put that construction on the 22nd section, and hold the Postmaster-General liable as occupier, your remedy would be by distress. For the purposes of a *mandamus* you must show that he has public moneys which he wrongfully refuses to pay away.] Here no distress is legally capable of being taken; so that the only remedy is by *mandamus*. That of itself is a reason why the court should grant it. [LUSH, J.—Yes; if there be a duty.]

BLACKBURN, J.—I have no doubt whatever but that it was intended by the 22nd section that the parish should not be losers by the transfer of the telegraphs—that they should have the same rates they had, or ought to have had previously. But the Act provides no means of enforcing the payment, and in that respect it is defective. All we can do is to refuse the writ.

MELLOR, LUSH, and QUAIN, JJ., concurred.

Rule discharged.

Attorneys for applicants, Clarkson, Son, and Greenwell.

Attorney for respondents, The Solicitor to the Treasury.

[SITTING AT BAR.]

Tuesday, April 29, 1873.

(Before COCKBURN, C.J., MELLOR AND LUSH, JJ.)

REG. v. CASTRO.

Trial at bar—Removal by certiorari from Central Criminal Court—Indictment for perjury—Offences in two counties.

An indictment, containing two counts, one alleging perjury committed in Middlesex, the other alleging perjury committed in London, was tried, upon removal by certiorari from the Central Criminal Court, before the Queen's Bench sitting at bar.

Held, that it was no valid objection to the jurisdiction of the court that the jury was entirely from the county of Middlesex.

INDICTMENT for perjury, removed from the Central Criminal Court by *certiorari*, and tried at bar by application of the Attorney-General. The jury summoned by the court consist of special jurors of the county of Middlesex.

The indictment contains two counts: the first, alleging that the defendant committed perjury in the trial at Nisi Prius at Westminster of the ejectment *Tichborne v. Lushington*; the second,

[Ex.]

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[Ex.]

alleging that the defendant committed perjury in affidavits in the Chancery suit of the same name, sworn by him in the city of London before a commissioner for taking oaths in Chancery. The *venue* laid in the indictment is "Central Criminal Court."

The *certiorari*, in pursuance of 9 & 10 Vict. c. 24, s. 3, states the county of Middlesex to be that in which the indictment is to be tried. That section is:—

3. And whereas doubts have been raised as to the proper place of trial, where indictments have been removed by writ of *certiorari* from the Central Criminal Court into the Court of Queen's Bench: Be it enacted, that every writ of *certiorari* for removing an indictment from the said Central Criminal Court, shall specify the county or jurisdiction in which the same shall be tried; and a jury shall be summoned, and the trial proceed in the same manner in all respects as if the indictment had been originally preferred in that county or jurisdiction.

Kenealy, Q.C. and *McMahon* on defendant's behalf, contended that the court with a Middlesex jury had no jurisdiction to try this indictment. The general common law rule to which perjury is no exception, requires that a criminal shall be tried in the county, and by a jury of the county, in which the crime has been committed. That rule is not affected by the provision in 9 & 10 Vict. c. 24, s. 3, concerning indictments removed by writ of *certiorari*. *Corner's Crown Practice* (p. 259), says, "As the trial [at bar] must be by a jury of the county wherein the offence was committed (unless otherwise ordered by the court upon suggestion), it has been thought that a trial at bar cannot be had in a cause originating in London, or in a county Palatine, the jurors being exempted by charter from coming out of their city or county to try any issue, unless the jurors consent to waive their privilege; but the more convenient mode would be to move for a suggestion for trial by a jury of an adjoining county, and, that being granted, to move for a trial at bar." In this case no motion had been made for trial by a jury of an adjoining county, nor indeed would that be of any avail, for part of the perjury alleged in the indictment was committed in Middlesex, and part in London. [*COCKBURN*, C.J. Surely, if necessary, we can quash the second count of the indictment, and try on the first.] The whole indictment is bad in consequence of the joinder of the two counts. [*LUSH*, J.—When this court tries a case with a jury, it must be a jury of Middlesex.] That is not what is laid down by *Corner*.

COCKBURN, C.J.—We are all of opinion that there is nothing at all in the point taken on behalf of the defendant by way of objection to the jury. Such as it is, however, it appears on the record, and if required may be raised hereafter.

COURT OF EXCHEQUER.

Reported by T. W. SAUNDERS and H. LEIGH, Esqrs.,
Barristers-at-Law.

Thursday, Jan. 16, 1873.

THE ATTORNEY-GENERAL v. SCOTT (Chamberlain of London).

Income Tax Acts (5 & 6 Vict. c. 35; 16 & 17 Vict. c. 34)—*Schedule D*—*Municipal corporation*—*Profits of*—*Deductions from*—*What to be allowed*—*Principle of assessment*.

The income of the Corporation of the City of London, including the profits derived from "renewing fines," "profits of markets," "corn and fruit

metages," "brokers' rents," "Mayor's Court" and other fees, is liable to income tax; and the proper principle on which deductions are to be allowed, is to take each item or head of income separately, and to assess the income tax upon the net value of such item after deducting from its gross receipts the costs incurred in earning it.

But, semble, no deduction can be allowed in respect of the general expenditure for keeping up the establishment of the Corporation.

So held by Kelly, C.B., and Martin, Bramwell, and Pollock, BB.

1. This is a proceeding by the Attorney-General, on the revenue side of the Court of Exchequer, against the defendant as the chamberlain and officer of the mayor and commonalty and citizens of the city of London, hereinafter called the Corporation.

2. The proceedings commenced by writ of *subpoena*, issued on the 27th Oct. 1868, and the claim indorsed on the writ was for the forfeiture of two penalties of 50*l.* each, in respect of the alleged neglect of the defendant, as the chamberlain and proper officer in that behalf, to make due returns under the Income Tax Acts of the profits and gains of the Corporation for the two years commencing respectively on the 6th April 1867, and the 6th April 1868.

3. By consent of the Attorney-General, on behalf of the Crown, and of the solicitor of the defendant and of the Corporation, and by an order of M. Smith, J., dated the 13th April 1869, it was ordered that a special case, without pleadings, should be stated, for the opinion of the Court of Exchequer, under the 10th section of the Crown Suits Act (22 & 23 Vict. c. 21), and that in the event of the court being of opinion that the return dated the 8th July 1867, made by the defendant on behalf of the Corporation was insufficient, judgment should be entered for the Crown for a nominal sum of 1*s.* in lieu of the penalties, with costs, and that the Corporation should be charged with and pay the duty chargeable according to the opinion of the court for each of the said two years commencing as aforesaid; and that in the event of the court being of opinion that the said return was sufficient, judgment should be entered for the defendant, with costs, and the said mayor and commonalty and citizens should be charged with, and pay duty for, each of the said years commencing as aforesaid, according to the said return so made on their behalf by the defendant.

4. For the year commencing on the 6th April 1867 the defendant, as such chamberlain and officer, made the following return:

6257*l.* 18*s.* 6*d.* The amount of the balance of profits of the corporation of the City of London returnable under Schedule D., including the profits of markets but exclusive of rents of land, &c., and interest on Government securities.

BENJAMIN SCOTT,
Chamberlain.

Chamber of London, 8th July 1867.

5. The account set out below in paragraph 7 of this case purports to be a statement of the income of the Corporation (exclusive of rents and interest on funded property) for the year 1866, rendered them by the defendant, and shows the mode in which the said sum of 6257*l.* 18*s.* 6*d.* has been arrived at.

6. The account is to be taken as a true account of the sums therein appearing to be received and paid by the Corporation.

7. "A statement of the income of the Corpora-

[Ex.]

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[Ex.]

tion of the City of London (exclusive of rents and interest on funded property) for the year 1866, together with the deductions and abatements therefrom with the view of showing the amount which should be returned to the Commissioners acting in the execution of the Acts 5 & 6 Vict.

c. 35; 8 Vict. c. 64; 11 & 12 Vict. c. 8; 14 & 15 Vict. c. 12; 15 & 16 Vict. c. 20; 16 & 17 Vict. c. 34; 17 & 18 Vict. c. 10; and 18 Vict. c. 20, in order that the Corporation may be assessed to duties payable under Schedule D of the first-mentioned Act for the year ending 5th April 1868."

	£	s.	d.	£	s.	d.
Renewing fines				12,743	18	3
Profits of markets				18,517	19	2
Produce of groundage and water bailage	486	10	8			
Less return of duty to freemen, factors, and demurrage	187	11	4			
				298	19	4
Metage on corn	14,989	16	10½			
Less expenses	3,227	16	2			
				11,762	0	8
Fruit metage	1,812	9	2			
Wages	900	0	0			
				912	9	2
Stamping weights and measures				114	18	8
Broker's rents, &c.	6,694	5	0			
Less expenses	521	15	1			
				6,172	9	11
Mayor's Court fees	5,596	3	8			
Rents and disbursements	799	6	9			
				4,796	16	11
Fees, judiciary business (less wages)				549	17	6
Officers' surplus fees and profits				17,694	1	3
Sundry and casual receipts				446	5	9
				£73,949	16	7

DEDUCTIONS.

	£	s.	d.
Salary and wages to officers and servants in respect of the civil government of City courts of justice, prisons, &c.	40,803	2	6
Repairs to Guildhall, Mansion House, prisons, sessions house, justice rooms, and other public buildings	6,266	10	2
Charges under City Police Act	17,982	19	5
Ditto under Act 13 & 14 Vict. c. 10, for Freeman's Orphan School	2,639	6	0
	£67,691	18	1
Balance of profits	6,257	18	6
	£73,949	16	7

8. Dispute and litigation arose between the Corporation and the Commissioners of Income Tax in the year 1810, and a settlement was come to in the Court of Exchequer, in Hilary Term in that year, by consent of the counsel for the Corporation, and the then Solicitor-General as representing the Crown, but without argument.

9. The nature and history of the said dispute and litigation and settlement are described and detailed in two orders of the Court of Exchequer dated respectively 10th Nov. 1810 (Appendix marked W 1), and 28th Feb. 1811 (Appendix marked W 2), and in the report of the Coal and Corn and Finance Committee of the Corporation presented on the 3rd Oct. 1867 (Appendix marked W 3), and which said Appendices W 1, W 2, and W 3, are to form part of this case. The defendant on behalf of the Corporation, contends that from the above proceedings a principle can be derived which is binding as to the mode in which the revenues of the Corporation comprised in the above account ought to be assessed, and they also contend that the account in paragraph 7 is made out and stated upon that principle. The Attorney-General denies that the above proceedings are evidence against the Crown in the present proceedings, or, if evidence, are binding. He also denies that any principle can be derived from the above proceedings, or that the account is made out and stated in accordance with it.

10. All the sums appearing on the left hand side of the said account to have been received are carried by the Corporation to one general account, together with their revenue arising from real and funded property, and, out of this general account, all payments appearing on the right hand side of the said account are made, and also the

sums appearing on the left hand side of the said account as deductions from the sums received.

11. The details of the sum of 40,803*l.* 2*s.* 0*d.*, appearing on the right hand side of the said account, are set forth in the paper marked X in the appendix to this case, and the details of the second item on the right hand side of the said account, viz.: the sum of 6266*l.* 10*s.* 2*d.* are set forth in the paper marked Y in the said appendix.

12. The sums appearing on the left hand side of of the account as deductions from the sums received are items which exclusively relate to the particular source of income from which they appear to be deducted, and it is admitted by the Crown that those items, and all other items of expenditure necessary in order to enable the Corporation to earn or acquire the several sources of income on the left hand side of the account, are proper to be deducted; but the defendant, on behalf of the Corporation, contends that all the items on the right hand side of the account are to be deducted or taken into account before any of the items of profit on the left hand side of the account can be charged with duty.

13. All the various officers and persons mentioned in the said paper marked X are officers of the Corporation, and the various salaries and sums paid to them and the expenses of their establishments, which are included in the items appearing in the said paper marked X, are all respectively reasonable and necessary salaries and remuneration for services performed, and expenses of offices and establishments or compensation paid in order to lessen the expense of such officers and servants, and the item described as "fees on presentation to Lord Chancellor" is an ancient fee, payable by the Corporation on the presentation of the Lord Mayor

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to the Lord High Chancellor for her Majesty's approval.

14. Many of the said officers are essential to the very existence of the Corporation, and the services of all the said officers and persons are necessary for the due discharge by the Corporation of its corporate functions and duties. The Corporation have by charter confirmed in Parliament, the franchise of all markets within seven miles in circuit of the said city. They have also by prescription and statute, several courts of law, the Court of Hustings, the Mayor's Court, the Chamberlain's Court, the Sheriffs' Courts, and the City of London Court. They have also by prescription, charter, and statute, the office of measurer of grain, fruit, salt, cheese, and other merchandise coming into the port of London. They are also bound to provide in part for the administration of justice for the district of the Central Criminal Court within their city, and for the administration of summary justice for the limits of their county. They have also to provide prisons for the detention of criminals and misdemeanants within their city and the district of the Central Criminal Court, and also for debtors within London and Middlesex, and to provide a common gaol for the county of Middlesex, and also for prisoners committed for contempt of the Superior Courts at Westminster. The services of the various officers of the Corporation included in the paper marked X, are required for some or all of these purposes, as well as in collecting and controlling the receipt of the revenues of the Corporation, so far as their respective functions extend, in a manner which renders the apportionment of the salaries to each particular purpose impossible.

15. All the said officers, whose salaries and profits appear in the said paper marked X, are assessed to and pay income-tax in respect of such salaries and profits, except so far as they may be entitled to exemption under the Income Tax Acts.

16. The Mansion House and the Guildhall have been assessed under Schedule A of the Income Tax Acts, and the property tax so assessed has been paid accordingly.

17. The item of 17,982*l.* 19*s.* 5*d.* described as "Charges under City Police Act," on the right-hand side of the said account, is the amount contributed by the Corporation during the year ending 5th April 1867, out of their said general revenue account, under the 57th section of the Act for Regulating the Police in the City of London (2 & 3 Vict. c. 94, Local and Personal), which Act is to form part of this case.

18. The item of 2639*l.* 6*s.* described as "Freemen's Orphan School," on the right-hand side of the said account, is the amount expended by the Corporation out of their said general revenue account in the year 1866, in maintaining and supporting the school established under the provisions of the Private Act, 13 & 14 Vict. c. 10, "for establishing a school for orphans of freemen of the City of London" (which Act is to form part of this case), over and above the funds and moneys by the said Act particularly appropriated to that purpose.

19. In addition to the said deductions shown in the said account, the Corporation provide out of their said general corporate revenues account various other sums for public purposes, which they have not now, or in any former year, deducted in making their return of income, under Schedule D

of the Income-Tax Acts, in consequence, as they allege, of the settlement made in 1811, but claim to do so should the court decide that they are not entitled to the benefit of the said settlement.

20. The following is a description of the nature of such expenses, viz. :—

Expenses in connection with the Central Criminal Court, established since 1811, by Act of Parliament.

Expenses connected with the sittings of the Courts of Queen's Bench, Common Pleas, and Exchequer, at Guildhall.

Expenses connected with criminal and pauper lunatics, under various Acts of Parliament.

Expenses in connection with the magistracy within the City of London, viz. : The Courts sitting daily at the Mansion House and Guildhall Justice Rooms.

Expenses of the office of Coroner for London and Southwark.

Expenses in connection with the inspection of weights and measures.

Expenses in connection with the prison of Newgate, the City House of Correction at Holloway, the prison for debtors in Whitecross-street, and the Borough Court.

Rates and taxes on public buildings of the Corporation.

The aggregate of the expenses referred to in this paragraph is 20,274*l.* 9*s.*, and the particulars are set out in Appendix Z to this case.

21. The item of 12,743*l.* 18*s.* 3*d.*, on the left-hand side of the account is the aggregate of the annual sums received by the Corporation for renewing leases of house and other property belonging to and let on leases by the Corporation.

22. The question for the opinion of the court is whether or not the said return of 6257*l.* 18*s.* 6*d.*, is sufficient? If the court shall answer this question in the negative, judgment is to be entered for the Crown for the nominal sum of 1*s.*, with costs, and the Corporation is to pay the duty chargeable according to the opinion and upon the principle fixed by the court for each of the said two years, commencing as aforesaid (the amount of such duty to be ascertained by the Queen's Remembrancer in the event of the parties differing), and if the court shall answer the above question in the affirmative, judgment is to be entered for the defendant, with costs.

Points for argument on behalf of the Crown. That the return of the Corporation is insufficient for the following, amongst other, reasons: First, because the sums on the right hand side of the account on which the return is based have not been expended in or about the earning of the items of profit appearing on the left hand side of the account, and the Corporation is therefore not entitled to deduct or take credit for those sums; secondly, because the Income-tax Acts do not contain any exceptional enactments in favour of Corporations entitling them to make deductions from the return of their profits and gains to which other persons are not entitled; thirdly, because the Crown is not bound by the arrangement of 1811, even assuming that the present return can be shown to be in accordance with that arrangement.

Points for argument on the part of the defendant: First, that under the circumstances stated in the case the said return of 6257*l.* 18*s.* 6*d.* made by the defendant on behalf of the said Corporation is sufficient; secondly, that the settlement, orders, and other proceedings in the Court of Exchequer,

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in the 8th and 9th paragraphs of the case respectively mentioned, and referred to, disclose the true principle on which the revenues of the Corporation ought to be assessed for the duties payable under schedule D of the 5 & 6 Vict. c. 35, and subsequent Income-tax Acts and the return made thereunder; thirdly, that the principle on which the said settlement in the 8th paragraph mentioned was come to, and the said orders of the Court of Exchequer in the 9th paragraph mentioned were drawn up, is binding and conclusive against the Crown in the present proceedings as to the mode on which the revenues of the Corporation are to be assessed; that the account in the 7th paragraph of the case set out has been made out on the said principle, and is correct in its details, and the return based thereupon is therefore sufficient; fourthly, that in ascertaining the amount, in respect of which the Corporation are liable to be assessed to the duties payable under the said Schedule D, the Corporation is entitled to deduct the full amount of their corporate expenses from the amount of their corporate revenues, excepting rents of land and interest on funded property.

The Attorney-General (Sir J. D. Coleridge, Q.C., with whom was Pinder) for the Crown. The question is whether the return made by the City of London for Income Tax for the years 1866 1867 is made upon a right or a wrong principle. The Crown is quite content to take the figures in the statement of account in paragraph 7 of the case, as perfectly correct. The question at issue is not one at all of detail or of figures, but of principle. The sum of 6257l. 18s. 6d. is the amount returned by the defendant on behalf of the City as the amount of the balance of the profit of the Corporation returnable for the year 1866, under Schedule D., including "Renewing Fines" and "Profits of Markets," but excluding rents of land, &c., and interest on Government securities. The total receipts are 73,949l. 16s. 7d., and the deductions claimed by the Corporation are 67,691l. 18s. 1d., leaving a balance of 6257l. 18s. 6d. as taxable income (see paragraphs 4, 5, 6, and 7, of the case). The question is, are the Corporation entitled to make these deductions. It is contended on the part of the Crown that the return has been made upon an entirely wrong principle. First of all the Crown insists that the Corporation must pay tax upon their income just as an individual would, whatever may be the purposes to which that income may be applied; and that it is not upon the *residue* only of such income, after the several payments for various purposes which are imposed thereon, either by usage, custom, or statute, that the tax is to be paid. And secondly, with regard to the settlement in 1810, mentioned in the case, and relied on by the defendant, we say that that was no settlement at all binding beyond the moment, but a matter arrived at by compromise and consent between the law officers of the Crown of that day and the Corporation. But, further, even if there was no compromise, the judgment of this court in 1810 was upon a totally different state of things, and a different set of Income Tax Acts long since expired, and can therefore in no degree bind the court now. By sect 40 of the 5 & 6 Vict. c. 35, corporate bodies are to be chargeable with the same duties as any private person, and the Chamberlain, &c., of every such Corporation, &c., is to do all acts and things required under the Act for the assessing such

corporate bodies, &c., to the duties granted by the Act, and paying the same. The Corporation is to be treated as an individual, and if an individual would not have to pay tax on this 73,000l. and odd a year, then it may be admitted that the Corporation should not pay. But if an individual would, as it is confidently urged he would, have to pay upon it, then it is submitted that it lies on the defendant to show why the Corporation should not pay. That being so, in sect. 100 of the 5 & 6 Vict. c. 35, are contained the rules under which Schedule D (the one in question) is to be administered. Rule 1 shows on what the duty is to be computed; and Rule 3 specifies what deductions may and may not be allowed. Rule 3 (sect. 60), for estimating (under schedule A) the profits arising from "markets" and the like, is also to be considered, for though by a subsequent Act (29 & 30 Vict. c. 36) these profits are transferred to schedule D, yet the same rules are retained. It is enacted in the broadest way that the tax is to be paid on the *gross* profits, and it is to be paid subject only to legitimate and statutable deductions. The case of the *Attorney-General v. Black* (the Brighton coal duties' case), in this court (24 L. T. Rep. N. S. 370; L. Rep. 6 Ex. 78; 40 L. J. 89 Ex., affirmed in error, 25 L. T. Rep. N. S. 207; L. Rep. 6 Ex. 308; 40 L. J. 194, Ex.), is conclusive in favour of the claim. In his judgment in the court below in that case, Martin, B., said that no one could contend that, because sect. 92 of the Municipal Corporations' Act directed the corporate income to go into a borough fund, and to be applicable to the general purposes mentioned in that section, therefore the large property of several municipal corporations, such for instance as Liverpool, could not be taxed; the only effect being, his Lordship said, that "the income of the public property is brought in to contribute to the public expenses." Substituting "London" for "Liverpool" that, it is submitted, is a decision on the present case. The proceeds, which are to be applied to public purposes, are the amount which remains after discharging the burden to which the income so derived is subject by the Act of Parliament, viz., the payment of income tax. To take a familiar analogy: an individual has to preserve a certain appearance, not doubtless cast upon him by statute, but he has to keep horses, carriages, servants, and establishments, &c., out of his income; he does not eat and drink his carriages, and servants, &c., but chooses so to apply his income; nevertheless he must pay the tax upon it. So, if a benevolent person, like Lady Burdett Coutts, chooses to apply thousands a year to what she, and most people, think good purposes, it is neither eaten or drunk, or spent on the person's self, yet income tax must be paid upon it. The deduction of the income cannot be looked at, whether that be regulated by law, or by that which is a law to man's self, his conscience; or by his fancy or pleasure. A man may spend every farthing he has, except what is sufficient for bare sustenance, upon what may be called "public purposes," but income tax is nevertheless payable upon it. The test put by this court, and affirmed in error in *The Attorney-General v. Black* (*ubi sup.*) is not what becomes of the income after it is gotten, but how it is gotten? Does it come into hand as income? A *rate*, as is there pointed out, is not income at all, and it is a fallacy to say that it is. [BRAMWELL, B.—The fallacy seems to me

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to be the treating the obligation to spend the income in a particular way, as part of the cost of earning it.] It is admitted on the part of the Crown that a certain expenditure may be necessary in order to earn the income, and it is not intended to claim or charge as income in the hands of the corporation the gross receipts appearing in the account. All expenditure admittedly necessary to the earning of the income will be allowed as fair deductions. But after making all proper deductions a very large sum comes yearly into the hands of the corporation, spent, it is admitted, and as they are bound to spend it, upon public purposes; but none the less their income, and taxable. [KELLY, C.B.—As I understand, you make no distinction between the voluntary application of any portion of this income and the application of it, not for such purposes as the relief of a particular set of persons, but to some public purposes with some peculiar exceptions provided by the statute?] None whatever; and it was as on all fours on that point with the present case that I cited *The Attorney-General v. Black* (*ubi sup.*). [BRAMWELL, B.—That case is a stronger case than the present one, for this reason; the coal duty there was a tax upon inhabitants, without which the borough rate would have been larger, and would have been applied to the same purposes, but would not have been assessable to the income tax. But this is actual property. It is income to the corporation, although they too apply it in a particular way which leaves no residue in their pockets, and they must pay tax upon it.]

Manisty, Q.C. (with him was *Talfourd Salter*) for the defendant, *contra*.—No doubt the arrangement in 1810, to which the Attorney-General has referred, was come to by consent; but there is a principle to be collected from the documents in that case (all of which appear in the appendix to the present case), which show the grounds upon which the then settlement was come to. It is contended on the part of the defendant that in 1810 the corporation of that day set up precisely the same ground as is done by the corporation here to-day; and they did so successfully on that occasion, and the Crown was advised by their then law officer that the contention of the corporation was valid, and for that reason the Crown consented to the repayment of all the surplus beyond the sum assessed upon the balance, made out as it has been made out in the present case; and for more than sixty years that has been acted upon, and the returns have been made out upon that footing. [MARTIN, B.—How can an agreement between the Attorney-General and the corporation in 1819, and upon another Act of Parliament, bind us now?] It is the same Act of Parliament, word for word, containing the same enactments, and the same rules. The question is an important one, and novel in principle, and I contend that the case of *The Attorney-General v. Black* does not touch the point which I have to submit to the court. It is contended by the Attorney-General that the Corporation are to pay tax upon their income irrespective of the application of it. I contend, on the contrary, that the tax is payable upon profits only, and not upon income. "Profits" is the word used in the Act as distinguished from "income." It is not the income, it is the "profits" which they realise after, and which they earn by reason of, the very payments which they make, and without which they could not earn these profits. These payments are

the expense of earning the "profits." The word "income" is never used in the Act. It is the "profit" resulting. [KELLY, C.B.—It is not disputed that there are certain deductions for the office and duties of the corporation. The question is what comes within the meaning of that word "deductions" necessary in order to enable the corporation to carry on its duties?] I cannot take them all. But take the item in paragraph 7 of the case, where the Corporation debit themselves with "Mayor's Court fees, 5596*l.* 3*s.* 8*d.*; rents and disbursements, 799*l.* 6*s.* 9*d.*; balance, 4196*l.* 16*s.* 11*d.*" But how could these fees be earned without a recorder or a judge and a staff of officers? Then there are claimed as deductions payments amounting to 40,803*l.* 2*s.* 6*d.*, for salary and wages to officers and servants in respect of the civil government of the City courts of justice, prisons, &c., including (*inter alia*) 3000*l.*, the recorder's salary, and for all the staff, amounting to 7150*l.* It is not, as in the *Attorney-General v. Black*, the application of a sum which might be applied to this or to that or the other purpose; but here there are costs incurred in the course of earning, and without which none of the large items in the account could be earned. It is earning profits as distinguished from income; and for the purpose of earning them an expenditure of 40,803*l.* has indispensably to be incurred for salaries and wages as mentioned in the account. It cannot be contended that the Legislature contemplated the payment of income tax upon these items. What alone *Black's* case decided was, that income tax cannot be avoided on the ground that what is earned, the profit of the income, is to be applied in a particular way. But that has no application here. It is admitted that all the amounts in this account are reasonable, that many of them are essential, and all necessary for the due discharge of the corporate functions and duties, yet is it to be said that they are "profits" assessable within the meaning of the Income Tax Act. [MARTIN, B.—The Corporation take certain specific heads of income, and say that is our income, and against that we will not set our disbursements or charges against any particular part of it, but we will tell you what the whole expense of the City of London is, and will deduct it in bulk from our income before we are assessed to the tax. *The Attorney-General*.—Quite so; and that is what the Crown says the Corporation are not entitled to do. We do not contend that 73,949*l.* 16*s.* 7*d.* is the sum on which they are to pay, but that it is upon much more than 8257*l.* 18*s.* 6*d.*, and, if there is any substantial head of deduction which the court thinks ought not to be made, the Crown will be entitled to judgment for 1*s.*, and the case should go to some person to say what is the sum to be assessed, on the principle to be stated by the court. KELLY, C.B.—The question is whether the corporation is entitled to deduct all or any of the items in appendix X, which make up the 40,000*l.* and odd in the account in par. 7 of the case.] The Corporation claims against the amount of Mayor's Court fees a part at least of the recorder's salary, and part, also, of the salaries of the other necessary officers. [MARTIN, B.—Supposing that the payments to these officers exceed the whole profits of the Mayor's Court, do you say you can fall back upon the renewal fines and pay the recorder out of that fund?] No; I give up the 12,000*l.* item for "renewing fines,"

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being more than the 6000*l.* and odd. I admit that judgment must be against the Corporation for the shilling; but the principle of calculation is the matter to be settled, as to which a declaration from the court is sought. [*The Attorney-General.*—I gather from your Lordships that the true principle is that, like an individual, the Corporation are not to pay taxes upon what they expend in earning the income, and the Crown is ready to admit that the Corporation should be taxed upon that principle, and that when, in the earning of any particular head of income, there are certain expenses necessarily incurred, those expenses ought to be allowed before the income which is earned by them is assessed, and if more is spent in earning a particular head of profits than the profits amount to, then the Crown admits no tax is to be paid upon that head. But that is not to discharge the Corporation from the liability of paying upon other matters as to which there is no expense, or on which, after paying the expenses, there is a balance of profits. The whole, in short, must not be thrown into hotchpot. They must not, because they have 100,000*l.* a year which they expend variously, allocate the whole to different purposes, say, to maintaining the Lord Mayor and recorder, which are partly necessary for earning one particular head of income.] The defendant is content, the Crown being willing, that the Corporation should be assessed on the balance of the income they derive, after deducting all that they pay in earning that income. [BRAMWELL, B.—Taking each item separately.] The Corporation must not be taken as assenting to the principle that each item is to be dealt with separately, or that they are not entitled to claim deductions in respect of their expenditure in maintaining the civil government of the city, as well, also, as the general expenses of the whole corporate establishments, or as precluding themselves from any right of appeal upon those questions.

BRAMWELL, B.—It is conceded that judgment must be given against the Corporation. The court is asked to lay down a principle, and they have laid it down in the course of the argument as definitely and intelligibly as it need be laid down—that is to say, that each item or head of profit or income is to be taken separately, and the Corporation are to be assessed to the income tax upon the net value of such item after deducting the cost expended in earning it. Whatever is expended in earning the profits, whether it be for the wages of the humblest official employed—as, for instance, the doorkeeper of the court in which the fees are earned, or the salary or a portion of the salary of the judge who presides there—the sum so expended in earning the profits ought to be deducted. It may be that when that principle comes to be applied, in practice, to the various heads of corporate income, there may arise some intricate questions as to which there may be some difficulty; but if we are to sit here and anticipate all possible cases, and lay down a rule which is to govern them all, I am afraid that we might sit here for an indefinite period. If any further difficulty should arise hereafter, we must try and meet it when it comes before us.

MARTIN, B.—I am of the same opinion. I entirely agree with what Lord Campbell once said, that this Act of Parliament (the Income Tax Act) must be looked at and be administered by the ordinary rules of common sense and reason. The

deductions must in some way be allocated as regards the property. The Corporation cannot take the whole of their property in gross and say, "We have a quantity of property liable to income tax, but we have to pay the recorder and the different persons mentioned in the case, such as the controller, the remembrancer, the solicitor, and so on, and we will take the whole together and deduct the payments we make to all these persons, not as against the specific property, but against the whole taken together." The Queen's Remembrancer, when it comes before him, should, I think, find what is the net income arising from the "renewing fines," the "profits of markets," and all the other items or heads of income which have been referred to and which are mentioned in this case. It may, I dare say, be rather difficult to ascertain what the "Mayor's Court fees" and the disbursements with regard to that item are; but I am sure that it is not impossible to arrange it. The Lord Chief Baron has a strong feeling that there should be allowed, as against those fees, the reasonable expenses that the Corporation are put to in earning them. It may turn out that those expenses are more than the profits, and in that case the question will probably be raised whether or not, that excess should come off other heads of property. Again, some particular item, as for instance, the "profits of markets," might be agreed upon to raise the question whether, upon the true construction of the Income Tax Acts, all these various salaries ought to be deducted. The principle has been laid down in this court and in the Exchequer Chamber. "Renewing fines" are fines upon property. "Profits of markets" are a property arising from the landed property of the Corporation. There is no difficulty at all in ascertaining the respective amounts of these several heads of profits, but then the Corporation say, they must deduct the expenses of the salary of the Lord Mayor, to which the answer is, that that has nothing to do with property, it is an entirely collateral matter, to which the Corporation think fit to apply a portion of their income, and that is all.

POLLOCK, B.—I quite agree with what has fallen from my learned brethren on this matter. There may be a difficulty with regard to the recorder's salary. If I recollect rightly the recorder at one time received a salary for the criminal duties of his office. At one time the duties in the Lord Mayor's Court were almost nominal, but now the Lord Mayor's Court sits some ten days in every month, yet still the recorder receives the same salary. It may be a question, too, whether strictly and accurately the precise cost of earning any one particular sum can be gotten at. When you take two or three sums or heads of income earned on the one hand, and the costs of earning on the other hand, then it is, I imagine, that the "common sense" of the referee, whoever he may be, which has been alluded to, will come into play, and the Corporation will probably get what strictly perhaps they would not get from the court.

KELLY, C. B.—The principle on which in this case the income-tax is to be assessed is, that the assessment is to be made upon each head or item of income taken separately, after deducting from the gross receipts under each head, the costs expended in earning the income; the amount, therefore of any further deductions, if any, beyond

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those appearing in the account set out in paragraph 7 of the case, is to be the amount of the cost or expenses incurred in earning or obtaining that particular head or item. For example, upon the item of "Renewing fines, 12,743l. 18s. 3d.," if any expenses beyond whatever may have been already deducted to leave that sum, have been incurred they will be deducted. So, also with regard to the next item the "profits of markets," and so on to the end. With respect to the "Mayor's Court fees," 5596l. 3s. 8d., from which it is extremely probable that some deductions must be made beyond the 799l. 6s. 9d., the amount which is deducted in the account, we must be told, when the matter comes back to us, if it does come, what (if any) expenses, in addition to that sum of 799l. 6s. 9d. have actually been incurred by the Corporation and expended by them in obtaining the net sum of 4796l. 16s. 11d. And so also with regard to the other items of the account. But the Corporation must take it for better and for worse, and deal with each item separately, and must not, if, in order to earn one item or head of income, they spend more than that item amounts to, claim to make that extra expenditure go in deduction of other assessable items. As it has been suggested, and the suggestion has been agreed to between the parties, that, instead of referring the case at once to the Queen's Remembrancer, the officer of the Corporation, and the officer of the Board of Inland Revenue should meet together and endeavour to agree to an intelligible rule as to what further deductions, if any, are to be made in any of these items, let that be done; and where they do not agree they will go before the Queen's Remembrancer, and he, if necessary, will raise the question in a form in which it can be dealt with by the court, which is the only way in which it can properly be done. There will, therefore, be judgment for 1s., the parties agreeing to the arrangement which I have just mentioned.

Judgment for the Crown for 1s.

Attorney for the Crown, *The Solicitor of Inland Revenue*, Somerset House, W.C.

Attorney for the defendant, *T. J. Nelson*, City Solicitor, Guildhall, E.C.

SECOND DIVISION OF THE COURT.

Friday, Jan. 24, 1873.

(Before BRAMWELL, CLEASBY, and POLLOCK, BB.)

WALKER v. THE NOTTINGHAM BOARD OF GUARDIANS.

False imprisonment—Action against guardians for acts done under authority of Act of Parliament—Knowledge—Means of, equivalent to—Negligence—Bona fides—Notice of action—Necessity for under 4 & 5 Will. 4 c. 76 s. 104.

Where poor law guardians are acting in discharge of their public duty they are entitled to notice of action in respect of anything done by them in the discharge of such duty, unless it be shown that they have acted mala fide; and it is to be assumed in the absence of proof to the contrary, that they have acted bona fide.

The plaintiff, at the instance of his wife, was, on the 14th April, taken as a dangerous lunatic to the workhouse of the Nottingham union, upon the certificates of two medical men, and was placed in the lunatic ward of that establishment, and there kept from the 14th to the 25th April. Upon his admission into

the ward on the 14th, he was inspected by the resident medical officer, who found him "not to be suffering from any form of insanity," and made an entry to that effect in the ordinary course of his official duty, in a book provided by the guardians, and kept at the workhouse for that purpose. On the 16th April there was the usual weekly meeting of the board of guardians, when this book was before them, but the entry in question was not, as it ought to have been, seen by them or brought to their notice; nor was the fact of the plaintiff's detention in the lunatic ward known to any of the guardians until the 25th April, when the report of the case for the first time came before them, whereupon the plaintiff was immediately discharged from the house by order of the visiting committee. An action having been brought by the plaintiff against the defendants (the Board of Guardians), for false imprisonment, it was

Held by the court (Bramwell, Cleasby, and Pigott, BB.) making absolute a rule to enter a nonsuit, that the defendants were entitled to notice of action under sect. 104 of the 5 & 6 Will. 4, c. 76.

THIS was an action against the defendants for an assault and false imprisonment of the plaintiff and wrongfully detaining him in the lunatic ward of the Nottingham workhouse. To the plaintiff's declaration in the action the defendants pleaded, first, not guilty, by statutes 4 & 5 Will. 4 c. 76 (Public Act) sects. 15, 16, 17, 18, 20, 21, 38, 42, 46, 104; 5 & 6 Vict. c. 97, s. 4 (Public Act); 10 & 11 Vict. c. 109, sects. 1, 10, 14, 15, 16, 18 (Public Act); 30 & 31 Vict. c. 106, sects. 1, 22, 30 (Public Act); secondly, leave and licence of the plaintiff.

On these pleas issues were joined; and at the trial before Cleasby, B. and a special jury at the last summer assizes for Nottinghamshire at Nottingham, the following facts were proved or admitted in evidence. The plaintiff was an upholsterer and valuer, residing and carrying on his business in the town of Nottingham, and the defendants were the Board of Guardians for the Nottingham Union.

It appeared that the plaintiff's wife, on the 14th April 1872, made an application to a Mr. Pilkington, the relieving officer of the Nottingham Union, to the effect that her husband, who was stated to be somewhat given to drinking, was suffering under an attack of *delirium tremens*, and was not fit to be left at large, as she was in danger of her life from his violence. She at the same time handed to Pilkington a certificate of a medical man named Stanger, which was in the following words

15th April 1872.

I hereby certify that I have this day seen Mr. George Walker, of Lister-gate; that he is subject to uncontrollable fits of delirium, and that the life of his wife is in jeopardy whilst he is under their influence, and that it is very necessary that he should at once be placed under restraint.

(Signed)

GEORGE STANGER.

Nottingham, 13th April 1872.

The relieving officer thereupon informed the plaintiff's wife that he could not interfere in the matter unless he was furnished with a certificate signed by one of the medical officers of the union, and accordingly Mrs. Walker then applied to a Mr. Lille, one of such medical officers, and that gentleman, upon Mrs. Walker's verbal statement, and upon seeing the certificate which Mr. Stanger had given, but without himself having any interview with her husband, the plaintiff, wrote and

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gave to Mrs. Walker a certificate to the following effect:

This is to certify that George Walker is a person of unsound mind, and not fit to be at large.

Mrs. Walker having handed both these certificates to Pilkington, the latter proceeded at once to Walker's (the plaintiff's) house, and having induced the plaintiff to get into a fly which was ready at the door under the assumed pretence that he (Pilkington) wanted the plaintiff to go with him to view and value some houses, the fly was driven to the Nottingham union workhouse, where the plaintiff was delivered over by Pilkington to the custody of the master of the workhouse as a lunatic. The plaintiff protested against the proceeding, and demanded to know by what or whose authority he had been so treated, when Pilkington informed him that the step had been taken at the instance of his (the plaintiff's) wife, and that the certificates of the medical men had been obtained by his wife authorising and justifying what had been done. Immediately upon the plaintiff being taken into the lunatic ward of the workhouse, on the 14th April, he was inspected in the usual and ordinary course, by a Mr. Deane, the resident medical officer of the workhouse, and was found by that gentleman to be of perfectly sane mind and free from anything like insanity. An entry or report of the plaintiff's admission, and also of the state of his mind, &c., was at the same time made, in the ordinary course, by Mr. Deane, in a book provided by the guardians, and kept at the union workhouse for the purpose. That entry was as follows: "George Walker, aged 47, admitted April 14, 1872. Found *not to be suffering from any form of insanity*." On Tuesday, the 16th April, two days after the plaintiff had been so taken to the workhouse, there was a weekly meeting of the board, when this report book was before them; but it did not appear that the entry in question had been seen by, or brought to, the notice of any of the guardians present. On the 18th April, also, there was a meeting of the visiting committee at the house, but no notice was then taken of the defendant's case, and he was consequently detained in the asylum and treated as a lunatic patient until the 25th April, when, for the first time, the report of the plaintiff's case was brought to the knowledge of the board of guardians, they having been up to that date personally unaware that the plaintiff was in the house. Immediately upon their attention being drawn to the case, the plaintiff was discharged from the house by an order of the visiting committee. It was to recover compensation for the injuries and damage done to him by the wrongful imprisonment and detention above mentioned that the plaintiff brought his present action, and he contended that the defendants, if not responsible for his being originally taken to the workhouse by their relieving officer (which he contended they were), were, at all events, responsible for his illegal detention there after the 16th April, when they might and ought, in the due performance of their duty, to have seen and read Mr. Deane's report, and to have at once discharged the plaintiff from the asylum. The defendants, on the other hand, insisted that what had been done was done under the authority and in pursuance of the Act of Parliament, and that they were in no way liable for the wrongful acts, if such they were, of their servants; and also, that they were entitled

to have had notice of action under sect. 104 of the 4 & 5 Will. 4, c. 76, which provides for twenty-one days' notice of action being given to the guardians in respect of anything done by them in pursuance of or under the authority of the Act. To prove knowledge on the part of the defendants of the usual course of proceeding adopted by their servants and officers in such cases, it was shown that so far back as the month of July 1868 the attention of the board of guardians had been expressly called to the matter at a board meeting in that month, when a committee was appointed to inquire into the mode of admission and treatment of alleged lunatics into and in the workhouse.

The learned judge left it to the jury to say whether on the 16th April the board of guardians had had brought before them the fact that the plaintiff was in confinement, in such a way as to make it negligence on their part not to take notice of his case; and that the proper question for the jury was "whether the defendants had the means of knowledge and were guilty of negligence in not knowing that the plaintiff was in the asylum, being not at the same time suffering from any form of insanity?"

The jury, through their foreman, said that they were of opinion either that the fact of the plaintiff's detention was brought to the knowledge of the guardians, or that, if they did not know it, it was in consequence of their negligence in not examining the book containing the entry relating to the plaintiff's admission. Thereupon a verdict was found for the plaintiff, with 20s. damages for the period from the 16th to the 18th April, and 40s. from the 18th to the 25th April, and leave was reserved to the defendants to move to enter a nonsuit on the grounds, first, that there was no evidence to fix the defendants with liability under the declaration, and, secondly, that they were entitled to notice of action.

A rule having accordingly been obtained to that effect on the part of the defendants,

Case for the plaintiff, now showed cause against it.—He contended that the original proceeding by the medical officers of the union in granting the certificate upon which the plaintiff was imprisoned was unlawful and wrongful, and that for such wrongful act on the part of their officers the defendants as guardians were liable. The act complained of was done in violation of all duty and could not therefore be said to have been done in pursuance of the Act of Parliament, and the defendants therefore could not claim the protection of the Act which applied only to matters done lawfully under its authority. Here there was a total absence of authority. The case, therefore, was not within the statute, and, therefore, the defendants were not entitled to notice. *Eliot v. Allen and others* (1 C. B. 18; 14 L. J., N. S., 136, C. P.), is in point and an authority to that effect. See also *Cook v. Leonard* (6 B. & C. 351); *Shatwell v. Hall and others* (10 M. & W. 523; 12 L. J., N. S., 74, Ex.) The cases of *Judge and another v. Selmes* (24 L. T. Rep. N. S. 904; 40 L. J. 287, Q. B., and s. c. nom. *Selmes v. Judge and another* (L. Rep. 6 Q. B. 724); *Hermann v. Seneschal* (6 L. T. Rep. N. S. 646; 13 C. B., N. S., 392; 32 L. J. 43, C. P.); *Roberts v. Orchard* (9 L. T. Rep. N. S. 727; 2 H. & C. 769; 33 L. J. 65, Ex., and *King v. Chamberlain* (24 L. T. Rep. N. S. 736; 40 L. J. 273, C. P.; s. c., nom. *Chamberlain v. King* (L. Rep. 6, C. P. 474); are all distinguishable. The true rule deducible from those cases is that

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there should exist a *bond fide* belief on the part of the defendants in such a state of facts as if they had existed would have afforded a justification, whereas in the present case there was no such belief at all on the part of the defendants. On the contrary, they had knowledge, or at all events ample means of knowledge, which is equivalent, that the plaintiff was of perfectly sound mind and not a subject for a moment's detention. At all events, to entitle the defendants to protection of the statute it lay upon them to show that they were acting *bond fide*, and that they failed to do. Although the defendants are a corporate body, yet corporate bodies, if negligent in the discharge of a public duty, are liable for the consequences of such negligence.

Winterbottom v. Wright, 10 M. & W. 109; 11 L. J. N. S. 415, Ex.

Mersey Docks and Harbour Board Trustees v. Gibbs (in the House of Lords), 14 L. T. Rep. N. S. 677; L. Rep. 1 Eng. & Ir. App. 93; 35 L. J. 225, Ex.; 12 Jur. N. S. 57.

Had the defendants known the facts of this case as they were bound to have known them from the first they would have been responsible for detaining the plaintiff one moment in the asylum after such knowledge; and they are equally responsible now, because this ignorance is the result of their culpable negligence. If the guardians of a union choose to make the workhouse a gaol or a lunatic asylum, it becomes their duty to have a person there duly authorised to deal with all such cases, and for the breach of that duty they are liable: (*Goff v. The Great Northern Railway Company*, 3 L. T. Rep. N. S. 850; 3 E. & E. 672; 30 L. J. 148, Q. B.) The case of *Roe v. The Birkenhead, Lancashire, and Cheshire Traction Railway Company* (7 Ex. 36; 21 L. J. 9, Ex.), shows that an authority by the board on the present occasion may be implied from their previous conduct in such cases. He cited also

Seymour v. Greenwood, 7 H. & N. 357;

Reg. v. The Guardians of the Wallingford Union, 10 A. & E. 259; 8 L. J., N. S., 89, M. C.;

Levingston v. The Lisgar Union, 2 Ir. Rep. C. L., 202.

D. Seymour, Q.C., Field, Q.C., and Sturge for the defendants *contra* supported their rule.—They urged that even supposing the medical officer to have committed a mistake in his duty in this matter, yet, nevertheless, inasmuch as the act of which the plaintiff complained in this action was done in pursuance or under the authority of the Act of Parliament, and the defendants were consequently entitled to the protection afforded by sect. 104 of the Act of Parliament (4 & 5 Will. 4, c. 76) and should therefore have had notice of action. If the plaintiff intended to rest his case upon the ground that what the defendants had done or caused to be done to him, was taken out of the operation of the statute by reason of its having been done by them *malá fide*, then it was incumbent upon him to have given evidence at the trial in support of such an allegation, but he had done nothing of the sort. There was here an honest belief in the defendants that they were doing their duty, and they were entitled to notice. [They were here stopped.]

BRAMWELL, B.—I think that in this case a notice of action was necessary; that is, of course, assuming that there was no cause of action against the defendants as individuals. It is difficult, if not impossible, to suppose that the guardians were not

entitled to notice of action in a case in which they were sued in their corporate capacity, unless indeed it is to be supposed, or it could be shown, that they were acting *malá fide*. That is a matter which I will deal with presently; but, whatever they do as guardians they do under the authority of the Act of Parliament, and, as I have before said, it is difficult to suppose a case which in the absence of *malá fides* on the part of the board, they would not be entitled to notice of action, because it almost follows from the nature of their office that whenever they do act they act *bond fide* in supposed pursuance and under the authority of the powers contained in the Act of Parliament. But I will not content myself with laying down that general proposition, but will look at the particular facts of the case now before us. Now here the defendants are charged with falsely imprisoning the plaintiff. There was no order under their common seal that he should be confined or detained, and there was no general antecedent authority given to deal with him, except the declaration of the wife. Neither was it within any general rule, or upon any particular declaration of their opinion, that it was necessary to imprison the plaintiff, that the proceedings complained of took place. It is not like the railway case, which has been referred to, where authority is given to an official generally to manage and superintend the line, and where, if an act done by him or by his order is erroneously founded thereon, it is still within the authority for the purpose of binding the persons who gave it, and making them responsible. But here, what is urged against the defendants is, that the act done was altogether wrongful; and the imputation against them is not that they caused the imprisoning of the plaintiff in the particular way in which I have suggested it might have been, as in the railway case, but that they have a place in which people are kept, and in which they may be justly kept, and that it is their duty to see that the persons who may be placed there are not wrongfully kept there, and consequently it is said by the plaintiff that the defendants are liable to an action for false imprisonment. I do not say I agree with that argument. I will assume it; and if it is a bad argument, then the defendants would not in that case be guilty of the false imprisonment. But, assuming it to be a good argument, let us see what the state of things really is. Can there be a doubt, notwithstanding what may be called their negligence in not sooner finding out this matter, that the defendants were nevertheless really acting under the authority, or in pursuance of their Act of Parliament? We have heard what their statement is. The doctor went round the wards, he inquired of the nurses, and he saw this particular patient, the plaintiff. It is more than a mere negation, and, as my brother Pollock has suggested to me, we have it shown affirmatively that they were acting under the authority of the Act of Parliament; and if, as the jury have found, they did not go far enough and find out what they ought to have found out (which in my opinion was negligence) why are they not to be protected under their Act of Parliament? There is no doubt that cases of negligence are within the protecting clauses of the Act, and it seems to me that this is of all cases one in which it is only reasonable that notice of action should have been given. Suppose these defendants had been individuals

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and not incorporated, what an unreasonable thing it would have been to have made them liable for the discharge of a public duty, merely because they had not discharged it with sufficient care, without giving them notice so that they might have the opportunity afforded them of making a tender of amends by the tendering or paying money into court. It seems to me, as I have already said, that in cases of this description, where poor-law guardians are acting in discharge of a public duty, they are entitled to notice of action in respect of anything done by them in the discharge of such duty unless they can be shown to have acted *malâ fide*, and certainly the present defendants were entitled to notice of action where bad faith is not alleged against them, and where the question simply is whether or not they acted with sufficient care. Then, with respect to the other point, that if the defendants were entitled to notice, the jury would have found that they acted *bonâ fide* in what they did, and in the belief that the evidence would justify them in what they had done, if the facts, which they believed in the existence of, had existed and were true. As to that latter matter it seems to me that it is not in all cases necessary that the justifying matters should be believed in; in some cases it is no doubt necessary, but not in all. In this particular case I think that the argument on the part of the defendants is well-founded; that if the plaintiff intended to say, "I charge you, the guardians, with not acting *bonâ fide*," then the right course for the plaintiff to have taken would have been to say, "I cannot agree that you are entitled to notice, because I say you did not act *bonâ fide* in the matter;" and if the learned counsel for the plaintiff meant to deny that it was so, and to contend that that matter should have been left to the jury, he should have done so at the trial, otherwise there would have been a sort of trap laid for the defendants to fall into, for they would lose the benefit of an objection which, independently of any answer being made to it, they might have got the benefit of, by the jury resolving the matter. I think in the present case the defendants were entitled to notice of action, and that it is to be assumed in such a case that the guardians were acting *bonâ fide*, unless the contrary be shown; and certainly, even assuming that the defendants would otherwise have been liable to this action of trespass, as to which I say nothing, I think they were entitled to notice, and not having received it, I think this rule should be made absolute.

CLEASBY, B.—I agree in this, and am quite of the same opinion. It must be taken that the verdict was given, and that in fact it was asked for, on the ground of the unlawful detention of the plaintiff from the 16th to the 25th of April. That was an act done by the defendants in pursuance and by the authority, of their Act of Parliament. Then, as my brother Bramwell has pointed out, it was an act done by them as a board of guardians, and this action is brought against them as such board. If the action had been brought against an individual and not against the board, it might have been different. Here, however, it is brought for some act done by them in the execution of their office as guardians. Then, whatever question there may be as to other matters there can be no question upon this particular matter, except whether, when they did this act, it was or not an act purporting and intended

to be an act done by them as a board of guardians, and whether at the time when they ordered the plaintiff to be detained they did or not believe that he was a lunatic, and that there existed reasonable ground for his detention. If the circumstances were such that the defendants ought to have known that the plaintiff was in the asylum, though not in a state of mind justifying his detention, there would be a responsibility upon them in the matter, and the very case would arise in which the protecting section of the statute would apply, and notice of action ought to be given. The jury came to the conclusion that the defendants should have taken more care. It is a case of omission and irregularity in their proceedings under the authority and powers of an Act of Parliament, in which notice of action ought to have been given. Entirely agree in the judgment and conclusions of my brother Bramwell.

POLLOCK, B.—I am also of opinion that this rule ought to be made absolute, and upon this ground, that the defendants were entitled to notice of action. It therefore becomes unnecessary for me to say anything about the cause of action, except this: that, in any view, now that the facts are before us, this is not a case in which the defendants could be made liable in the way which has been contended for. Their liability, if any, must rest upon their negligence in not making themselves acquainted with the materials which were in their possession, and with which they might have easily become acquainted. The issue here of negligence or no negligence was the one for consideration; and it is a compound proposition depending upon the mere balance in the mind. It is a case in which, to my mind, notice of action is peculiarly applicable. I guard myself from saying that there may not be a duty and a case in which a plaintiff may aver a breach of duty; but here there is only a blank negligence, and nothing but a blank negligence, in the defendants with regard to their neglect to inform themselves of the existence of matters which, had they known them, would have prevented their being guilty of a cause of action in this case. In this case the board of guardians knew certain facts, but they did not know other facts, and this man was kept in custody on the supposition that he was a pauper, and as a pauper, had it been the case, it is quite clear he might have been detained. On the ground, therefore, that the defendants were acting as the board of guardians, and under the authority and in pursuance of their Act of Parliament, and were therefore entitled to notice of action, I think that the rule obtained in this case should be made absolute.

Rule absolute.

Attorneys for the plaintiff, Parker, Lee, and Haddock, 18, St. Paul's-churchyard, E.C., agents for A. Parsons and Bright, Nottingham.

Attorneys for the defendant, Torr, Janeway, and Tagart, 88, Bedford-row.

EX. CH.] GASLIGHT AND COKE COMPANY v. VESTRY OF ST. GEORGE, HANOVER-SQUARE. [EX. CH.]

EXCHEQUER CHAMBER.

Reported by M. W. McKELLAR, Esq., Barrister-at-Law.

Saturday, Feb. 1, 1873.

GASLIGHT AND COKE COMPANY v. VESTRY OF
ST. GEORGE, HANOVER SQUARE.*Construction of statute—Incorporation of inconsistent provisions—23 & 24 Vict. c. 125—31 & 32 Vict. c. cvi.—31 & 32 Vict. c. cxxv.*

The plaintiffs were one of the gas companies included in the Metropolis Gas Act 1860, and under sect. 36, they had elected to adopt its provisions. In 1868, The City of London Gas Act, and The Gaslight and Coke Companies' Act, two local Acts, received the royal assent on the same day. By the former of these two Acts, certain provisions in the Act of 1860, concerning the purity and illuminating power of gas, were repealed, and others were enacted in their stead. By the latter of these two Acts, which was an Act promoted by the plaintiffs, it was enacted that the plaintiffs' company should be and continue subject to the powers and provisions of the Metropolis Gas Act 1860, as if this Act were not passed, so far as the same were not varied by this Act; and that nothing in this Act contained should exempt the plaintiffs' company or their gasworks from the provisions of the Metropolis Gas Act 1860. It was also enacted that if the former of these two local Acts should pass into a law in that session, then the plaintiffs' company and their undertaking should be subject to the provisions of the City of London Gas Act.

Held, by the Exchequer Chamber, affirming the Court of Queen's Bench, in an action to recover the price of gas supplied to the defendants, the amount of which depended upon whether the plaintiffs were bound by the provisions of the Metropolis Gas Act 1860, repealed by the City of London Gas Act 1868, that the plaintiffs were, by the terms of their Act of 1868, subject to all restrictions imposed upon them for the benefit of the public by both the Metropolis Gas Act 1860, and the City of London Gas Act 1868.

THE plaintiffs brought an action to recover 2160*l.* 5*s.* 11*d.* for gas supplied to the defendants. The defendants paid into court 1787*l.* 1*s.* 7*d.*, and denied their liability to pay the residue of the claim.

The cause came on to be tried, and a verdict for 373*l.* 4*s.* 4*d.* was recorded for the plaintiffs, being the balance of the claim above the payment into court, subject to the opinion of the Court of Queen's Bench upon a special case, and subject also to a reduction of the amount of the verdict to be named by an arbitrator in the event of the Court being of opinion that the defendants have a right to any reduction whatever. The only question left by the special case for the opinion of the Court was whether the provisions of the Metropolis Gas Act 1860 are in force and binding on the company as respects the supply of gas described in the special case.

The court below (Blackburn, Mellor, and Lush, JJ.), decided that the Act of 1860 does apply to the plaintiffs, and that the case should go to the arbitrator to be dealt with as he thinks right.

The special case, all the material sections of the three Acts of Parliament, the arguments, and the remarks of the court below are reported in full 26 L. T. Rep. N. S. 624.

Besley now argued for plaintiffs, the appellants. Streeten appeared for the defendants, but was not heard.

KELLY, C.B.—It really seems impossible to read ss. 109 and 110 of the Gaslight and Coke Companies' Act 1868, and not to hold the disputed clauses of the Metropolis Gas Act 1860 still to apply.

MARTIN, B.—I am quite satisfied there is nothing in the two Acts of 1868 to relieve the gas company from the duties imposed upon it by the Act of 1860.

KEATING and BRETT, JJ., and CLEASBY, B., concurred.

Judgment for defendants.

Attorneys for plaintiffs, Curtis and Bedford.

Attorneys for defendants, Capron, Dalton, and Hitchins.

Tuesday, Feb. 4, 1873.

CRONSHAW v. WIGAN BURIAL BOARD.

Incumbent's right to burial fees—New parish—Contribution of inhabitants to burial ground—20 & 21 Vict. c. 81, s. 5.

In 1842, an Order of Council under 59 Geo. 3, c. 134, s. 16, authorised services and offices to be performed in a new church, assigned a district to it out of the parish in which it stood, and granted the incumbent the fees. The district formed part of a borough which separately maintained its own poor. There was no burial ground in the assigned district, and the persons dying in the district continued to be buried as before in the churchyard of the parish. No separate burial board has ever been appointed by, or ground provided for, the district. The burial ground of the defendants for the whole borough was consecrated in 1856, the district of the said new church having contributed to the rates for providing it. The rectory of the parish became vacant and a new rector was appointed in 1864. Plaintiff brought this action for the fees paid to defendants for the burials, since the last avoidance of the rectory, of persons who had lived in the plaintiff's district.

Held, by the Exchequer Chamber (affirming the Queen's Bench), that the plaintiff was entitled to recover.

THIS was a special case, stated in an action by the incumbent of the church of St. Thomas, Wigan, for the recovery of fees claimed to be payable by the Wigan Burial Board to the plaintiff for burials in the burial ground provided by the defendants for the borough and township of Wigan, between 11th Sept. 1869, and 23rd March 1870.

The Court of Queen's Bench (Cockburn, C.J., Mellor, Lush, and Hannen, JJ.) gave judgment on 11th Nov. 1871 in favour of the plaintiff. The case in the court below is reported 25 L. T. Rep. N. S. 536.

Fox Bristowe, Q.C. (with McConnell) argued for defendants the appellants.

Manisty, Q.C. (with Forbes) for the plaintiff.

The facts and arguments were sufficiently stated in the report of the case in the court below, and in the judgment of this court.

KELLY, C. B.—We are all of opinion that this judgment should be affirmed. Under the provisions of the statutes 58 Geo. 3, c. 45, and 59 Geo. 3, c. 134, a district had been created and a church built, and various provisions made, and acts done by means of

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an Order in Council, which, among other things, provides for the publication of banns of matrimony and the solemnization of marriage, churchings, and baptisms, and which confers upon the minister of St. Thomas a right to the fees upon the publication and performance of these offices. The matter remained in this state until the passing of the 19 & 20 Vict. c. 104, on the 29th July 1856. The real and single question which arises in this case, important as it is, is whether the 14th section of the said statute, of the 19 & 20 Vict., c. 104 applies to the present case. We are all of opinion that it does apply. I have already observed that under the 59 Geo. 3, c. 134, and the Order in Council which was made pursuant to the provisions of that Act, the minister of this district church was entitled to publish and perform banns of matrimony, marriages, churchings and baptisms; he was likewise clearly entitled to the fees arising in respect of these publications and performances. When we come to the 14th section of 19 & 20 Vict. c. 104, the question arises whether, reading that section according to its literal language, or with reference to the undoubted objects of the Legislature in passing that Act of Parliament, if any real question can arise, this case does not come strictly within its provisions. It provides, "Wheresoever banns of matrimony and the solemnisation of marriages, churchings, and baptisms are authorised to be published and performed, in any consecrated church to which a district shall belong, and the incumbent of which is by such authority entitled to the entire fees arising from the performance of such offices, such district shall become a separate and distinct parish for ecclesiastical purposes." In this case there was a consecrated church and a district, brought into existence under the provisions of 58 Geo. 3, c. 45, and 59 Geo. 3, c. 134, such district not being at the time of the passing of Lord Blandford's Act a separate and distinct parish for ecclesiastical purposes, and the incumbent of which, under the authority of the Order in Council, was entitled for his own benefit to the entire fees arising from the publication and performance of banns of matrimony, marriages, churchings, and baptisms. Now the object of the Legislature was to give to the provisions of this Act a general—I might almost say a universal—operation; and when we find that the language strictly and literally, as well as substantially, applies to St. Thomas's, I am unable to see why it is to be excepted out of the operation of this clause, when it comes strictly within its terms. It became at that time a separate and distinct parish for ecclesiastical purposes. Now let us see the further operation upon the case before us of the provisions of 20 & 21 Vict. c. 81, s. 5. I need not go through the other clauses of this Act of Parliament. We find in it a provision in these terms, "Until a burial ground shall be provided for any new parish, created pursuant to 19 & 20 Vict. c. 104, the incumbent of such new parish shall perform the same duties, and be entitled to the same fees, in respect of the burials of the remains of the parishioners of such new parish in any burial ground provided under the Burial Acts, to which such new parish shall have contributed, as if the said burial ground were exclusively the burial ground of such new parish, reserving, however, the rights of existing incumbents." Now this provision strictly and literally applies to the present case, and is sufficient of itself to entitle the plaintiff to the

judgment which he claims. I might refer further to the objects of the legislature in passing Lord Blandford's Act, but any further reference to that Act of Parliament and the object of the legislature is altogether superfluous, when we remember that this question came before the late Dr. Lushington in the case of *St. Mary's, Shrewsbury (Gough v. Jones, 9 Jur. N. S. 82)*; and he then, under similar circumstances, held that the provision of Lord Blandford's Act applied. I may observe, with reference to the several cases cited by Mr. Bristowe, that they were all determined upon the particular circumstances of each case, and in none of them was there any direct construction put upon this clause of Lord Blandford's Act. Upon these grounds, without going further into the arguments, we are all of opinion that the judgment of the Court of Queen's Bench should be affirmed.

MARTIN, B., KEATING, J., PIGOTT, B., BRETT, J., CLEASBY, B., and GROVE, J., concurred.

Judgment for plaintiff affirmed.

Attorneys for plaintiff, Bell, Brodrick, and Gray, for J. Park, Wiend, Wigan.

Attorneys for defendants, Gregory Rowcliffe and Co. for J. F. Taylor, Wigan.

ERROR FROM COMMON PLEAS.

Reported by H. H. HOCKING, Esq., Barrister-at-Law.

Nov. 28, 1872, and Feb. 7, 1873.

MACARTHY v. METROPOLITAN BOARD OF WORKS.

Compensation—Injury to land—Lands Clauses Consolidation Act 1845 (8 & 9 Vict. c. 18), s. 68.

Plaintiff resided and carried on business at certain premises of which he had a long lease. In front of plaintiff's premises there was a roadway, which separated them from a draw dock which led into the river T. This was a free and open public dock, but was principally used by plaintiff and a few other persons whose premises were in proximity to it. Plaintiff had no right or easement in or to the said dock other than his right as one of the public, nor was there appurtenant or otherwise belonging to plaintiff's premises any easement, right, or privilege in or to the said dock. It was found as a fact that, by reason of the proximity of the dock to plaintiff's premises, and the access given by the same to the river T., the said premises were rendered more valuable, as premises either to sell or occupy, with reference to the uses to which any owner might put them. In the execution of Parliamentary powers, defendants stopped up and destroyed the dock, and by reason thereof plaintiff's premises became and were, as premises either to sell or occupy in their then state and condition and with reference to the uses to which any owner might put them in their then state and condition, permanently damaged and diminished in value.

Held, by Kelly, C.B., Blackburn and Archibald, JJ., Channell and Bramwell, BB. (Cleasby, B. dissenting), affirming the judgment of the Common Pleas, that the plaintiff's interest in the premises was injuriously affected so as to entitle him to compensation.

ERROR from the Court of Common Pleas.

The following case was stated for the opinion of the court below:—

This was an action brought by the plaintiff against the defendants to recover the sum of 1900l.,

being the amount, less 430*l.*, the claim to which has been given up by the plaintiff, assessed by a jury summoned in accordance with the provisions of the Lands Clauses Consolidation Act 1845, as compensation for the alleged injurious affecting of the plaintiff's estate and interest in a house and premises in manner and under the circumstances hereinafter stated; and by consent of the parties, and by the order of the Honorable Mr. Justice Grove, dated the 11th May 1872, the following case has been stated for the opinion of the court, without pleadings:—

CASE.

1. The plaintiff, at the time of the stopping up of the Whitefriars Dock hereinafter mentioned, resided and carried on business as a carman and contractor for supplying builders with lime, bricks, and other materials, and as a large dealer in sand and ballast, at the premises in the next paragraph described, which he held under a lease for 80 years from Michaelmas 1854.

2. The said premises consisted of a house with warehouse, stables, and business premises, and are situate in Whitefriars, in the City of London. They are coloured pink on the plan annexed to this case, which also shows the surrounding premises, and a draw-dock known under the name of the Whitefriars Dock, leading into the River Thames, which was very largely used by the plaintiff in the way of his business.

3. The said draw-dock was a free and open public dock, but was principally used by the plaintiff, the City Gas Company, the Commissioners of Sewers for the City of London, and the other persons whose respective premises were in proximity to it.

4. The plaintiff had no right or easement in or to the said draw-dock other than his right as one of the public; nor was there, appurtenant or otherwise belonging to the plaintiff's said premises any easement, right, or privilege, in or to the said dock.

5. The said dock, at the time of its being stopped up, as hereinafter mentioned, was of the length of 352 feet, of the width of 46 feet at the outlet upon the River Thames, and of 30 feet at its head. It originally, and before the plaintiff became possessed of his premises, extended to Tudor-street, and the dotted line on the plans shows its former limits, but about twenty years ago it was shortened to its present length, as shown upon the said plan, by the said Commissioners of Sewers for the City of London, who filled in the end, and converted it into a roadway, and paved the space so obtained, and have down to the present time kept the said roadway in repair. Prior to such filling-in, the roadway between the plaintiff's premises and the edge of the dock was about 20 feet wide.

6. [Referred to plans.]

7. By reason of the proximity of the said dock to the plaintiff's said premises, and the access given by the said dock to and from the River Thames, the said premises were rendered more valuable, as premises either to sell or to occupy with reference to the uses to which any owner might put them.

8. In the execution of the works authorised by the Thames Embankment Act 1862, and the Thames Embankment (North and South) Act 1868, in the month of Oct. 1868, a solid embankment was carried along the foreshore of the Thames, as shown in the plan, and thus perma-

nently stopped up and destroyed the said Whitefriars Dock.

9. By reason of the stopping up and destruction of the said dock, as aforesaid, and the destruction thereby of the access to and from the River Thames, the plaintiff's said premises became and were, as premises either to sell or occupy in their then state and condition, and with reference to the uses to which any owner or occupier might put them in their then state and condition, permanently damaged and diminished in value; and the plaintiff alleged that, consequently, he became entitled to compensation.

10. The defendants denied that he was so entitled, and issued their warrant to the sheriffs to summon a jury, without prejudice to their right to dispute the question, and the jury assessed the amount of damage and injury at 1900*l.*

The question for the opinion of the court is, whether, under the circumstances set forth in this case, the plaintiff's interest in his said premises was injuriously affected within the meaning of the Lands Clauses Consolidation Act 1845, so as to entitle him to compensation.

If the court shall be of opinion in the affirmative, then judgment shall be entered for the plaintiff for 1900*l.*, with costs of suit, from the 27th April in the year of our Lord 1871.

If the court shall be of opinion in the negative, then judgment of *nolle pros.* shall be entered for the defendants, with costs of defence from the last-mentioned date.

The Court of Common Pleas gave judgment for the plaintiff, and the defendants now brought error.

The following were the grounds of error assigned:—

That the element of value for deprivation of which the compensation was given was in respect of a public right, and that the title by which the same was enjoyed by the plaintiff was as one of the public. That it was proximity of the premises to the dock, and consequent facilities for the use of the public right, which conferred the value on the premises, and that the title to compensation arises by reason of the quality, not quantity, of interest. That the court below were altogether in error in likening the draw-dock to the outer half of the road in *Beckett's case* (L. Rep. 3 C. P. 82). The court had no power to draw any inference of fact, and, if they had, they came to the wrong conclusion. That the stopping up of the draw-dock gave rise to no right of action at law, assuming the Thames Embankment Act 1862, had not been passed. That the nearness of the dock conferred value on the premises by reason of potential exercise of the public right by the occupier thereof, and that not as property or as incident thereto, but as personally accruing to him as occupier for the time being. That the plaintiff's estate and interest in the premises had not been injuriously affected so as to entitle him to compensation within the intent and meaning of the Lands Clauses Consolidation Act 1845.

The case is reported below, *ante*, vol. vii., p. 502.

Hawkins, Q.C. (Philbrick with him) for the defendants.—There is no distinction between the case of the plaintiff and the case of any other member of the public, so far as the *quality* of the injury which the plaintiff suffers is concerned; the only distinction is in the *quantity*. It is no ground for compensation under the Lands Clauses

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Act that a man suffers more than his neighbours; he must suffer a different sort of injury. It is necessary for the plaintiff to show, in order to entitle himself to compensation, that but for the fact of the defendants being authorised by Act of Parliament to do what they did, he could have maintained an action against them at common law. It is obvious here that all the plaintiff could have done in such a case would have been to prefer an indictment. Admitting that plaintiff's premises are rendered less valuable by the destruction of the draw-dock, that circumstance does not entitle the plaintiff to compensation. The case that has been most pressed against the defendants is *Chamberlain v. The West End of London and Crystal Palace Railway Company* (8 L. T. Rep. N.S. 149; 2 B. & S. 605). There is, however, this distinction between the two cases, that there the house was deprived of its ordinary access directly from the high road. [BRAMWELL, B.—Are you not driven to say that the effect of *Ricket v. Metropolitan Railway Company* in the House of Lords (16 L. T. Rep. N.S. 542; L. Rep. 2 H. L. Cas. 175) is to overrule *Chamberlain's* case?] He repeated the same arguments as in the cause below, and cited:

Reg. v. Metropolitan Board of Works (Batstone's case)
L. Rep. 4 Q.B. 358.

BRAMWELL, B. cited:

Rose v. Miles, 4 M. & S. 101.

The Caledonian Railway v. Ogilvy, 2 Macq. H. of L. Cas. 229.

Winterbotham v. Lord Derby, L. Rep. 2 Ex. 316.

Reg. v. Eastern Counties Railway Company, 2 Q.B. 347.

Prentice, Q.C. (Hon. A. Thesiger with him) for the plaintiff, urged the same arguments as in the court below, and cited, in addition to the above cases:

Moore v. Great Southern and Western Railway Company, 10 Ir. C. L. Rep. 46.

Tuohey v. Great Southern and Western Railway Company, 10 Ir. C. L. Rep. 98.

Hawkins, Q.C., in reply.

Cur. adv. vult.

Feb. 7.—The following judgments were delivered;—

CLEASBY, B.—The question in this case is, whether the plaintiff is entitled to compensation, under the 68th section of the Lands Clauses Consolidation Act, by reason of his premises being injuriously affected by the Thames Embankment made by the defendants. I understand that all my learned brothers think the plaintiff is so entitled. I regret that I cannot agree with them. The plaintiff appears to have suffered in his trade considerable damage from losing the use of the river; but it appears to me that the case is not brought within the words of the Act of Parliament, nor within the construction which they have received in the courts and in the House of Lords. If the plaintiff is entitled, I cannot see how any person occupying premises in a street communicating with the river, who, for the purposes of his occupation, made use of the river—a person, for instance, who had a coal-yard and who had barges brought up there, or a builder having premises contiguous to the new Courts of Law and engaged in some contract there—would not have a similar claim, for he could undoubtedly show that his premises were increased in value by the use of the river. And the multiplicity of claims which this would give rise to is strongly pointed out by Lord

Cranworth in *Ricket v. Metropolitan Railway Company* (*sup.*) as a good reason for not extending the meaning of the words. The present case, as well as that of others using the river, might have been made the subject of special provision for compensation, limiting the right within certain limits and under certain conditions; but under the general Act such cases are not provided for. The plaintiff was the occupier of certain premises at Whitefriars, of which he had a long lease, and where he carried on an extensive business in bricks and other building materials. The premises were situated at the distance of about 350 feet from the general line of the river Thames, with other premises between them and the river. There was, however, a dock projecting from the river into the land for the distance of 352 feet, as shown on the plan which forms part of the case, and the extremity of this reached to within about 25 feet of the corner of the plaintiff's premises, as appears by the scale at the bottom of the plan. The premises, therefore, do not adjoin the river or adjoin the dock so as to give the plaintiff any of the rights of a riparian proprietor. The case finds (paragraph 4) "the plaintiff had no right or easement to or in the draw-dock other than as one of the public, nor was there appurtenant or otherwise belonging to the plaintiff's premises any easement, right, or privilege, in or to the said dock." It appears to me that if the present question was now raised for the first time, the finding referred to would be conclusive against the present claim. For I do not see how premises can be injuriously affected unless there is some damage to the premises themselves, or to some right belonging to them. The premises themselves would be injuriously affected if there was any structural damage by reason of the execution of the works, as if (not to mention other instances) floods were brought upon them which made them unfit for occupation, whether buildings or lands: and the premises would be injuriously affected by loss of, or damage to, some right belonging to them in various ways. As for example, if they were waterside premises, and entitled to the flow of a river, and it was taken away as in the *Duke of Buccleuch's case* (L. Rep. 5 H. L. 418), or if right to light and air, or private right of way, or any similar right belonging to the premises were interfered with, of which the instances are numerous. Another instance may be mentioned, viz., if the premises adjoined a public highway, and in constructing some works, a bridge for instance, either to carry a railway over a public road or to carry the road over it, the level of the highway was altered—it might be several feet or it might be much less—in such a case the alteration of the level might be a damage to the premises. The public in general might be benefited by having a more level and convenient road, and the person occupying the premises might as one of the public share this benefit, but he would have a particular right annexed to his premises of having a certain access from them to the highway, and if this was prejudiced (which would be a question of fact) he would have a right to compensation. The general Act of Parliament does not give compensation to all persons whose premises are rendered less valuable for occupation in respect of their calling or trade carried on there in respect of general convenience, but only where the premises themselves are injuriously affected, and injuriously affected by the execution of the works.

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The premises themselves must be taken or injuriously affected by the execution of the works to give a right to compensation. The words "by the execution of the works," point as it appears to me to the direct effect produced upon the premises by the works, the effect of a contiguous cutting on the fabric, of an embankment upon the light, and so on. This foundation of a particular right interfered with places a limit to claims which would almost be unlimited if every diminution of value was to be sufficient. And as the only reason for the execution of the works by compulsory powers is that they are a great public benefit, any injury which a person suffers in common with the rest of the public may be regarded as compensated for by the benefit. And there is this further objection to reading the words as signifying a mere deterioration of value, that (independently of this being a matter of opinion) the test of the right to compensation would be fluctuating and uncertain, inasmuch as at one time the premises might appear to be diminished in value, at another—six months afterwards—they might appear to be increased, and then the title to compensation would depend upon when the claim was made. But although the reasons already given would have been sufficient, independent of authority, to satisfy me that in the present case the plaintiff was not entitled to compensation, yet, as similar questions have already arisen and been the subject of decision in all the courts and the House of Lords, and especially as the opinion which I have expressed is at variance with that of the court below, it is proper to consider the effect of these decisions, and to show that the conclusion arrived at is in entire conformity with what they established. The words, "injuriously affected," in the Lands Clauses Consolidation Act received a construction by the Court of Queen's Bench in the case of *Re Penny and South-Eastern Railway Company*. (7 E. & B. 660; 26 L. J. 225, Q. B.). The words of Lord Campbell are: "The test is whether, before the railway Act authorising the company to do what has been done here, an action would have lain at common law for what has been done and for what compensation has been claimed? If it would, and that act is authorised by the railway Act, compensation may be claimed in respect of it; if the land is not taken, and nothing is done which would have afforded a cause of action before the Act passed, then, although it may produce a deterioration of the property, it does not injuriously affect the land or constitute a ground for compensation." The other judges—Wightman, Erle, and Crompton, JJ.—lay down the same rule in almost the same words. It is taken from the opinion of Lord Cranworth in the House of Lords in the case of *Caledonian Railway Company v. Ogilvy* (2 Macq. 229), assented to by Lord St. Leonards, which is the real foundation of the rule since adopted by all the courts in dealing with cases of that description. It is unnecessary to refer to all the authorities; but as Willes, J., was one of the judges from whose judgment the present case is an appeal, I may quote his words in *Beckett v. Midland Railway Company* (L. Rep. 3 C. P. 94; 17 L. T. Rep. N. S. 499): "To entitle a claimant to compensation under the Lands Clauses Consolidation Act 1845, two things must concur, viz., that he has sustained a particular damage from the execution by the company of the works authorised

by the special Act, and that the damage was one for which he might have maintained an action if the work was not authorised by Parliament." The rule was adhered to and acted on by the House of Lords in *Ricket v. Metropolitan Railway Company* (L. Rep. 2 H. L. 175; 16 L. T. Rep. N. S. 542). It is true that in that case Lord Westbury states his opinion to the contrary, and would extend the meaning of the words "injuriously affected" by making them include any damage sustained by the occupier in connection with his occupation; but if that opinion had been adopted, the decision of the House of Lords must have been different, and therefore it must be considered as rejected by the highest tribunal, and by that we are bound. This test is really the same as that which has been put already in different words, viz., that where there is no injury to the premises themselves, nor to any rights connected with them, there is no claim to compensation, as there can only be an action where there is an injury to a right. In the present case, according to the statement in par. 4, there is no injury to the premises, nor to any right belonging to them, nor any damage of a different nature from that which would be sustained by any of the public using the dock regularly or occasionally; and when that is the case, the redress for the obstruction to a navigable river or highway is by indictment, and not by action: (*Reg. v. Directors of Bristol Docks*, 12 East, 429; *Winterbotham v. Lord Derby*, L. Rep. 2 Ex. 316.) It is true, a person injured may remove the obstruction so far as is necessary to enjoy his rights: (*Mayor of Colchester v. Brooke*, 15 L. J. 143, Q. B.); but he would do this, not as owner or occupier of particular premises, because he does not enjoy the right in that character, but as one of the public. The plaintiff, besides his right as one of the public to pass along the street in front of his premises, has also the right belonging to his premises to pass from them to that street not altered or interfered with except so far as the commissioners of sewers may have rights over it, with which we have nothing to do. And if the level of the street had been altered by the works of the defendant, or its inclination changed for the worse, or its use as a highway taken away by its being stopped, it might be said that the particular right of the plaintiff had been infringed, so as to give him a claim for compensation. It appears to me that the judgment of the House of Lords in *Ricket v. The Metropolitan Railway* (L. Rep. 2 H. L. 175), gives authority to the ground upon which Lord Cranworth puts his judgment. The question in that case was the right to compensation in respect of the obstruction of a public street communicating with a public footway, by the side of which the plaintiff's premises were situated. The case was therefore like the present one; the obstruction here is of a public river communicating with the street adjoining the plaintiff's premises; there it was of a public street. There is, no doubt, the distinction that in that case the obstruction was not permanent, in the present it is; but this it is submitted can make no difference in the construction to be given to the words "injuriously affected." Lord Cranworth says, in that case (at p. 198): "Both principle and authority seem to me to show that no case comes within the provision of the statute unless where some damage has been occasioned to the land itself, in respect of

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which, but for the statute, the complaining party might have maintained an action. The injury must be actual injury to the land itself, as by loosening the foundations of buildings on it, obstructing its lights or its drains, making it inaccessible by lowering or raising the ground immediately in front of it, or by some such physical deterioration. Any other construction of the clause would open the door to claims of so wide and indefinite a character as could not have been in the contemplation of the Legislature." And he adds, after a few sentences: "The loss occasioned by the obstruction now under consideration may be greater to the plaintiff than to others, but it affects more or less all the neighbourhood. He has no ground of complaint differing save in degree from that which might be made by all the inhabitants of houses in the town where the works for forming the railway were carried on." Lord Chelmsford's judgment is principally occupied with an elaborate discussion of all the authorities, but before examining them he bases his judgment upon the rule that the act complained of must have been the subject of an action unless legalised by Parliament. His lordship, in considering whether an action would be maintainable, first adverts, in general, to the case of personal injury or injuries of that nature arising upon the obstruction of a highway. In such cases, though no doubt an action would lie, there could clearly be no compensation, and then the subject is not further noticed. He then refers to the cases in which an action is said to be maintainable in respect of damages connected with the occupation of the premises, and after examining the adverse authorities, and referring to *Reg. v. London Dock Company* (5 Ad. & E. 16), and the judgment of Erle, C.J. in the Exchequer Chamber in the case before them, he holds that such damages are too remote to be the subject of an action for a public nuisance, and, therefore, not the subject of compensation. Now, the words "too remote" are used in connection with the judgment in *Reg. v. London Dock Company* (5 Ad. & E. 163), as being the effect of the judgment there. Those particular words "too remote" were not used, but the judgment was that the words "injury to an estate or interest in land" would be satisfied by such consequences as the following, "as if by their cut, or bridge, or any other work, they had weakened the foundations, damaged the lights, stopped the drains, or done any similar injury to the houses, lands, &c." It is not, therefore, too much to say that by the words "too remote" his lordship meant too remote from or not connected with the injury to the premises themselves, and this would make the opinion of Lord Chelmsford in effect and substantially the same as that of Lord Cranworth already given. His lordship then goes into a full examination of all the authorities, so that the House may give an authoritative final decision upon the whole case. Lord Chelmsford's judgment was delivered before that of Lord Cranworth, but I do not think it can be doubted, after reading it through, that if it had followed that of Lord Cranworth, he would have assented to Lord Cranworth's language above quoted, and the case was accordingly held to be one in which compensation could not be given, and the judgment of the Exchequer Chamber to that effect was affirmed. If the view taken of Lord Chelmsford's judgment be correct, it would not, I apprehend, be disputed that the decision of the

court below is at variance with the ground of decision of the House of Lords, and cannot be supported. This case was decided in the year 1867; but there was an earlier case in the House of Lords, decided in the year 1857, in which a similar question arose, viz., *Caledonian Railway Company v. Ogilvy* (Macq. 229). In that case, as I understand the facts from the judgment, a public road which was the principal access to a residence was obstructed by a railway crossing it on a level within a few yards of the lodge. Without the Act of Parliament this would have been a nuisance, and the subject of an action at the suit of any person who could show a particular damage of a different nature from that suffered by the public generally. The jury assessed the damages for the level crossing and severance at 560*l.*, and it was held by the House of Lords that the level crossing gave no claim for compensation, reversing the judgment of the Scotch court. In that case the obstruction was of a highway, in the present case it is of a public river, which is also a highway, and this is the main distinction between the two cases, with the addition that in the present case the obstruction is complete; in the other it was partial, an addition unimportant in principle if the obstruction was injurious. The case was decided by Lord Cranworth and Lord St. Leonards. Lord Cranworth thought the case clear both upon principle and authority upon the ground that though the plaintiff suffered by the obstruction more than any other person, yet he did not suffer differently, and therefore could not have maintained an action. He says at page 236, "But it would only be a more frequent repetition of the same damage; it would not be any damage different from that which might be sustained by any other subjects of Her Majesty; for all attempt at arguing that this is a damage to the estate is a mere play upon words." Lord St. Leonards decides the case substantially upon the same ground. But there are passages in his judgment which deserve particular notice. He points out the distinction between the case itself and those cases in which the highway which the premises adjoin is itself interfered with, a distinction of importance in dealing with the two cases on which the plaintiff mainly relied, viz., *Beckett v. Midland Ry. Co.* (L. Rep. 3 C. P. 82) and *Chamberlain v. West End of London, &c. Ry. Co.* (2 B. & S. 605, 617; 31 L. J. 201, Q. B.; 32 L. J. 173, Q. B.) Lord St. Leonards says, in reference to the case of *Reg. v. Eastern Counties Ry. Co.* (2 Railway Cases 736.) "In that case there was an actual injury I should say to the land; at all events there was an injury to the owner of the land, which would give him an immediate right, no doubt, to compensation. From his land he had been enabled to step at once upon the road which had been lowered by the company, and so lowered that he lost his access to that road unless he had new appliances in order to enable him to approach it. There was, therefore, a real injury, there was a ground of complaint there personal to himself, and which was not open to the rest of the world. It was a general complaint when he got to the road; when he got there he had to sustain an injury in common with all the rest of the Queen's subjects; that is to say, the road might be rendered a great deal less easy to travel upon than it was before it had been crossed. For that he would have no remedy, it is a common inconvenience; all are subject to it;

and the power to commit that injury was given by Act of Parliament for the public benefit, and therefore the benefit which is received by the public from the railway is considered to be the only compensation to which the Queen's subjects in general are entitled in respect of the damage caused at the particular spot over which the railway travelled, or in respect of which the road in that spot had been lowered." He afterwards, at page 251, refers to the case of *Reg. v. Bristol Dock Company* (12 East, 423). In that case the person complaining was a brewer, who had carried on his trade by means of water drawn from a navigable river by means of pipes. The defendants, in the execution of public works, had fouled the river and made the water unfit for brewing, and they were bound to make compensation to persons whose premises were damaged or made useless, or to purchase them at the option of the owner. The brewer endeavoured to supply the defect by procuring other water, but was unable to do so, and abandoned the premises. It was held not to be a case within the Act, because the right to pure water was not a particular right belonging to the owner in respect of his premises, but a general right enjoyed by all the public; Lord St. Leonards is unable to distinguish that case in principle, from *Ogilvy's case* (2 Macq. 229), and it appears to me, I must say, almost impossible to distinguish it from the present case. His lordship says, at p. 251, "It was held that he had only a general right; that nobody had any particular personal right to the water; that it was common to all the king's subjects; that, therefore, he was not entitled to recover upon that ground alone. Now, where is the difference between a public river and a public road? The rights of both are common. A public river is, in point of fact, a highway; and a public road is a highway. You use each according to its quality, and if you have only that common right which belongs to all men, you cannot claim compensation in regard to a damage to either the one or the other which is authorised by Act of Parliament; and if in any such case Parliament ever did intend that compensation should be given, it is perfectly manifest that it would be given generally to all within a certain limit, because there must inevitably be damage to many to a certain extent." The present case is one of the stopping up of the flow of a river at a particular spot in which the plaintiff has no different right from that of any other of her Majesty's subjects; and the authorities, I feel bound to say, appear to me to establish that the claim to compensation in such a case cannot be maintained; to allow it would be to break in upon a rule established by the highest authority upon full consideration, and which prevents the mischief referred to by Lord Cranworth and Lord St. Leonards. It would also introduce very great uncertainty as to the extent of liability to which all bodies executing great public works would be exposed; because their liability would depend not upon any facts capable of being ascertained, but upon the speculative opinion of surveyors and other witnesses upon the deteriorating effect of the works upon premises situated at a greater or less distance; as to which a case of deterioration by the loss of the contingent advantages of an available navigation might readily be believed in and easily established. The matter is of such general importance, involving a principle applicable to so many cases, that I have felt bound to

give effect as far as I could to my own opinion, though differing from so many of my learned brothers. But although the authorities in the House of Lords referred to would be considered binding even if they varied from decisions of other courts, I ought not to pass by without noticing the two cases upon which the plaintiff particularly relied. *Beckett v. Midland Railway Company* (L. Rep. 3 C. P. 82; 17 L. T. Rep. N. S. 499) was one of those cases. In that case the plaintiff's premises adjoined a public highway, and the works of the defendant had narrowed the highway from 50 feet to 35 feet, and there was evidence that the consequence was that carriages could not turn opposite the house as before, and that omnibuses, instead of stopping to allow himself and other passengers to alight opposite his house stopped where they could turn. The evidence was no doubt slight, but still there was evidence for the jury that the plaintiff had not the same beneficial access to the highway in front of his house which he had before. This was properly considered a particular injury and restriction of the right of the individual in the enjoyment of the house so as to give a claim for compensation. And the Chief Justice, in his judgment, puts the decision on that precise ground. The case is brought within the observations of Lord St. Leonards in connection with the case of *Reg. v. Eastern Counties Railway Company* (2 Railway Cases, 736) which I quoted at length from their bearing upon *Ricket's case* (L. Rep. 2 H. L. 175). The same remark applies to the case of *Chamberlain v. West End of London, &c., Railway Company* (2 B. & S. 605-617), which, being a judgment in the Exchequer Chamber, was mainly relied upon as binding on this court. For although the facts are not so clear as could be desired, sufficient appears to show that the works of the defendants had deprived the plaintiff's house of the right of being roadside premises adjoining a public highway as much as if the site of his house had been changed. The case is so much relied on, that I must be permitted to quote what Erle, C.J., says of it in delivering the judgment of the majority of the court in the Exchequer Chamber in *Ricket v. Metropolitan Railway Company* (5 B. & S. 165). The passage cited, and indeed the whole judgment, has a close bearing on the present case. "The principle is, that the value of a house is affected by the relation of its situation to the adjoining highway; that is, by the convenience of the private rights of ingress and egress from the one to the other, and by the circumstances of the highway itself tending to make it useful and agreeable to the occupier of the house. If a house on a level with a commodious, beautiful, well-frequented street, either be lifted or sunk by the railway 20 feet above or below the level of that street, the house would be injuriously affected both for pleasure or profit by means of the change in the access to and from the house; or, if a house fronting to a street of that description should be turned round, so as to front to a dark, back alley, the house would be injuriously affected. The site of the house would be altered for the worse. In these cases suggested, the house is supposed to be removed to make the meaning more clear; but if, instead of lifting or sinking the house, or turning its front from a grand street to a bad alley, the street is lifted, or sunk, or changed in its character, the relation of the house to its highway is affected

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precisely in the same degree as it would be by altering the relative position of the house itself in respect of this highway. Such is the principle of *Chamberlain v. West End of London, &c. Railway Company* (2 B. & S. 605-617). "The frontage had been to a wide, well-frequented road, leading direct to and from important towns; by the execution of the railway works it was made to front to a dumb alley much below the level of the substituted thoroughfare over a railway bridge, along which the stream of passengers would be compelled to flow. Frontage gives the value to building ground; therefore, the railway company took away valuable frontage and substituted that which was very inferior, and, therefore, it was held that they had injuriously affected the house, both in its frontage and in its access to and from the effective thoroughfare of the locality." After reading the manner in which this court dealt with the case referred to, can it be regarded as an authority that every house in all the streets leading down to the Thames, and in the streets connected with them, would confer a right to compensation if it could be shown that it was deteriorated in value by being deprived of the public use of the river? I do not think it necessary to consider the cases cited in which persons who have sustained particular injury by reason of the obstruction of a public highway, or by any other public nuisance, have maintained their action for damages; because that is not of itself a test, as is pointed out by Lord Cranworth in *Ogilvy v. The Caledonian Railway Company* (2 Macq. 229), and again, very distinctly, by Lord Chelmsford, in *Rickett's case* (L. Rep. 2 H. L. 175), and by one of the judges in this case in the court below. Although there is no right to compensation unless an action would have been maintainable, it does not follow because an action would be maintainable for damages sustained therefore there is in all cases a right to compensation. If a man sustained such injury as a broken limb or a damaged horse, he could maintain an action founded upon the unlawful obstruction of the highway; but that would not make it an injurious affecting of his premises however near the obstruction. The claim is brought into existence by something voluntarily done afterwards, and although the damage may in some measure be connected as to its extent and frequency with the proximity of the premises, that is too remote a connection to constitute an injurious affecting. As this judgment is founded upon decisions in the House of Lords in which those cases are examined, it would be superfluous to justify the decisions by a further examination of them. In many of the cases it would appear not to have been sufficiently borne in mind that if premises are injuriously affected, so as to give a right to compensation, the remainderman and reversioner would have the same right to compensation as the person in possession; that is, of course, if the injury was of a permanent character.

BLACKBURN, J.—I will now deliver the judgment of my brother Archibald and myself, in which my brother Channell, before he ceased to be a member of the court, concurred. In this case the plaintiff is owner of real property which is much deteriorated in value in consequence of the works of the defendants having shut up a draw-dock which was a public waterway coming near to the plaintiff's property, but not actually touching it, the public highway being between. The plaintiff had no

private right of way; but, in consequence of the proximity of the public dock, his premises were worth more either to sell or occupy. The jury assessed the amount of damage at 1900*l*. The question is, whether the plaintiff is entitled to receive compensation for this deterioration in value of his property? In *Chamberlain v. West End of London Railway, &c. Company* (2 B. & S. 617) the Court of Exchequer Chamber decided that the plaintiff in that case was entitled to compensation for the depreciation of the value of his houses, the arbitrator having found that the stoppage of an old highway seventy yards from the plaintiff's houses had diminished the number of passengers, and so rendered the plaintiff's houses less suitable to be let as shops, and so diminished their value. There was no actual touching of the premises in that case more than in this; and if there is any difference in respect of the directness of the damage, it is more direct in the present case. If this decision still remains not overruled by the House of Lords, it is binding on us, and the plaintiff in the present case is entitled to our judgment. But after that case, *Rickett v. Metropolitan Railway Company* (L. Rep. 2 H. L. 175), was decided in the House of Lords, and the House of Lords, by a majority of two peers to one, decided that the plaintiff in that case was not entitled to compensation. The decision of the House of Lords, the final court of appeal, is binding, not only on all inferior tribunals, but even on the House itself, and fixes the law until the Legislature thinks fit to intervene. We have, therefore, only one duty to perform, and that is to discover whether the ratio decidendi of the House in *Rickett v. Metropolitan Railway Company* (L. Rep. 2 H. L. 175) does or does not contain in it a reversal of the decision of the Exchequer Chamber in *Chamberlain v. West End of London, &c. Railway Company* (2 B. & S. 605, 617). The majority of the judges in the Exchequer Chamber in *Rickett v. Metropolitan Railway Company* (5 B. & S. 156) thought the two cases might stand together, for they reversed the decision of the Queen's Bench, though the decision in *Chamberlain v. West End of London, &c. Railway Company* (2 B. & S. 605, 617) was clearly binding upon them. The distinction which Erle, C.J., made between them in delivering their judgment is to be found at pp. 164, 165, in the report in 5 B. & S.; and, if I understand it rightly, is that a diminution in the rent which Chamberlain received when letting his houses in consequence of the diminished facility of access deterring passengers from coming that way, and so diminishing the profits which the occupiers of the shops would make, was an injury to the houses; but that a diminution in the profit which Rickett received from his own occupation of his house as a public house from a precisely similar cause was only a personal injury. I cannot, speaking for myself only, at all agree in this distinction. I think it necessarily follows, from the facts found in *Rickett v. Metropolitan Railway Company* (L. Rep. 2 H. L. 175), that the plaintiff's house would have let for a smaller rent during the twenty months that the obstruction continued; but such a distinction was certainly made. Whether the diminished value of a house to let or sell does or does not in itself constitute an injurious affecting of the land is another question. Lord Cranworth, in his judgment in *Rickett v. Metropolitan Railway Company* (L. Rep. 2 H. L. 175)

clearly was of opinion it did not. He says, p. 198, "Both principle and authority seem to me to show that no case comes within the purview of the statute, unless where some damage has been occasioned to the land itself, in respect of which, but for the statute, the complaining party might have maintained an action. The injury must be actual injury to the land itself, as by loosening the foundations of the buildings on it, obstructing its light or its drains, making it inaccessible by lowering or raising the ground immediately in front of it, or by some such physical deterioration. Any other construction of the clause would open the door to claims of so wide and indefinite a character as could not have been in the contemplation of the Legislature." If this is the principle of the decision of the House of Lords, *Chamberlain v. West End of London, &c. Railway Company* (2 B. & S. 605, 617) is clearly overruled, for in that case the works of the defendant did not come within seventy yards of the plaintiff's property. In *Reg v. Metropolitan Board of Works* (L. Rep. 4 Q. B. 358) the Court of Queen's Bench thought that this was the ratio decidendi of the Lords; and, therefore, in a case identical in principle with the present, gave judgment for the defendants. But in *Beckett v. Midland Railway Company* (L. Rep. 3 C. P. 82) the Court of Common Pleas took a different view of what was the ratio decidendi in *Ricket v. Metropolitan Railway Company* (L. Rep. 2 H. L. 175). They seem to have considered it as proceeding partly on the remoteness of the damage, and partly on the same distinction which was put in the judgment of Erle, C. J. to which I have already alluded, and therefore as not overruling *Chamberlain v. West End of London, &c. Railway Company* (2 B. & S. 605, 617). And in substance the Court of Common Pleas have followed that decision in the present case. Lord Westbury was clearly desirous, not only to support the decision in *Chamberlain v. West End of London, &c. Railway Company* (2 B. & S. 605, 617), but to carry it a great deal further; whilst Lord Cranworth, as it seems to us from the passage already cited, clearly decided on a principle inconsistent with the decision in that case: we must look to the opinion of the Lord Chancellor to see whether the House of Lords did overrule the decision or not. The Lord Chancellor did certainly proceed in part on the ground of the remoteness of damages, but he did not confine himself to it, but proceeds at p. 188 to state his views on the whole case. It is unfortunate that two courts should have differed as to what these were. But we find, at p. 191, that the Lord Chancellor does expressly mention *Chamberlain v. West End of London, &c. Railway Company* (2 B. & S. 617), and treats it as a right decision, apparently adopting the distinction made between this case and the case then at the bar by Erle, C. J. in the judgment delivered by him in the Exchequer Chamber. We think it not now the question whether that distinction was satisfactory or not, but whether the decision in *Chamberlain's case* is overruled by the House of Lords, or still a subsisting authority. We think, upon the whole, it is better to treat it as not yet overruled, leaving it to the House of Lords, if we have misapprehended the effect of their decision, to correct it. We, therefore, affirm the judgment below.

BRAMWELL, B.—In this case the plaintiff, by the execution of the works of the defendants, has sustained a damage in respect of his interest in

certain premises, the value thereof being lessened by the execution of these works, which loss could not have been inflicted on him except under the powers given to the defendants by their Act. In short, "he has sustained damage by reason of the exercise as regards such lands of the powers of the Act" 8 & 9 Vict. c. 20, s. 6. In reason and justice he ought to be compensated. The only matter urged to the contrary, viz., that the public benefit justifies this uncompensated injury, is idle. If the public benefit will not authorize the taking of the smallest piece of land or the doing of the smallest injury to the structure of a building or its easements without compensation, neither can it in reason or justice authorize this loss without compensation. Unless it will pay to do the work, including in its cost compensation for losses, the work should not be done. There is no difficulty in ascertaining the compensation any more than in a case of a partial loss of light. No doubt vague claims may be made, and unfounded ones, but justice must be done to A. though at the risk of a fraudulent claim by B. Indeed, if the plaintiff's premises had been taken this source of value would have had to be taken into account and estimated, and this is also a strong argument for the plaintiff. For if the defendants, by taking the premises, would have to pay the whole value, why are they to do this damage gratis, or could they have first stopped the draw-dock and then taken the house at the diminished value? The loss, it is to be borne in mind, is by execution of powers given; because there may be a loss by new works to which this reasoning does not apply, as the diversion of traffic from an old by the making of a new road. But then the damage is not "caused by the exercise of the powers of the Act." Take a plain case, indeed the one I have supposed; a new road is made, traffic is diverted from an old one. The owners of the soil could, without statutory powers, have dedicated the new road to the public; or the owners of the soil could make a railway if they pleased and diminish the value of the houses in the town through which the old coach road ran, as at Maidenhead. They could not, indeed, in most cases, make the railway without statutory powers, because they would not take land by compulsion, cross and divert roads, and other things; but the railway injures property, not directly by exercise of any of their powers given by the Act, but as an indirect consequence of the exercise of such powers, and of the dealing with land they have purchased as any owner might have dealt with it if he pleased. And, indeed, railways have been made without statutory powers, as that from Gravesend to Stroud, and the Festiniog Railway. But for the powers of the Act the loss by the diversion of traffic would not have occurred, but the exercise of those powers did not cause it. Those powers are certainly not *causa causans*, and hardly a *causa sine qua non*. For the statute means exercise of the powers in relation to the land affected. And, indeed, the loss in such cases is caused not by the making of the railway but by its subsequent user. I say, therefore, that in this case there is a direct loss caused to the plaintiff by the exercise of powers conferred by the Act of Parliament, and that there is no reason why the plaintiff should not be compensated. And it seems to me legitimate to say, that the Legislature ought not to have intended this, and legitimate and respectful to say

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that what it ought not to have intended presumably it did not intend, and that what it did not intend it has not enacted. I approach the consideration of the statute therefore with the belief that the true construction is in the plaintiff's favour. Now I agree that the word "injuriously" does not mean "wrongfully" affected. What is done is rightful under the powers of the Act. It means hurtfully or "damnously" affected. As when we say of a man that he fell and injured his leg. We do not mean that his leg was wronged, but that it was hurt. We mean he fell, and his leg was injuriously, that is to say hurtfully, affected. At the same time, I am clearly of opinion that to entitle the parties interested to compensation, the injury or hurt must be such as could not lawfully be inflicted except by the powers of the Act. I have above given my reasons for this. But I will shortly add that the words of the section show this. The lands must be "injuriously affected by reason of the exercise as regards such lands of the powers of the Act." The act, therefore, injuriously affecting must be one which would be wrongful but for the statute. But I agree that it need not be one for which an action would lie. It is enough that it would be indictable or might be prevented by injunction. Now clearly this stoppage of the draw-dock would have been indictable, and the defendants might have been compelled to abate the nuisance; besides it is not to be presumed anyone would break the law. Further, I believe that they might have been prevented by injunction from doing, and compelled to undo if they did, the act which has caused the loss. If so, then, we have a thing done under the powers of the statute which could not have been lawfully done but for those powers, which if done might have been compelled to be undone, which directly causes a loss to the plaintiff in respect of his interest in these premises. Why is this not within the section? It says, "shall make to the owners, &c., of land injuriously affected by the construction of the works full compensation for all damages sustained by such owners, &c., by reason of the exercise, as regards such lands, of the powers of the Act." I admit, of course, that the loss must be to the person in respect of his interest in the thing—that the thing, the premises, must be lessened in value, not merely that the person suffers in common with the rest of the public, or on account of something peculiar to him personally. I admit, for instance, that if a market gardener had usually landed his goods there and taken them to Farringdon Market he would have no claim, because no premises of his would be injuriously affected. It might be an inconvenience and even loss to him to get his goods to market in some other way. But his premises would not be injuriously affected. He would suffer as one of the public—more, perhaps, than anyone else—but still as one of the public only; and it may well be, that though his loss is special, yet he must bear it as one of the public for the public gain, and on account of the difficulty of compensating in such cases. He would be injuriously affected, but not his premises. His case would be like that of a medical man injured by sanitary improvements under statutory powers, which, by diminishing sickness, diminished his practice. Nor is such an affecting one by the exercise of the powers of the Act. No power of the Act is directly applied to cause it; it is an indirect consequence only. Here the premises are injuriously affected, and for actual

and potential purposes they are of less value. If it is to be asked where the line is to be drawn, I answer, not by distance in point of measurement. Premises might be injuriously affected by the stopping of a landing-place ten miles off if there was no other within twenty of the premises affected. The line is to be drawn by ascertaining whether the premises are actually or potentially affected for present or other purposes, or the man—whether it is only the person who happens to be using them. It is said this might give the right to make an immense number of claims. Suppose it did. Suppose there were a thousand claims for 1000*l.* each. If they are well founded 1,000,000*l.* of property is destroyed, and why is not that part of the cost of the improvement; and if taken into account as such, why should not the loser of it receive it? On these principles I think the present case within the statute, and give my entire concurrence in Lord Westbury's reasoning, from which the foregoing is borrowed. Of course, if there is any binding authority on the subject, reasoning is useless. But I think the cases are in such a condition that there is none on which we can act, and that the matter must be set right by the House of Lords or by legislation. That being so, we may reasonably inquire how this case ought to be decided. *Ricket v. Metropolitan Railway Company* (L. Rep. 2 H. L. 175), would govern us did we know the *ratio decidendi*. Now, there is a *ratio decidendi* expressed by Lord Cranworth which would entitle the defendants to judgment. He appears to think that there must be some damage to structure or easement to constitute injurious affecting. Now, it does seem strange that, the act and its results being the same, the premises are injuriously affected or not according as the right hurt or injured is public or private as by grant or prescription. But, further, Lord Cranworth says, "or making it inaccessible by lowering or raising the ground immediately in front of it." I suppose the important word there is "immediately," making the thing peculiar to the house. But what in principle is the difference between "immediately" and five yards distant; what is the difference in principle between total inaccessibility and total loss and partial inaccessibility and partial loss? With great respect to his lordship's opinion and that of my brother Cleasby, they seem to give up their position in this. For lowering the ground in front would be no cause for compensation unless it was a highway; and if it is a highway the claimant has no right in relation to it except as one of the public. His premises being close to the road does not alter his case in principle, but in degree only. But Lord Cranworth's was not the *ratio decidendi* of Lord Chelmsford. Further, I agree in the remark of my brother Blackburne, that the judges and (for aught we can see) the Lords in *Ricket v. Metropolitan Railway Company* (L. Rep. 2 H. L. 175), did not mean to overrule *Chamberlain v. West of London, &c., Railway Company* (2 B. & S. 605, 617); and I agree with him in thinking that if that is law, it is an authority for the plaintiff, and that the distinction between the two cases is unreal. Then, in order to reverse the judgment, we ought to be able to say that it is wrong on principle or authority. I cannot say it is on either.

KELLY, C.B.—It is necessary, in the first place, to have a clear apprehension of the facts of the case. The plaintiff is the owner of a house and

premises, in which he carried on the business of a carman, and the defendants, in order to construct an embankment, possessed themselves, under the powers of their Acts of Parliament, of a waterway or public highway called a draw-dock, leading from a portion of a highway, lying between the plaintiff's premises and the draw-dock, to the river Thames. The plaintiff, therefore, had a public way from his house and premises, across a space of twenty-one feet to the draw-dock, and thence, by the draw-dock of the length of 352 feet to its outlet on the Thames; and the defendants, by taking the draw-dock and constructing an embankment upon its site, have permanently destroyed and extinguished the public highway from a spot twenty-one feet from the plaintiff's premises to the river Thames. By this means the communication between the plaintiff's premises and the Thames has been taken away, and his premises have become less valuable, either to sell or to occupy, to the amount of 1900*l*. The question is whether the plaintiff is entitled to compensation under the Lands Clauses Act 1845, which is incorporated with the defendants' Act of Parliament. A great many decisions, some of them seeming to conflict with each other, are to be found on this question, and it may be well to consider at the outset in what state of things claimants or plaintiffs, whose property, as alleged, has been prejudicially affected within the Lands Clauses Consolidation Act, have been held not entitled to compensation. And, first, it has been determined that loss of profits of trade is not within the Act. Why this should be so; why a man should be deprived of the profits which he is acquiring in his trade, by means of a public highway in the immediate neighbourhood of his premises being taken by a joint-stock company, or other public body, and applied to their own use, and in many cases used for their own profit, and the injured trader should be entitled to no compensation, I have never yet been able to discover; but such is the law, as laid down by the House of Lords, and this court is bound by their decision. So it has been decided that no compensation can be recovered where no action could be maintained if the wrong had been done not under the authority of an Act of Parliament; and further that it does not follow that even if an action might be maintained a claimant could necessarily obtain compensation within the Lands Clauses Act. Finally, it has been held that the temporary obstruction, as in *Ricket's* case, or the occasional obstruction, as in *Ogilvy's* case, of a public highway, is not the subject of compensation, and that the permanent extinction of a highway but so distant from the premises of the claimant that he only sustains an injury in common with the public at large is also not an injury within the meaning of the Act. And Lord Cranworth has laid it down, that to entitle a claimant to compensation "there must be a direct injury to the land itself, as by loosening the foundations of buildings upon it, obstructing its light or its drains; making it inaccessible by lowering or raising the ground immediately in front of it, or by some such physical deterioration." On the other hand, it has never yet been determined that the permanent extinction of a public highway so near to the claimant's premises as directly to diminish their value to sell or to let, or to be enjoyed by the claimant himself, is not the subject of compensation within the Act, and

it will be found, upon a careful consideration of the authorities bearing upon this question, that such an injury has been held to entitle the party injured to compensation, and the decision to that effect affirmed by a court of error and approved in the House of Lords. In *Chamberlain v. West End of London, &c., Railway Company* (2 B. & S. 605, 617), it was decided in the Queen's Bench, and afterwards in the Exchequer Chamber, that the destruction or extinction of a highway at a distance of seventy yards from the nearest of the plaintiff's houses alleged to have been injuriously affected, was an injury within the Lands Clauses Act 1845, which entitled the plaintiff to compensation. In that case, the highway at the point of extinction was not only not in contact with the plaintiff's premises, but, as observed, at a distance of seventy yards; nor were the premises directly injured in any of the modes pointed out by Lord Cranworth in *Ricket's* case, or otherwise than that by reason of the proximity to the plaintiff's premises of that portion of the highway which had been taken for the purposes of the railway, the access to them by a substituted road was less convenient, and the premises had thereby become less adapted to the carrying on of a trade, and of a less pecuniary value. All these requisites concur in the case now before the court, and it remains to be considered whether *Chamberlain's* case must be taken to have been overruled by *Ricket v. Metropolitan Railway Company* (L. Rep. 2 H.L. 175) in the House of Lords. Having carefully considered the facts and the language of the opinions delivered in this case of *Ricket's* it appears to me that it in no wise conflicts with the decision in *Chamberlain's* case, and that it clearly and plainly is distinguishable from the case now before this court. First, the broad and substantial ground of the decision in *Chamberlain's* case and in this case is, that the portion of a highway, the taking of which by the defendants was complained of, had been permanently and absolutely extinguished, and the plaintiffs in both cases had been for ever deprived of the use of it for themselves and all others resorting to their premises; whereas in *Ricket's* case, the highway was not taken at all, and the access to it had been for a time only, and partially, obstructed; another temporary way to the plaintiff's premises had been substituted, and the highway itself ultimately restored to its former condition. It is true that the obstruction was continued for the long period of twenty months, and it may be that as in *Wilkes v. Hungerford Market Co.* (2 Bing. N. C. 281), an action might have been maintainable for the continuance of the obstruction for an unreasonable time. But there is a marked and manifest distinction between a mere temporary obstruction, which must occasionally take place in a highway under a great variety of circumstances, as during the repairs of the way, or of the sewers, or of the gas-pipes, or water-pipes underneath it, and the permanent destruction of a way by which property in its neighbourhood may be permanently and irreparably injured. But, further, the only damage found by the jury or complained of by the plaintiff, was a loss of profit in his trade estimated by the jury at 100*l*., a loss which, as already observed, the House of Lords had decided not to be within the Act of Parliament. Here, on the other hand, as in *Chamberlain's* case, it is expressly found that the premises of the plaintiff, with reference

to the use to which they might have been applied by any owner or occupier, have been permanently damaged or diminished in value. The decision, therefore, in *Ricket's* case, upon the facts there found, is clearly distinguishable from *Chamberlain's* case and this case, and is in express terms distinguished from *Chamberlain's* case by Lord Chelmsford, one of the majority by whom that decision was pronounced. We are, however, bound not merely to consider the judgment itself of the House of Lords, but to collect, as far as we are able to do so, the *rationes decidendi* from the language in which it was delivered. And it certainly appears from some expressions that fell from Lord Cranworth to have been his opinion that to constitute an injury within the Act it must have been caused by something in contact with or directly and physically operating upon the land. But if such was really the meaning of his lordship, it is not only opposed to some of the authorities recognised by the decision to which he was a party, but inaccurately illustrates the proposition intended to be laid down. For "the raising or lowering of a highway in front of a claimant's premises" had not the effect in the case referred to of rendering the premises inaccessible, though it diminished the facility of access; and the destruction of a portion of a highway by the construction of an embankment upon it at the distance of some fifteen feet from the claimant's house, is no more "an actual injury to the land itself" than the construction of a railway at the distance of seventy yards, or an embankment at the distance of twenty-one feet. Passing by, then, these remarks of Lord Cranworth, which would confine all claims to compensation within narrower limits than either the authorities or the provisions of the Act of Parliament have prescribed, and without calling in aid the able and elaborate opinion of Lord Westbury in support of the claim of compensation, I think we are warranted in holding that the true *rationes decidendi* in this case of *Ricket's* were, that the pecuniary injury complained of was confined to the loss of profit in trade, that there was no finding of any diminution in the value of the property, and that the highway in question had not been permanently extinguished or taken away, but only temporarily obstructed; all which reasons for the decision are inapplicable to either *Chamberlain's* case or the case before us. *Caledonian Ry. Co. v. Ogilvy* (2 Macq. 229) is equally distinguishable from the present case. There the plaintiff complained, not of the permanent extinction of a highway, but only of an occasional and temporary obstruction by the shutting of the gates on either side of a railway for a few minutes or seconds at a time during the passing or expected passing of a railway train. There is, therefore, no decision to be found in any court of appeal that where a highway is not merely obstructed, but permanently destroyed so near to premises alleged to be injuriously affected as to render them of less pecuniary value by preventing an easy and convenient access to them by the occupiers and the public, the owner of the premises is not entitled to compensation. Upon these grounds, therefore, supported by the many authorities referred to, consistent with the decisions of the House of Lords, and in accordance with the strict principles of justice, I am of opinion that the judgment of the Court of Common Pleas should be affirmed.

Judgment affirmed.

Attorneys; for plaintiff, *John Edmunds*; for defendants, *W. W. Smith*.

COURT OF APPEAL IN CHANCERY.

Reported by E. STEWART ROCHE and H. PRAT, Esqrs.,
Barristers-at-Law.

Dec. 9, 10, and 16, 1872.

(Before the LORD CHANCELLOR (Selborne) and the LORDS JUSTICES.)

CHAMBERLAYNE v. BROCKETT.

Charitable legacy—Gift to build almshouses when and so soon as a site should be given—Remoteness—General dedication to charity—Cy près.

When personal estate is once effectually given to charity, it is taken entirely out of the scope of the law of remoteness; but when a gift in trust for charity is conditional upon a future and uncertain event, which is so remote and indefinite as to transgress the limits of time prescribed by the rules of law against perpetuities, the gift fails ab initio.

A testatrix, after giving small legacies to certain relatives, and reciting that she could not select any of her family who she could confidently feel would not spend her money on the vanities of the world, and that she felt she was doing right in returning it in charity to God who gave it, bequeathed all her residuary personal estate to trustees upon trust to invest, and when and so soon as land should at any time thereafter be given for the purpose, her will was that almshouses should be built in certain parishes, and that the surplus remaining after building the almshouses should be appropriated in making weekly allowances to the inmates:

Held (reversing the decision of the Master of the Rolls), that the gift was not void for remoteness, but was a good dedication of the residue to charity.

Inquiry directed whether any land had been given or legally rendered available for the purposes intended by the testatrix.

THIS was an appeal from a decision of the Master of the Rolls.

By her will, dated the 13th Jan. 1858, Sarah Chamberlayne, after giving legacies of 100*l.* apiece to certain relatives, proceeded in these words:—"As I consider all my family the same to me, I wish to make no difference, and as I could not select any of them that I confidently could feel would not spend my money on the vanities of the world, as a faithful servant of the Lord Jesus Christ, I feel I am doing right in returning it in charity to God who gave it; I therefore give and bequeath all the rest, residue, and remainder of my personal estate unto my brothers," upon trust to invest, and out of the dividends of the investments to make certain charitable payments, and "when and so soon as land shall at any time hereafter be given for the purpose, my will and desire is, that almshouses for poor, aged, and infirm men and women, shall be built" in certain specified parishes, and that the surplus remaining after building the almshouses should be appropriated in making weekly allowance to the inmates.

The Master of the Rolls held (*ante*, vol. vii., p. 604) that the gift of the residue was void for remoteness, being conditional on the gift of land at a future indefinite time.

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From this decision the Attorney-General, as the representative of charitable interests, appealed.

The *Solicitor-General* (Sir George Jessel, Q.C.) and *Hemming*, for the appellant.—In this will there is a distinct gift for charitable purposes, and *The Attorney-General v. The Bishop of Chester* (1 Bro. C. C. 443), shows that these moneys ought to be kept for a reasonable time to see whether anyone will give the land for the purpose of erecting the almshouses. In that case there was a gift to trustees for the purpose of establishing a bishop in America, and it was held that the money must remain in court till it was seen whether the appointment of a bishop would take place. The same view was taken by Lord Hatherley in the recent case of *Sinnett v. Herbert* (26 L. T. Rep. N. S. 7; L. Rep. 7 Ch. 232), where he said that he thought the *Attorney-General v. The Bishop of Chester* was a complete answer to the difficulty that arose upon the possible remoteness of the testatrix's intention being carried into effect. If no one gives the land for the purposes of the will in a reasonable time, these moneys must be applied *cy près*, for there is a clear dedication to charitable purposes, and where that is so, the doctrine of *cy près* applies. In *Martin v. Margham* (14 Sim. 230), a testator directed funds to be provided for certain charity schools, by accumulating his property, but fixed no time for the continuance of the accumulation, which must necessarily have exceeded the legal period, and it was held that the direction to accumulate was void, but as the testator had shown an intention to devote his property to charitable purposes, the court directed his intention to be carried into effect *cy près* by means of a scheme to be settled by the master. In *Mills v. Farmer* (19 Ves. 483), a testator directed his residue to be divided for certain charitable purposes, and other charitable purposes which he intended to name afterwards; he did not name any other purposes, and it was held that there was a good bequest to charity to be executed by the court having regard particularly to the objects specified. *Cherry v. Mott* (1 M. & Cr. 123), which may seem adverse to us is quite distinguishable from the present case. Here there is evidence on the face of the will of a general intention to exclude the next of kin, and to devote the fund to charity, while there was no such general intention apparent in *Cherry v. Mott*. A gift to charity is general, unless you find something to the contrary. They also cited

Attorney-General v. Andrew, 3 Ves. 633;
Andrew v. The Master and Wardens of the Merchant Taylors' Company, 7 Ves. 223;
Andrew v. Trinity Hall, Cambridge, 9 Ves. 525;
Moggridge v. Thackwell, 7 Ves. 36;
Hayter v. Trego, 5 Russ. 113;
Loscomb v. Wintringham, 13 Beav. 87;
Simon v. Barber, 5 Russ. 112;
De Costa v. De Paz, Amb. 228; 2 Swan. 487n.;
Cary v. Abbott, 7 Ves. 490;
Attorney-General v. Oglander, 3 Bro. C. C. 165;
Attorney-General v. The Ironmongers' Company, 2 My. & K. 576; Cr. & Ph. 208; 10 Cl. & Fin. 906;
 2 Jarm. on Wills. 3rd edit. 223;
Lewis v. Allenby, W. Notes, 1871, p. 213;
Attorney-General v. Goulding, 2 Bro. C. C. 427;
Attorney-General v. Whitchurch, 3 Ves. 141.

[Lord Justice JAMES referred to *The Attorney-General v. Sibthorp* (2 Russ. & My. 107).]

Sir R. Baggallay, Q.C. (with him Speed), for the plaintiff.—The gift is void in itself, as it is conditional on the gift of land at some indefinite future

time, and therefore the doctrine of *cy près* cannot apply. There is no gift of the income till the almshouses are built, so as to oust the next of kin. Nor is there any direction to accumulate. The gift is also void as transgressing the rules against perpetuity, for no limit of time can be suggested here, the words being so soon as land shall "at any time hereafter" be given for the purpose. This case is not governed by *The Attorney-General v. The Bishop of Chester* (1 Bro. C. C. 443), for there the gift was immediate, while here it is a gift "so soon as land shall be given for the purpose." And there is the same distinction between this case and *Sinnett v. Herbert* (26 L. T. Rep. N. S. 7; L. Rep. 7 Ch. 232). *Cherry v. Mott* (1 My. & Cr. 123) is on all fours with this case as to principle. This is not one of the cases to which the doctrine of *cy près* applies. That doctrine applies, (1) where the testator expresses an intention to devote his property to charitable purposes but fails to name the objects, as in *Mills v. Farmer* 19 Ves. 483; (2) where the person who is to select the object is not indicated; (3) where the person who is to select the object dies before the testator, as in *Moggridge v. Thackwell* (7 Ves. 36); (4) where the gift fails by reason of a direction to accumulate beyond the legal time, as in *Martin v. Margham* (14 Sim. 230); (5) where the gift fails through illegality, as in *De Costa v. De Paz* (Amb. 228; 2 Swanst. 487n), and *Cary v. Abbott* (7 Ves. 490); (6) where it fails for impracticability, as in *Hayter v. Trego* (5 Russ. 113). In all these cases the gifts were immediate gifts, and not postponed or conditional, as in the present case. They also referred to

The University of London v. Yarrow, 1 De G. & J. 72;
Henshaw v. Atkinson, 3 Mad. 306;
Philpott v. President and Governors of St. George's Hospital, 6 H of L. Cas. 338.

Cadman Jones (with him Fry, Q.C.) for the next of kin, supported the same contention.

Hemming, in reply.—The words of the will, "I feel that I am doing right in returning it in charity to God who gave it," show a clear intention to devote the property to charity. We have therefore a general dedication to charity and the indication of a particular charity. Therefore if no one gives the land within a reasonable time, this will be clearly a case for the application of the *cy près* doctrine. The objection of remoteness cannot apply to a charity.

Their LORDSHIPS reserved their judgment.

Dec. 16.—The LORD CHANCELLOR (Selborne) delivered the following written judgment of the court:—The only question which appears to us to require decision in this case is, whether upon the true construction of the will a trust for charitable purposes of the whole residuary personal estate was constituted immediately upon the death of the testatrix, or whether the charitable trust as to the residue not required to make the fixed payments mentioned before the directions as to the almshouses and alms people, were conditional upon the gift of land at an indefinite future time for the erection of almshouses thereon. If there was an immediate gift of the whole residue for charitable uses, the authorities mentioned during the argument: *The Attorney-General v. The Bishop of Chester*, 1 Bro. C. C. 443; *Henshaw v. Atkinson*, 3 Mad. 306; and *Sinnett v. Herbert*, 26 L. T. Rep. N. S. 7; L. Rep. 7 Ch. 232; to which may be added *The Attorney-General v. Craven*, 21 Beav.

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392, prove that such gift was valid, and that there was no resulting trust for the next of kin of the testatrix, although the particular application of the fund directed by the will would not of necessity take effect within any assignable limit of time, and could never take effect at all except on the occurrence of events in their nature contingent and uncertain. When personal estate is once effectually given to charity, it is taken entirely out of the scope of the law of remoteness. The rules against perpetuities, as was said by Lord Cottenham in *Christ's Hospital v. Grainger* (1 M. & G. 464), "are to prevent, in the cases to which they apply, property from being inalienable within certain periods." The word "within" is here slightly inaccurate; "beyond" would have been more exact. But those rules do not prevent pure personal estate from being given in perpetuity to charity, and when this has once been effectually done, it is not, to use again Lord Cottenham's language, "either more or less inalienable," because there is an indefinite suspense or abeyance of its actual application, or of its capability of being applied to the particular use for which it is destined. If the fund should either originally, or in process of time, be or become greater in amount than is necessary for that purpose, or if strict compliance with the wishes and directions of the author of the trust, should turn out to be impracticable, this court has power to apply the surplus or the whole, as the case may be, to such other purposes as it may deem proper, upon what is called the *cy près* principle. On the other hand, if the gift in trust for charity is itself conditional upon a future and uncertain event, it is subject, in our judgment, to the same rules and principles as any other estate depending for its coming into existence upon a condition precedent. If the condition is never fulfilled the estate never arises, and if it is so remote and indefinite as to transgress the limits of time prescribed by the rules of law against perpetuities, the gift fails *ab initio*. We agree with what was said by the Master of the Rolls in *Cherry v. Mott* (1 My. & Cr. 132), that "there may no doubt be a conditional legacy to a charity as well as for any other purpose," and we think that the question whether this is so or not ought to be determined, like all other questions of construction, by the application of the ordinary rules of interpretation to the language of each particular will. We do not assent to the suggestion made by the Solicitor-General that *Cherry v. Mott*, and other cases of the same class which have followed it, were ill decided. If we thought, as appears to have been the view of the Master of the Rolls, that the case now before us was really the same as if the testatrix had left her residuary personal estate to devolve on her next of kin, subject to a contingent gift to trustees, "when and so soon as land shall at any time hereafter be given for the purpose," for the erection of almshouses upon the land to be so given and the maintenance of almspeople therein, we should probably have concurred in the conclusion of his Lordship, that such a contingent gift to trustees, although for a charity, having the effect of rendering the property inalienable during the whole continuance of the preceding non-charitable estates, must, in order to be valid, necessarily vest within the same limits of time as if the trustees had taken the residue, upon the same condition, for their own benefit or for any other than charitable objects. If

therefore we differ, as we are compelled to do, from the decree at the Rolls, it is not on any principle of law, but upon the construction of this particular will. In this case the testatrix expressly declares her intention to "return" the whole residuary estate "in charity to God who gave it," and she "therefore" gives and bequeaths it, immediately upon her death, to trustees, to invest the whole in Consols, proceeding to direct various specified payments to be made out of the trust fund so created, and adding the directions, on which the present question arises, for the erection of almshouses and the maintenance of alms people therein, "when and so soon as land shall at any time hereafter be given for that purpose." According to *Green v. Elkins* (2 Atk. 473), *Hodgson v. Lord Bective* (1 H. & M. 397), and other similar cases, a gift of the residue of personal estate carries with the *corpus* the whole income arising therefrom and not expressly disposed of as income or expressly directed to be accumulated from the day of the death of the testator. Here, therefore, nothing is undisposed of; there is no resulting trust for the next of kin. The intention in favour of charity is absolute, the gift and the constitution of the trust is immediate, the only thing which is postponed or made dependent for its execution upon future and uncertain events is the particular form or mode of charity to which the testatrix wished her property to be applied. Taking this view of the proper construction of the will, we hold the present case to be completely governed by *The Attorney-General v. The Bishop of Chester* (1 Bro. C. C. 443), *Sinnett v. Herbert* (28 L. T. Rep. N. S. 7; L. Rep. 7 Ch. 232), and the other authorities of that class, and we propose accordingly to vary the decree of the Master of the Rolls by a declaration that the residue of the personal estate of the testatrix, which we assume to be all pure personality, is well given to charity, and by directing an inquiry, similar in principle to that in *Sinnett v. Herbert*, whether any and has been given or legally rendered available for the purposes intended by the testatrix, further consideration being reserved. The costs of all parties of the suit and of the appeal will be paid out of the residuary estate, and the deposit will be returned.

The LORDS JUSTICES concurred.

Solicitors for the appellants, *Raven and Bradley*.

Solicitors for the respondents, *Taylor, Hoare, and Taylor*.

Thursday, Jan. 16, 1873.

(Before the LORD CHANCELLOR (Selborne) and the LORDS JUSTICES.)

BALL v. RAY.

Nuisance—Stables—Prescriptive right—Alteration of user—Annoyance to dwelling house.

A private hotel kept by the plaintiff adjoined a house, the ground floor of which had for twenty years been used as a livery stable without causing annoyance to him. In Feb. 1871 the defendant became tenant of the latter premises, and made certain alterations in a stable which was separated from the plaintiff's dining room by a party wall only, and had up to that time been chiefly used as a coach-house. In place of the wooden mangers therein, which ran at right angles to the said room, the defendant put up iron mangers parallel with, and affixed to, the party wall; for hatter

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ropes he substituted iron chains; he laid down a pavement of a more resonant substance than that forming the previous floor, and, having rearranged the stalls as loose boxes, kept several horses in them. The consequence of these changes was that the movement of the horses created an intolerable noise and vibration, which disturbed the quiet of the plaintiff's house, drove away his lodgers, and well nigh ruined him. In Jan. 1872, he filed a bill to restrain the defendant from continuing the nuisance:

Held, that no prescriptive right to use the stable so as to occasion annoyance had been acquired, and that an actionable nuisance was committed causing serious injury to the plaintiff, who was therefore entitled to an injunction, damages, and costs.

Decision of the Master of the Rolls reversed.

THIS was an appeal from a decision of the Master of the Rolls, dismissing a bill for an injunction to restrain a nuisance.

The plaintiff, a private hotel keeper, carried on business in a house, No. 18, Green-street, Grosvenor Square; and the defendant, a captain of Life Guards, was tenant of the adjoining house, No. 19, in the same street.

The occupation of No. 18 by the plaintiff began in 1863. At that time Mr. Sheward, a livery stable keeper, occupied No. 19, and kept about seventeen horses there. It was, however, alleged in the bill that the horses so kept were never a nuisance or annoyance to the plaintiff, his family, or lodgers, who dwelt in the neighbouring house. The plaintiff also asserted that during the tenancy of Sheward the front part of the ground floor of No. 19, which adjoined the dining-room of No. 18, and was separated therefrom by a party wall only, had been used as a double coach-house wherein carriages were generally kept, although horses might have been sometimes placed in it when the stables were full.

The horsedealing business was carried on at No. 19 until Feb. 1871. In the course of that month the defendant became the occupier of those premises, and he proceeded to arrange the front part of the ground floor as a four-stalled stable and three loose boxes, wherein he thenceforth kept some half-dozen horses. He also made certain alterations in the stables by putting up iron mangers, which were affixed to, and parallel with, the party wall, whereas the former wooden mangers ran at right angles to the same. Iron chains were substituted for the halter ropes previously used in the stables, and the flooring replaced with Staffordshire blue paviments. The result of these changes had been, as the plaintiff alleged, that the noise of the horses occupying the front part of No. 19, the stamping of their hoofs on the new and more resonant pavement, the rattle of the chains through the iron mangers attached to the wall, and the vibration thereof, caused a great annoyance and nuisance to the plaintiff, his family, and the other residents in his house, inasmuch that his lodgers had complained and left him, and his business had much decreased. Consequently in Jan. 1872 he filed the present bill.

The defendant set up as his defence a prescriptive right to use the premises for stables, and that the quantum of annoyance necessarily caused thereby had not been materially increased by the alterations he had made.

The nature of the nuisance, and of the evidence adduced by both parties, sufficiently appears from the judgments *infra*.

The Master of the Rolls having dismissed the bill with costs, the plaintiff appealed from his decision.

Higgins, Q.C. and *J. Chester*, for the appellant.—An actionable nuisance has been proved, and the right to an injunction established. The evidence shows that prior to the occupancy by the respondent, the whole, or at least the front part, of the ground floor was used as a coach-house, and no annoyance resulted therefrom to the appellant, but that the alterations in the furniture, arrangements, and user of the premises have caused noise and vibration whereby he has been seriously affected and injured in his business. No prescriptive right to create such annoyance has, therefore, been proved. Nor has there been any such delay of complaint as in the recent case of *Gaunt v. Finney* (27 L. T. Rep. N. S. 569; L. Rep. 8 Ch. 8) where, the annoyance being trifling and the lapse of time before bill filed considerable, this court left the plaintiffs to their remedy at law. Noise alone may be a nuisance which Chancery will restrain: (*Crump v. Lambert*, 17 L. T. Rep. N. S. 133; L. Rep. 3 Eq. 409). There, it was said by the Master of the Rolls, "the real question in all the cases is the question of fact, viz., whether the annoyance is such as materially to interfere with the ordinary comfort of human existence." In *Sollau v. De Held* (2 Sim. N. S. 133) the ringing of church bells so as to occasion a nuisance to the plaintiff was restrained; and the noise of bells is of course less objectionable than the annoyance complained of in the present case. The respondent contends that the use of the premises as a stable must always have necessarily caused annoyance; that, however, is denied by the plaintiff, but even if a right to create some annoyance had been acquired by lapse of twenty years, yet the respondent is not entitled to considerably increase that annoyance, as he has undoubtedly done: (*Crossley and Sons, Limited, v. Lightowler*, 16 L. T. Rep. N. S. 438; L. Rep. 4 Ch. 478).

Sir Richard Baggallay, Q.C. (with him *Watson*), for the defendants.—A right to occupy the ground floor as a stable having been acquired by twenty years' user so that this court would not have interfered had no alteration taken place, the onus of proving a nuisance caused by the alteration is cast upon the plaintiff: (*Baxendale v. McMurray*, L. Rep. 2 Ch. 790). There the defendant had for more than twenty years discharged into a stream the refuse from his paper factory, and it was held that the easement to which he was entitled was to be presumed to be a right to discharge the washings produced by the manufacture of paper in the reasonable and proper course of such manufacture, but not to increase the pollution, and that the onus lay on the plaintiff to prove any increase. The alteration complained of is the change in the arrangement in the stalls. But surely the defendant was entitled to make such change. [*MELLISH, L.J.*—If you prove twenty years' existing nuisance, you shift the onus on to the plaintiff. *LORD SELBORNE, C.*—But there is no allegation in your pleading of a twenty years' user. *JAMES, L.J.*—The plaintiff says that before the bill was filed, there was a serious nuisance committed by the defendant. Then the first question is, was there such a nuisance? The next,

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was a right acquired by lapse of twenty years?] The affidavits show such a user as the defendant was entitled to continue. Should the court think there was no nuisance before the alteration, then the nuisance, if any, is new, and the burden will fall on the defendant of proving that the alterations had no noxious effect. Lord Cairns says, in the case last cited (p. 794): "Does then the use of a new raw material in the manufacture of paper, from the mere circumstance that the material is new, and different from that formerly used, destroy the right previously possessed by the defendant, to discharge polluted water into the stream? I doubt whether the question on this part of the case is one so much of law as of fact. The question appears to me to be, what is the right or easement of the defendant?" In this case his right is to use the premises as a stable, and what is more reasonable than that he should re-arrange the stalls? Moreover, the evidence shows that the whole ground floor was used as a stable for more than twenty years, and the plaintiff cannot argue that because it was not always quite full of horses, and a carriage was occasionally put into a vacant stall, that the character of the stable was taken away. There is no clear proof that the alterations have caused an annoyance which did not previously exist. And even if injury to the property may have been occasioned, it does not follow that the plaintiff is entitled to an injunction. There must be actionable damage. "Mere diminution of value does not, *per se*, constitute a nuisance," per Kindersley, V.C. in *Soltan v. De Held* (2 Sim. N. S. 158). [JAMES, L.J.—Diminution in value by that which is *not* a nuisance is of course not actionable. Lord SELBORNE, L.C.—Being *damnum sine injuria*.] And see per Bacon, V.C. in *Harrison v. Good* (24 L. T. Rep. N. S. 263; L. Rep. 11 Eq. 353). Suppose a doctor by giving charitable medical advice attracted crowds of the poor to his door, thereby injuriously affecting his neighbour's lodging house, would the court grant an injunction? Surely not. That mere increase of business causing annoyance will not found an injunction is evident from *Baxendale v. McMurray* (*sup.*). Then if mere diminution in value of the property affected is not sufficient, nor mere increase of business, neither is a change in the mode of carrying on that business, as the case last cited proves. Suppose a too musical neighbour were to alter the position of his piano so as to place it against the party wall of my house, and thereby cause annoyance to me which I had not suffered when it stood in a more distant part of the room; or that he began to give constant parties and caused a stream of carriages to drive to and from his door at late hours past mine; the court would not restrain him from playing his piano or being hospitable. [JAMES, L.J.—For neighbours must mutually bear and forbear.] Then pass to the case of business premises; suppose the entrance to a large shop being formerly in a side street, a new door was opened into the main street beside mine, and the flow of customers was an increase of the annoyance to me. As in such instances, so here there is a clear right to continue to use these premises as stables, and any excess of annoyance caused by the alterations complained of does not take away any such right. No case of actionable nuisance is made out. The architects who gave some evidence as experts are not authorities on

acoustics. Moreover, these alterations were complete in March 1871, and ten months elapsed before the filing of the bill. There was, therefore, a delay in complaining which shows the injury was not serious. [MELLISH, L.J.—If there is any doubt about the nuisance, should we not send the question to a jury?] It is not now necessary to do so, for the court can deal with it: (*Inchbald v. Robinson*, 20 L. T. Rep. N. S. 259; L. Rep. 4 Ch. 388). There was annoyance for twenty years, but no actionable nuisance, and the effect of the alterations has not been to make the nuisance actionable. They also cited

Crossley and Sons (Limited) v. Lightowler, 16 L. T. Rep. N. S. 438; L. Rep. 3 Eq. 281.

Without calling for a reply,

The LORD CHANCELLOR (Selborne) said: With great deference to the judgment of the court below, I must acknowledge for my part that I have been from an early part of the argument, and still am, unable to perceive that there is really any material contradiction in the evidence as to any really material question of fact in the cause. It appears to me that the plaintiff has proved what it was his duty to prove, and that the defendant has attempted to meet only by raising issues not really relevant to the case. The alleged nuisance is committed on the ground floor of the street front of the defendant's house in Green-street, next door to the plaintiff's dwelling-house, used by the plaintiff as a private hotel, by which, as he alleges, he has lost his livelihood. The nuisance is said to be this, viz., that the defendant in the year 1871, within a year of the filing of the bill, constructed or reconstructed certain stables on the front ground floor of his house, adjoining the plaintiff's dwelling-house in the same street, with iron mangers fastened against the party wall, dividing them from the best room in the plaintiff's house, and that his horses' heads being fastened to the manger, at right angles to the wall, with iron chains attached to the iron mangers, a noise and vibration is caused when the horses move, the other fittings of the stable being such as to enhance the noise made by the horses, and to conduct it through and affect the party wall; all that being, as alleged by the bill and proved by evidence to be, a new state of things created by the defendant in 1871, for the bill is express on this point, and the plaintiff swears in the same words "that the late Mr. Sheward, the previous occupier, kept seventeen horses: in the same stables, which did not extend the length of the street, but were more to the left, as stated in the bill; that they were never in any respect a nuisance or annoyance to the plaintiff or his lodgers, and did not in any way interfere with the quiet of Green-street, or to the inhabitants therein." Sir Richard Baggeley has contested the effect of the plaintiff's evidence, and says that statement is not directly verified by any one but the plaintiff; but no one can know better than the plaintiff as to the matter in question, and, if his oath is uncontradicted, why should he not be believed? I myself find nothing to impeach his testimony. He has been cross-examined, yet not a question put to him tending to show that there was, before the changes, any nuisance to the lodgers, or any interference with No. 18, Green-street, unless horses kept against the party wall must necessarily produce a nuisance, which in my judgment is not the case. Then the question is

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now as to the effect of the alterations. The plaintiff says, "This is perfectly ruining me. I cannot get my living. I cannot let my house as before. Some lodgers who came go away expressing their dissatisfaction with the noises they hear"; and the very last thing brought out in re-examination upon this subject was that the plaintiff said, "There is a great difference as to the number of occupants of my house between the present year and 1870. In 1870 I was letting for twelve and fourteen guineas a week, and I have been letting during last year at only four guineas. During 1871 the usual prices for my house during the season were ten, twelve, or fourteen guineas a week, sometimes more, sometimes less. I have had an application in answer to my advertisements this year where the applicant gave as a reason for not coming the noise of horses against the dining-room." Now, such objections had never been taken prior to 1871. Another deponent proves the same thing, viz., the particular acts done by the defendant causing the noises felt as nuisances which have deterred lodgers from taking the house. We have also the evidence (not of persons, indeed, who knew the house before and after the alterations, but) of perfectly volunteer witnesses who prove, in point of fact, the state of things in the house *before* the alterations, and the state of things *after*. Four witnesses, gentlemen about whose credit no doubt can be suggested, who at different times in the years 1864, 1869, and 1870 were lodgers for a considerable time in the plaintiff's house under such circumstances with respect to the health of themselves or their families as would have made noise important to them, all positively declare there was no nuisance or annoyance affecting the house. On the other hand, there is the evidence of two witnesses of the same class and character *since* the alterations, one of whom was actually driven from the house by the nuisance long before he intended otherwise to have gone, and others say their sleep was so much disturbed they could hardly get any rest at all. Therefore, we have in evidence that which is absolutely uncontradicted, and nothing adduced in opposition but some evidence to show that horses were kept in all parts of the stables previously to the alterations. Suppose the testimony as to that had gone to the highest point—what does it amount to? Neither the defendant nor any witnesses say either that that amounted to a nuisance, or that the arrangements as to the horses were the same then as now, and there is the evidence of two witnesses, who not only say there is an intolerable noise which relates to the present, and not to the past state of things, but also that the change in the *stalls*, and the position of the horses' heads, now set against the party wall (whereas at first there was only one horse with his head standing at *right angles* to the party wall), and all these sonorous appliances, are likely to cause noises not heard before. The true result of the evidence appears to me to be that there never was more than one horse kept in such a manner as to be in any sense in contact with the plaintiff's wall, but supposing there had been a horse kept in a different manner so as to enhance the annoyance, it is not to be inferred that it would create a nuisance. This case presents all the circumstances which in cases of this kind would entitle the plaintiff to an injunction. With regard to the questions of law in the case I shall say very little, because in these

cases the questions are eminently questions of fact rather than law. But I desire to say so much as this, that I apprehend that in making out a case of nuisance of this character there are always two things to be considered—one is the right of the plaintiff and the other is the right of the defendant. If houses adjoining each other are so built that from the commencement of their existence it is manifest that each adjoining inhabitant intended to enjoy his own property for the ordinary purposes for which each of the different parts of it was constituted, then it is not anything done by one party which is an annoyance that can be regarded in law as a nuisance which the other party has a right to prevent. But, on the other hand, if either party turns his house, or any portion of it, to unusual purposes, in such a manner as to produce a substantial injury to his neighbour, it appears to me that this is not according to principle or authority a reasonable use of his own property, and his neighbour, showing that substantial injury, is entitled to protection. I do not regard it as a reasonable or as a usual mode of using the front portion of a dwelling-house in such a street as Green-street that it should be used for the purposes of stables for horses, and if it is so used, which may and can be done without creating a nuisance, it is the bounden duty of the proprietor to take care that it is so used as not to be a substantial annoyance detrimental to the comfort or to the value of his neighbour's property. In my judgment that which is unreasonable and unusual has been done here. It is proved that the defendant has committed a substantial interference with the comfort and value of the neighbouring property, and I think a decree ought to be made for an injunction, and an inquiry directed as to damages as asked by the bill, with costs.

Lord Justice MELLISH.—I am of the same opinion. I will first consider whether if this case had been tried at law, an action for a nuisance could have been maintained by the plaintiff against the defendant, and then, if such action could have been maintained at law, whether there is any reason why the plaintiff should not have a remedy in this court. If the case had been tried at law, the pleadings must have raised distinctly the issues which would be material for the determination of the case. In the first place, the plaintiff of course would have had to show in his declaration what the nuisance was of which he complained. That would have been denied by the defendant under the plea of "Not Guilty," and the burden of proof would have been on the plaintiff to make out that the defendant had committed an actionable nuisance. Then the defendant, in addition to the plea of "Not Guilty," under the circumstances of this case would no doubt have pleaded that he and the occupiers of his premises had for a period of twenty years been accustomed as of right to commit the alleged nuisance in the same way that the defendant had committed it. In answer to that, the plaintiff would of course have traversed and denied that, and he might in addition have new assigned that, even although the defendant might have acquired a prescriptive right to commit such a nuisance, yet he had committed a nuisance in excess of the right which he had acquired. I do not think it necessary in this case to consider whether there has been any excess, because, as I read the plaintiff's bill, it does not allege that if the defendant had acquired

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a right to commit a nuisance, there has been any excess. He puts his case on this—that, previous to the time when the defendant committed the nuisance, there was no nuisance on the premises at all, and the two issues which have to be determined are, first, does the plaintiff make out that the defendant has committed an actionable nuisance? and, secondly, if the plaintiff does make out that, has the defendant made out that he is entitled to commit that nuisance by reason of its having been committed by the occupiers of his premises as of right for a period of twenty years. In my opinion (and indeed it is hardly seriously denied by the counsel for the defendant), it is proved beyond all possible question that the defendant has committed an actionable nuisance. I entirely agree with what has been said by the Lord Chancellor, that when in a street like Green-street the ground floor of a house is turned into a stable, we are not to consider the noise of horses in that stable in the same way as the noise of a pianoforte in a neighbour's house, or the noise of a neighbour's children in their nursery, which are noises you must reasonably expect in such a house, and must to a considerable extent put up with. This is a sort of noise that if it exists to such an extent as materially to disturb the comfort of the plaintiff's dwelling-house, and to prevent people sleeping at night, and still more if it exists to such an extent as seriously to interfere with his trade as a lodging-house keeper, beyond all question constitutes an actionable nuisance. No doubt the mere fact that the value of his premises has been interfered with, and that his right to let his rooms is interfered with, would not necessarily by itself show that there was an actionable nuisance. But if the thing complained of is of such a kind as of itself to constitute a nuisance (which the noise of the tramping of horses beyond all question is), if it is a nuisance of that kind, and is proved to exist to such an extent as seriously to diminish the value of the plaintiff's premises, and seriously to interfere with his right of letting his rooms, beyond all question it is an actionable nuisance. That being so, the real question to my mind to be determined in this case is, has the defendant made out that this nuisance has been exercised for a period of twenty years? It appears to me very important to bear in mind that the burden of proving that is upon him, and I think it clearly ought to be upon him, because if premises are turned (so to speak) to a use which is not their natural use, notwithstanding that the occupier of the house cannot now complain if fifty years ago the ground floor of the adjoining premises in Green-street was turned into a coach-house, and adapted for the purposes of a gentleman who dealt in horses—I have no doubt that was a great inconvenience, and caused damage to the owners of the neighbouring houses; but until it became a nuisance—until there was an actionable nuisance—they would have no remedy on account of that inconvenience. Then no doubt the owner of the next house is in such cases put in a great difficulty as to when he should commence his legal proceedings, because, if he commenced them too early, when an actionable nuisance cannot be proved, all the costs of a bill in Chancery, or of an action at law (both of which are likely to be very expensive because they involve the calling of a great number of witnesses), that whole expense is thrown upon him, and therefore a man naturally

waits until there really is a nuisance which he can prove beyond all question, so that when he commences his proceedings he may be tolerably certain that he will be successful. If he took the advice of any competent counsel, he would be advised not to commence his proceedings until he could prove his case beyond all question, and therefore we ought not to be too strict and too particular when he does commence them. Then the defendant who commits the nuisance says, "Oh, this nuisance has gone on for twenty years." Therefore, it appears to me quite right to throw upon the defendant the burden of proving very clearly that it really has been committed during twenty years. Now, in my opinion, there is here actually no evidence that this nuisance had existed for twenty years before the filing of the bill. And, in my opinion, if this case had been tried at law, it would have been the duty of the judge to tell the jury that there was no evidence on that issue setting up the right for twenty years, and to direct a verdict on that issue for the plaintiff. What is the evidence which on that point the defendant has produced? for the greater part of the argument on the part of the defendant has consisted in criticising the plaintiff's evidence, not in showing that the defendant himself has brought forward any evidence to prove his case. Now the entire evidence he has brought forward is to show that horses were kept for a period of upwards of twenty years in the immediate neighbourhood of the plaintiff's house on the defendant's premises. That is not sufficient. What he has got to prove is, not that horses have been kept for twenty years on the defendant's premises in immediate contiguity to the plaintiff's premises, but that the horses have been kept during the whole period of twenty years so as during the whole of that time to constitute an actionable nuisance. For the plaintiff is to lose his right because for the period of twenty years he, and all the occupiers of his premises, having during all that time a right to bring an action, have omitted to bring their action. It appears to me that no one single witness on the part of the defendant does state or profess to state that the horses as kept previously to the alteration of the defendant's premises did constitute any nuisance at all, and the only argument that has been adduced to us upon it, is this, that we must take judicial notice—that we must exercise our own common sense on the subject, and see that a nuisance necessarily must have followed the keeping of horses there. I have tried to exercise my common sense upon it, and I cannot at all say or infer in the least degree that it necessarily follows that because horses were kept, even in the way in which the defendant's witnesses describe them to have been kept, there was an actionable nuisance of which the plaintiff could complain. [His Lordship then commented upon the evidence and added] On the whole, I am of opinion that the plaintiff has most clearly made out his case, and I am very clear that if an action had been brought at law there must have been a verdict in his favour. That being so, there cannot be any doubt that there is also a remedy in this court. I do not mean to say that there may not be cases where, although an action might be maintained at law for a nuisance, yet in this court there would be no remedy. But I must confess I should be very unwilling indeed in such a case as this to dismiss a bill and to send the plaintiff to law, causing a most intolerable

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amount of litigation by proceeding first in one court and then in another. It appears to me that as in the present case the plaintiff has made out a nuisance of such a kind as materially to interfere with his livelihood, and to be of most serious consequences to him, beyond all question he ought to have a remedy in this court as well as in a court of law.

Lord Justice JAMES.—I am entirely of the same opinion.

The LORD CHANCELLOR (Selborne).—The form of the decree will be this: An injunction to restrain the defendant from keeping any horse, or suffering any horse to be on the ground floor of No. 19, Green-street, so as to occasion any nuisance to the plaintiff, his family and lodgers residing in No. 18, Green-street. Then direct an inquiry to ascertain the damages sustained by the plaintiff by reason of the user by the defendant of the said building, so as to occasion a nuisance to the plaintiff, and an order on the defendant to pay the amount of such damages when ascertained, and the costs of the suit.

Solicitors for the appellant, *Miller and Miller*.

Solicitors for the respondents, *Wilde, Wilde, Berger, and Moore*.

ROLLS COURT.

Reported by G. WELBY KING, and H. GODFREY, Esqrs.,
Barristers-at-Law.

Wednesday, March 12, 1873.

THE COMMISSIONERS OF SEWERS OF THE CITY OF
LONDON v. GLASSE.

*Concise statement—Interrogatories by defendant—
Exceptions to answer—Disclosure of plaintiff's
evidence.*

*In a suit to establish rights of common over waste
lands within a certain manor, a defendant filed a
concise statement and interrogatories, requiring
the plaintiffs to set forth any instances in which
the rights of common claimed by them had been
exercised. The plaintiffs refused to set forth the
instances.*

*Held on exceptions to their answer that they could
not be compelled to answer such an interrogatory,
which in effect would be disclosing the evidence on
which their case was supported. Each party was
entitled to information that would support his case,
but not to that which would support his oppo-
nent's case.*

THIS was a suit instituted by the plaintiffs on behalf of themselves and all other the owners and occupiers of lands and tenements within the Forest of Essex (except the defendants) against the lords of divers manors within the forest, and sought to establish in favour of such owners and occupiers certain rights of common over the whole of the waste lands within the forest. One of the defendants, James Mills, the lord of the manor of Chigwell and West Hatch, within the forest, by his answer alleged that rights of common over the waste lands within his manor had been enjoyed by the tenants thereof only, and he denied that the owners or occupiers of land within the forest, but not within the manor, had ever enjoyed any right of common over the waste lands of his manor. He subsequently filed a concise statement and interrogatories thereon for the examination of the plaintiffs.

The concise statement contained the following paragraphs:—

"The plaintiffs deny the rights of the several lords of the several manors in the said bill mentioned to enclose the waste lands of their respective manors, on the ground that such enclosures interfere with the plaintiffs' alleged right of pasture and common. But they do not state when the right to enclose such waste lands was exercised by the said lords or any of them, or what attempts have been made to interfere therewith prior to the filing of the plaintiff's bill."

"The rights of pasture and common claimed by the plaintiffs are so extensive that they could not and never did exist, and so it will appear if the plaintiffs will set forth the discovery hereinafter sought."

The eighth interrogatory was as follows:—

"Is it not the fact that with regard to the rights of common of pasture over the waste lands of the said manor of Chigwell and West Hatch, the same have for all practical purposes been exclusively, or to some and what extent, enjoyed by the said freeholders and copyholders of the said manor holding lands within the said manor, and by no other persons? Is it not the fact that no owner or occupier of land within the said forest, but not within the said manor, have ever enjoyed any rights of common of pasture over the waste lands of the said manor? If the plaintiffs allege that they have, let them set forth any instance in which such rights have been enjoyed, and by whom, and when, and in respect of what land, and where such land was situated, and in respect of what cattle or other animals."

To this interrogatory the plaintiffs put in the following answer:—

"It is not the fact that with regard to the rights of common of pasture over the waste lands of the manor of Chigwell and West Hatch, the same have for all practical purposes been exclusively enjoyed by the said freeholders and copyholders of the said manor holding lands within the said manor, and by no other persons. We do not know or admit that the freeholders and copyholders of the said manor, or either of them, have in those characters respectively any such right of common of pasture, or, if they have, to what extent they or either of them have enjoyed the same. It is not the fact that no owners or occupiers of land within the said forest, but not within the said manor, have ever enjoyed any right of common of pasture over the waste lands of the said manor; but, on the contrary, we allege that such owners and occupiers have enjoyed such right; and as to that part of the said defendant's eighth interrogatory in which we are required to set forth any instance in which such rights have been enjoyed, and by whom and when, and in respect of what land and where such land was situated, and in respect of what cattle or other animals, we say that the said particulars form part of the evidence which we shall adduce at the hearing of this cause in support of our said claim; and we submit that at this stage of the cause we are not bound to set forth, and accordingly we refuse to set forth, the same."

The defendant, James Mills, filed exceptions to this answer, "for that the said plaintiffs, though alleging in and by their said answer that it is not the fact that no owners or occupiers of land within the said forest in their pleadings mentioned, but not within the manor of Chigwell and West Hatch,

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has ever enjoyed any right of common of pasture over the waste lands of the said manor, have not in and by their said answer, according to the best of their knowledge, information, and belief, set forth any instance in which such rights had been enjoyed, and by whom and when, and in respect of what land and where such land was situated, and in respect of what cattle or other animals."

Southgate, Q.C. and *W. F. Robinson* referred to *Hoffman v. Postill* (L. Rep. 4 Ch. 673), part of the head note to which is as follows:—"Interrogatories for the examination of a plaintiff are on a different footing from those for the examination of a defendant, in this respect, that a plaintiff is not entitled to discovery of the defendant's case, but a defendant may ask any questions tending to destroy the plaintiff's case. They relied chiefly upon the passage in the judgment of Lord Justice Giffard in that case, where he said, "As regards the case of *Daw v. Eley*, it must be always remembered that that was the case of a plaintiff exhibiting interrogatories to a defendant, and it was there held that the plaintiff could not call on the defendant to set forth the particulars of his defence. But when you come to the case of a defendant asking questions of a plaintiff, it is a very different thing. It is the defendant's business to destroy the plaintiff's case; and therefore the defendant has a right to ask all questions which are fairly calculated to show that the patent is not a good patent, or that what he alleges to be an infringement is not an infringement."

Joshua Williams, Q.C., Fry, Q.C., Speed, and W. B. Fisher, for the plaintiffs, were not called on.

Lord ROMILLY said that he considered the rights of the plaintiff and defendant to discovery to be reciprocal. Each was entitled to know everything that was in his own favour, but not anything which would support his opponent's case. He was entitled to know what his opponent's case was, but he was not entitled to know what evidence he relied on. If the defendant had alleged that there were instances in which the right set up by the plaintiffs had been successfully resisted, and had interrogated the plaintiffs as to such instances, they would have been bound to answer. The exceptions would be overruled with costs.

Solicitors, Druce, Sons, and Jackson; Horns and Hunter.

V.C. BACON'S COURT.

Reported by the Hon. ROBERT BUTLER and F. GOULD,
Esq., Barristers-at-Law.

March 18 and 19, 1873.

BIGG v. MAYOR, &C., OF LONDON.

*Parliamentary powers—Depression of trade—
Remote damages.*

A corporation being authorised by Act of Parliament to stop up or level a street for the purpose of their Act, in the course of their operations, wrongfully cut into the cellars of the plaintiff's house, which were under the street, leaving them open and exposed. They also, in the course of their works, partially stopped the traffic along the street. An injunction having been obtained restraining the corporation from cutting into the plaintiff's cellars, with an inquiry as to damages, Held that, although the plaintiff was entitled to

damages for the structural injury to his cellars, he was not entitled to damages for depression caused to his trade by reason of the difficulty of access to his shop, it not being shown that the depression arose from the wrongful, as distinguished from the authorised, act of the defendants.

Whether if the plaintiff had shown that the depression was partly caused by the wrongful act he would have been entitled to any such further damages, quære.

By the Holborn Valley Improvement (Additional Works) Acts 1867, the Corporation of the City of London were authorised to stop up, appropriate, alter, or use for the purposes of their Act certain streets and ways, including Thavies Inn.

The plaintiff Bigg was the owner, and Adkins the lessee under him, of a house and shop, No. 4 Thavies Inn, part of which consisted of cellars extending under the roadway of the Inn. The shop was occupied by the plaintiff Adkins in his trade as a silversmith.

In pursuance of their powers, the defendants began to lower the roadway of the Inn, but in so doing they cut into and took possession of the cellars forming part of No. 4. The surface of the roadway, as proposed to be lowered by the defendants, would be lower than the top of the plaintiff's cellars. The defendants, in the course of their operations, cut a trench of several feet in width across the roadway, thus leaving the cellars exposed. They also, by reason of their operations, interfered with traffic along the roadway of the Inn, by which access to the shop was impeded. On the 14th April 1870, the plaintiffs filed a bill to restrain the defendants from prosecuting their works through the cellars or any part of the plaintiffs' house until the purchase money or compensation should have been paid to the plaintiffs, and prayed an inquiry as to damages.

On the hearing of the cause on the 23rd Jan. 1872 the court granted the injunction, and directed an inquiry as to damages. As to the damages caused by the depression to his business, the plaintiff Adkins, by his affidavit, stated as follows:—

I say that the nature of the defendants' works and their conduct has had a tendency to depress the trade in Thavies Inn. I am prepared to show a loss of profits in business of 800*l.* I have been made aware of the fact of former customers in the retail trade being cognizant of the circumstance of the defendants' works, and, finding a difficulty of access to the house, have ceased to confer the orders they had hitherto conferred upon me.

The chief clerk by his certificate assessed the damages sustained by the defendant, Adkins, at the sum of 470*l.* as follows:

	£	s.	d.
1. Loss sustained by the plaintiff, Adkins, by reason of part of his stock-in-trade requiring resilvering, and cleaning, &c.	50	0	0
2. Reconstruction of cellars	70	0	0
3. Sum necessary in order to place the house in a habitable condition	200	0	0
4. For depression of the trade carried on by the plaintiff, Henry Adkins, caused by the defendants' works	150	0	0
	£470	0	0

This was a summons to vary the chief clerk's certificate so far as it gave the plaintiff, Adkins, damages for the loss caused to him in his trade.

Kay, Q.C., Miller, Q.C., and Watson, in support of the summons.

The corporation had power by their Act to alter the level of the roadway, and the plaintiff does not say that the depression to his business was caused

by anything but the lawful interruption of the traffic which was an authorised act on our part. The damage to the cellars is a different matter, for which separate damages are given. Any damage arising from the stoppage of the traffic is common to all who live in the street. But whether the depression arises from our rightful or wrongful act it is a damage too remote. That is decided in

Ricketts v. Metropolitan Railway Company, L. Rep. 2 Eng. & Ir. App. 175; 16 L. T. Rep. N. S. 542, S. C., 5 Best & S., 149.

They cited also:—

Brand v. Hammermith Railway Company, L. Rep. 4 Eng. & Ir. App. 171; 21 L. T. N. S. 238.

City of Glasgow Union Railway Company v. Hunter, L. Rep. 2 App. Scotch & Div. 78.

Amphlett, Q.C., and *Phear* for the plaintiff.—The corporation were acting beyond their powers in cutting through the cellars, and are, therefore, responsible just as any other person. The cases establish only that depression of trade alone is not a subject for compensation. They referred to—

Wilkes v. Hungerford Market Company, 2 Bing. N. C. 281;

Glover v. North Staffordshire Railway Company, 16 Q. B. 912.

The VICE-CHANCELLOR said that the law was settled that such damages as those arising from depression in business caused by the lawful exercise of parliamentary powers were too remote, and compensation could not be obtained. All the inhabitants of Thavies Inn had as much right as the plaintiff to claim such compensation. The plaintiff had not shown that the depression in his business arose from the unlawful act of the corporation as distinguished from the lawful exercise of their parliamentary powers. But even if he could have separated a part of the alleged loss in his business, and shown that it arose from the wrongful act of the corporation, he doubted whether he would have been entitled to compensation. The chief clerk's certificate must be varied by disallowing the fourth item. No order as to the costs of the summons.

Plaintiffs' solicitors, *Prior, Bigg, and Co.*

Defendants' solicitor, *T. J. Nelson*, city solicitor.

Feb. 15 and 18, and March 1, 1873.

Re BATEMAN'S TRUSTS.

Felon's goods—Colonial conviction—Forfeiture—Prerogative of Crown.

A person entitled to a legacy to be paid to him at twenty-one was, while under that age, convicted of felony in this country, and after attaining that age was again convicted of felony in New South Wales.

Held, that the legacy would have been forfeited by the colonial convictions had it not been already forfeited by the conviction in England.

THIS was a petition for the transfer to the Crown of certain sums of stock which had been paid into court under the following circumstances:

Thomas Bateman, by his will made in 1814, gave a sum of 3000l. Bank Annuities to his wife for life, and after her decease he gave the same to his grandchildren, Arthur and Alfred Bryer, to be transferred to them on their respectively attaining the age of twenty-one years, and he directed the income in the meantime to be applied for or towards their maintenance, with gifts over in

default of their respectively attaining the age of twenty-one.

The testator also gave a moiety of his residuary estate to be divided equally between his said grandchildren at the same time and in the same manner as the preceding gift.

The testator died in 1820, and his widow died in 1837.

Alfred Bryer, who was born in 1805, was on the 20th June, 1825, convicted of felony at the Old Bailey, but sentence was not recorded on his relations undertaking to send him out to New South Wales for a term of seven years. While there he was three times convicted of penal offences, and sentenced to certain terms of imprisonment. In 1842 he received a certificate of freedom, since which time he had not been heard of, in consequence of which in 1872, his brother, Arthur Bryer, took out letters of administration to his estate.

The trustees of the will being in doubt as to the effect of the convictions upon the interest of Alfred Bryer under the will, paid the fund to which he was entitled, amounting to about 12,000l. Bank Annuities, into court, under the Trustee Relief Act.

Hemming, on behalf of the Crown.—By the conviction of Alfred Bryer at the Old Bailey all his property, whether vested in possession or not, became forfeited to the Crown (*Re Thompson's Trusts*, 22 Beav. 506; 28 L. T. Rep. O. S. 57); but even if it were not so, the subsequent convictions in New South Wales after the fund had come into possession would have worked a forfeiture.

Swanston, Q. C. and *Stirling*, for Arthur Bryer.—The interest which Alfred Bryer, took under the will of his grandfather, not being in possession at the time of the conviction at the Old Bailey, was not thereby forfeited: (*Stokes v. Holden*, 1 Keen, 145.) The Crown is not entitled to the goods of felons in the colonies. Forfeiture for felony is simply a feudal law, and the forfeiture is not necessarily to the Crown, but to the next lord above the felon, which in this case would be the Colonial Government and not the Crown in England. In some cases corporations are entitled to the felon's goods: (*Staunford on Prerogative*, 45; *Yorke on Forfeiture*, 92.) Colonists carry with them only such of the laws of the mother country as are required by the state of the country to which they go, and it is for the Crown to show that the law of forfeiture has been transplanted into Australia: (*Attorney-General v. Stewart*, 2 Mer. 159 n.) It has been held that the Mortmain Act is not applicable to Australia (*Whicker v. Hume*, 7 H. L. C. 124; 31 L. T. Rep. 319), and on the same principle the law of forfeiture cannot be applied. The following authorities were also referred to:

9 Geo. 4, c. 83;

33 & 34 Vict. c. 23;

Story's Conflict of Laws, c. 16, par. 621;

Blackstone's Commentaries, 134;

Ogden v. Follitt, 3 Term. Rep. 726, 733;

Emperor of Austria v. Day, 4 L. T. Rep. N.S. 274, 404; 2 Giff. 628.

Kekewich appeared for the trustees.

Hemming in reply.—Forfeiture for felony is a punishment for the offence, and does not at all relate to the feudal system, but is a prerogative vested in the Crown: (*Blackstone's Commentaries*, vol. 2, p. 252; *Chitty on Prerogative*, 215.) Goods are forfeited on conviction, lands on attainder; and it is immaterial whether the interest be legal or equitable, in possession or action: (*Jarman's Bythe-*

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wood's Conveyancing, vol. iv., pp. 70, 74.) The Colonial Government is no more the mesne lord between the Crown and the felon than a minister of the Crown in England is mesne lord between them. It is true that in some places corporations are entitled to forfeitures for felony, but then it is only by grant from the Crown. The Queen's prerogative runs as much in the colonies as in England, and the Crown is therefore entitled to this money.

The VICE-CHANCELLOR said:—I have no doubt that this money was the property of Alfred Bryer at the time of his conviction at the Old Bailey, and therefore that it is properly forfeited to the Crown. It has been suggested on behalf of the respondent that the right of forfeiture to the Crown by reason of the colonial convictions has not been established, and that the Queen's prerogative does not extend so far as New South Wales; but the arguments which have been brought forward in support of these propositions have really nothing to do with the question. The Queen is as much the Queen of New South Wales as she is the Queen of England, and I have no hesitation in saying that her prerogative is as valid in the colonies as it is in this country. As to the argument that the mesne lord is entitled to forfeitures for felony, wherever such rights do exist, they are derived only by grant from the Crown. I am, however, of opinion that the legacy was absolutely vested and not contingent at the time of Alfred Bryer's conviction in England; and that, therefore, irrespective of the colonial convictions, it is properly forfeited to the Crown.

Solicitors for the Crown, *Raven and Bradley*.
Solicitors for the respondent, *F. and E. Chester*.
Solicitors for the trustees, *Freshfields*.

COURT OF QUEEN'S BENCH.

Reported by J. SEBOTT and M. W. McKELLAR, Esqrs.
Barristers-at-Law.

Tuesday, Jan. 21, 1873.

ORMEROD v. THE BLACKBURN BURIAL BOARD.

Sexton—Chapelry district—District parish—Sexton's right to fees—Burial boards.

A sexton of a chapelry district constituted under 59 Geo. 3, c. 134, s. 16, which is afterwards formed into a district parish under the powers conferred upon the Ecclesiastical Commissioners under ss. 11 and 14 of 19 & 20 Vict. c. 104, is, by virtue of the proviso in sect. 5 of 20 & 21 Vict. c. 81, entitled to the fees in respect of the burial of inhabitants in a burial ground provided for the parish.

Demurrer to a declaration; there being also demurrers to pleas.

THE declaration alleged that, whereas the parish of Blackburn, in the county of Lancaster, comprises the borough and township of Blackburn and several outlying townships, and within the said parish there is, and has been from time immemorial, a parish church and a parish churchyard, and on all burials in the said parish churchyard, until the same was closed by an Order of Her Majesty in Council bearing date the 3rd July 1854, and made under the provisions of the statute 16 & 17 Vict. c. 134, fees have always been payable by the custom of the said parish to the sexton thereof; and whereas, in the year of our Lord 1789, the church of St. John the Evangelist was built within the

said borough and township as a chapel of ease to the said parish church, and the said church of St. John the Evangelist was, with a churchyard attached thereto, duly consecrated by the Bishop of Chester, within whose diocese the same then lay, on the 31st July in the year of our Lord 1789; and whereas, by an Order of Her Majesty in Council made on the 11th Aug. in the year of our Lord 1842, upon the recommendation of the Commissioners for Building New Churches under the 16th section of the statute 59 Geo. 3, c. 134, a particular district lying wholly within the said borough and township was duly assigned to the said church of St. John the Evangelist, and by the said order in council, churchings, baptisms, and burials were authorised to be performed therein; a plan and description of the bounds of the said district so assigned was also then duly enrolled in the High Court of Chancery, and registered in the office of the registry of the said diocese within which the said chapelry district then lay, as required by the statutes in that behalf; and a copy of the said order in council, and of the said description of the boundaries so assigned as aforesaid, was inserted in the *London Gazette* on the 20th day of September in the year of our Lord 1842. And the plaintiff says that from and after the said last-mentioned order in council, and until the 1st day of May in the year of our Lord 1855, when, by another Order of Her Majesty in Council, bearing date 3rd July in the year of our Lord 1854, and made under the provisions of the said statute 16 & 17 Vict. c. 134, the said churchyard of St. John the Evangelist was (with certain exceptions therein mentioned) closed, the said last-mentioned churchyard was the churchyard of the said chapelry district of St. John the Evangelist, and for all burials therein, from the consecration thereof as aforesaid, until the same was closed as aforesaid, fees were paid and received by the sexton for the time being of the said church and chapelry district of St. John the Evangelist; and the plaintiff says that in the year of our Lord 1845 the defendants duly became, under the provisions of the statutes 15 & 16 Vict. c. 85, 16 & 17 Vict. c. 134, 17 & 18 Vict. c. 87, 18 & 19 Vict. cc. 78 and 128, and 20 & 21 Vict. c. 81, a burial board for the said borough and township, the said borough and township being then, and having since continued to be, and still being a place having separate overseers of poor and separately maintaining its own poor; and the defendants afterwards, under the provisions of the said statutes 15 & 16 Vict. c. 85, 16 & 17 Vict. c. 134, 17 & 18 Vict. c. 87, 18 & 19 Vict. cc. 78 and 128, and 20 & 21 Vict. c. 81, duly provided a burial ground for the said borough and township, which said last-mentioned burial ground (except the portion thereof not intended to be consecrated) was, with a chapel erected thereon, afterwards, to wit upon the 20th June in the year of our Lord 1857, duly consecrated by the Bishop of Manchester, within whose diocese the same then lay, for the purpose of interments therein in accordance with the rites of the Church of England. And the plaintiff further says that afterwards, to wit on the 9th April in the year of our Lord 1866, he was duly appointed and has since continued to be sexton of the said chapelry district; and since the plaintiff's said appointment as sexton the remains of inhabitants of the said chapelry district have been buried in

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the consecrated portion of the burial ground provided by the defendant as aforesaid. And, although the plaintiff has always been ready and willing to perform, and offered to perform and exercise, the same duties and functions in respect of the burial of the remains of inhabitants of the said chapelry district in the consecrated portion of the burial ground provided by the defendants as aforesaid, and has claimed to be entitled to receive the same fees on such burials as the plaintiff's predecessors in office as sextons of the said chapelry district previously performed and exercised and received in respect of the burial of the remains of inhabitants of the said chapelry district in the said churchyard of the said chapelry district until the same was closed as aforesaid, yet the defendants have, since the plaintiff's said appointment as sexton, wrongly and improperly prevented, and still prevent, the plaintiff from performing and exercising the said duties and functions as sexton, or any duties and functions as sexton, in respect of the burial of the remains of inhabitants of the said chapelry district in the consecrated portion of the burial ground provided by the defendants as aforesaid, and from receiving fees in respect thereof. And the plaintiff also sues the defendants, for that, whereas the said parish of Blackburn, in the county of Lancaster, comprises the borough and township of Blackburn and several outlying townships, and within the said parish there is and has been from time immemorial a parish church and a parish churchyard, and on all burials in the said parish churchyard, until the same was closed by an Order of Her Majesty in Council, bearing date 3rd June in the year of our Lord 1854, and made under the provisions of the statute 16 & 17 Vict. c. 134, fees have always been payable by the custom of the said parish to the sexton thereof; and whereas in the year of our Lord 1789 the church of St. John the Evangelist was built within the said borough and township as a chapel of ease to the said parish church and the said Church of St. John the Evangelist was duly consecrated by the Bishop of Chester; within whose diocese the same then lay, on the 31st July in the year of our Lord 1789 And whereas by an Order of Her Majesty in Council, made on the 11th Aug. in the year of our Lord 1842, upon the recommendation of the commissioners for Building New Churches under the 16th section of the statute 59 Geo. 3, cap. 134, a particular district lying wholly within the said borough and township was duly assigned to the said church of St. John the Evangelist, which then became the chapelry district of St. John the Evangelist, and a plan and description of the bounds of the said district so assigned was also then duly enrolled in the High Court of Chancery, and registered in the office of the registry of the said diocese of Chester within which the said chapelry district then lay as required by the statutes in that behalf, and a copy of the said order in council and of the said description of the boundaries so assigned as aforesaid was inserted in the *London Gazette* on the 20th Sept. in the year of our Lord 1842; and whereas in the year of our Lord 1854 the defendants duly became, under the provisions of the statutes 15 & 16 Vict. c. 85, 16 & 17 Vict. c. 134, 17 & 18 Vict. c. 87, 18 & 19 Vict. cc. 78 and 128, and 20 & 21 Vict. c. 81, a burial board for the said borough and township of Blackburn, the said

borough and township being then, and having since continued to be, and still being, a place having separate overseers of the poor and separately maintaining its own poor; and the defendants afterwards, under the provisions of the said statutes 15 & 16 Vict. c. 85, 16 & 17 Vict. c. 134, 17 & 18 Vict. c. 87, 18 & 19 Vict. cc. 78 and 128, and 20 & 21 Vict. c. 81, duly provided a burial ground for the said borough and township, which said last-mentioned burial ground (except the portion thereof not intended to be consecrated) was, with a chapel erected thereon, afterwards, to wit upon the 20th June in the year of our Lord 1857, duly consecrated by the Bishop of Manchester, within whose diocese the same then lay, for the purpose of interments therein in accordance with the rites of the Church of England. And the plaintiff says that the whole of the said chapelry district of St. John the Evangelist contributed to the rates out of which the said last-mentioned burial ground was provided; and that on the 18th Nov. in the year of our Lord 1869 the Ecclesiastical Commissioners for England, under the 11th section of the statute 19 & 20 Vict. c. 104, upon the application of the incumbent of the said chapelry district, with the consent in writing of the said Bishop of Manchester, within whose diocese the said church of St. John the Evangelist and chapelry district then lay, duly made an order under their common seal, bearing date the said 18th Nov. 1869, authorising from and after the date of such order the publication of banns of matrimony and the solemnisation in the said church of St. John the Evangelist of marriages, churchings, baptisms, and burials, according to the laws and canons then in force in this realm; and the plaintiff says that from and after the date of the said last-mentioned order the said chapelry district, which was not before a separate and distinct parish for ecclesiastical purposes, became under the 14th section of the said statute, 19 & 20 Vict. c. 104, a separate and distinct parish for ecclesiastical purposes, such as is contemplated in the 15th section of the statute 6 & 7 Vict. c. 37. And the plaintiff says that the said parish of St. John the Evangelist has never separately maintained its own poor, and has no separate burial ground; nor has the vestry, or any meeting in the nature of vestry, appointed any burial board for the said parish of St. John the Evangelist. And the plaintiff has been since the said 18th Nov. in the year of our Lord 1869, and still is, the duly-appointed sexton of the said parish of St. John the Evangelist, and since the 26th Nov. in the year of our Lord 1871, when the then sexton of the said parish of Blackburn died, the remains of parishioners or inhabitants of the said parish of St. John the Evangelist have been buried in the consecrated portion of the burial ground provided by the defendants as aforesaid, and has claimed to be entitled to receive the same fees in respect of such burials as if the said last-mentioned burial ground were exclusively the burial ground of the said parish of St. John the Evangelist, yet the defendants have wrongfully and improperly

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prevented, and still prevent, the plaintiff from performing the said duties as sexton, or any duties as sexton, in respect of the burial of the remains of parishioners or inhabitants of the said parish of St. John the Evangelist in the consecrated portion of the burial ground provided by the defendants as aforesaid, and from receiving fees in respect thereof. And the plaintiff also sues the defendants for money payable by the defendants to the plaintiff for money received by the defendants for the use of the plaintiff.

Demurrer to the first and second counts of the declaration, on the ground that neither 15 & 16 Vict. c. 85, s. 32, nor 20 & 21 Vict. c. 81, s. 5, creates a title to fees where none previously existed, nor gives a right to sextons to insist upon performing their functions at burials in the common burial grounds.

Pleas—(5.) That before any of the said times of the committing of the alleged grievances, the said chapelry district had ceased to exist as a chapelry district, and had been made into and became a separate and distinct parish for ecclesiastical purposes under and by virtue of the order in that behalf referred to in the second count, which was made upon such application and with such consent as therein is stated. (8.) As to the first count, that it was not, at any of the times of the committing of the alleged grievances, necessary for the plaintiff to perform the said duties and functions in the said first count referred to, or any of them. (9.) As to the first count, that by the said Order of her Majesty in Council made on the 11th Aug. 1842 it was ordered that churchings, baptisms, and burials should be performed in the said chapel of St. John the Evangelist, and that one moiety of the fees arising, according to ancient parochial usage, from the performance of the offices in the said chapel of St. John the Evangelist, should belong and be paid by the minister of the said chapel to the vicar for the time being of the said parish of Blackburn, and that the other moiety thereof should belong and be paid to the minister of the said chapel; and the said fees payable to the sexton of the said parish were not, nor was any part thereof, assigned to any sexton of the said district chapelry, nor was the churchyard in the first count alleged to be the churchyard of the said district chapelry the churchyard thereof, further or otherwise than that the minister of the said chapel was so authorised to perform burials therein; and when the said order was made, and thence until and at and during all the times of the committing of the alleged grievances herein pleaded to, there was, had been, and still is, a sexton for the time being of the said parish of Blackburn. (10.) As to the first count, the defendants repeat and re-affirm what is stated in the 9th plea, with the addition that the persons from time to time performing the functions of sextons at burials in the said churchyard since burials were authorised therein by the said Order in Council of 1842, including the plaintiff, have not, nor has any of them, been legally entitled to fees in respect of such burials, nor has any such person lawfully received money in respect of any such burials, further or otherwise than by receiving compensation for work done by such persons at the request of the persons respectively paying the same; and the alleged appointment of the plaintiff as sexton was first made after the said churchyard of St. John the Evangelist had been

closed, as in the first count mentioned. (13) As to the second count, that it was not, at any of the times of the committing of the alleged grievances herein pleaded to, necessary for the plaintiff to perform the said duties and functions as in the said second count referred to, or any of them. (16) As to the second count, that the said Order in Council of the 11th of Aug. 1842 was, and is, the order of the same date referred to in the first count, and the defendants re-affirm what is stated in the 9th plea. (17) As to the second count, that the said Order in Council of the 11th of Aug. 1842 was, and is, the order in council of the same date referred to in the first count, and the defendants re-affirm what is stated in the 9th and 10th pleas.

The plaintiff joined in demurrer to the declaration; and demurred to the 5th plea on the ground that the plaintiff's right to fees from the defendants under the 15 & 16 Vict. c. 85, ss. 32 and 52, is unaffected by the chapelry district having become a separate parish for ecclesiastical purposes; to the 8th plea, on the ground that the plea admits facts, stated in the count to which it is pleaded, that rendered it necessary, within the meaning of sect. 32 of the 15 & 16 Vict. c. 85, for plaintiff to perform the duties and functions of sexton; to the 9th plea, on the ground that it admits facts stated in the count to which it is pleaded, which show that the plaintiff was entitled to fees within the meaning of s. 32 of 15 & 16 Vict. c. 85, and it is immaterial that fees were not assigned to him by the order in council; to the 10th plea, on the ground of objection stated to the 9th plea, and because it admits that plaintiff's predecessors in office were entitled to payments which are within the meaning of s. 32 of 15 & 16 Vict. c. 85; to the 13th plea, on the ground (amongst others) of objection stated to the 8th plea; to the 16th plea, on the ground (amongst others) of objection stated to the 9th plea; to the 17th plea, on the grounds (amongst others) of objection stated to the 9th and 10th pleas.

Joinder in demurrer.

R. G. Williams for the defendants, in support of the demurrer to the declaration, contended that where no title to fees previously existed, none was conferred by either 15 & 16 Vict. c. 85, s. 32 (a),

(a). Sect. 32 of 15 & 16 Vict. c. 85 enacts that "from and after the consecration of any burial ground provided under this Act (except any portion thereof intended not to be so consecrated), or where all or any part of such burial ground, by reason of the same having been already consecrated, shall not require to be consecrated, then, from and after such time as the bishop of the diocese shall appoint, such burial ground shall be deemed the burial-ground of the parish for which the same is provided, and where the same is provided for two or more parishes, such burial-ground shall be in law as if such parishes were one parish, and as if such burial ground were the burial ground of such one parish; and every incumbent or minister of the parish, or of each of the parishes (as the case may be), for which such burial ground is provided, shall, by himself and his curate, or such duly qualified persons as such incumbent or minister may authorise, perform the duties and have the same rights and authorities for the performance of religious service in the burial in such burial ground, or in the consecrated portion thereof, of the remains of parishioners or inhabitants of the parish of which he is such incumbent or minister, and shall be entitled to receive the same fees in respect of such burials which he has previously enjoyed and received; and the clerk and sexton of such parish, or of each of such parishes, shall (when necessary) perform and exercise the same duties and functions in respect of the burial of the remains of

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or by 20 & 21 Vict. c. 81, s. 5, the former enactment only entitling the clerk or sexton to receive the same fees as he previously received, as if the burial ground were the burial ground of his parish, and the words of the latter section being similar (b). Neither does either of these enactments give sextons any right to insist upon the performance of their duties as sextons at burials taking place in the common burial ground. In *Roberts v. Aulton*, 2 H. & N. 432, a chapel, purchased for the purpose of being consecrated as a chapel of ease in the parish of A., was consecrated in 1810, under the provisions of a deed, by which the parish clerk and sexton were to be entitled to the fees for christenings, burials, and marriages in the chapel and cemetery thereof, as if they had taken place in the mother church. The chapel having, by order in council, been created a district chapelry under s. 16 of 59 Geo. 3, c. 134, by the 10th section of which Act, when any parish shall be divided under the provisions of 58 Geo. 3, c. 45, of that Act, all fees belonging to the parish clerk or sexton respectively of any such parish, which should thereafter arise "in any district or division of any parish divided" under the provisions of 58 Geo. 3, c. 45, shall belong to and be recoverable by the clerks and sextons of each of the divisions of the parish to which they shall be assigned; the plaintiff,

parishioners or inhabitants of the parish of which he is clerk or sexton in such burial ground, or the consecrated portion thereof, and shall be entitled to receive the same fees on such burials as he has previously performed and exercised and received, as if such burial ground were the burial ground of the respective parish of such incumbent or minister, clerk and sexton respectively," &c.

(b) Sect. 5 of 20 & 21 Vict. c. 81, enacts that "the vestry, or meeting in the nature of a vestry, of any parish, new parish, township, or other district not separately maintaining its own poor, and which has no separate burial ground, may appoint a burial board; and such vestry or meeting, and the burial board appointed by it, shall exercise and have all the powers which they might have exercised and had under the said Acts and this Act, if such parish, new parish, township, or district had had a separate burial ground before the passing of the said Act of the 18 and 19 of Her Majesty: provided always that all the powers of any other vestry or meeting and burial board, if any, shall then cease and determine, so far as relates to such parish, new parish, township, or district as aforesaid; and until a burial ground shall be so provided as aforesaid and consecrated for any any new parish or district created, or to be created, pursuant to the provisions of the 6 & 7 Vict. c. 37, the 7 & 8 Vict. c. 94, and the 19 & 20 Vict. c. 104, or any or either of them, and to which the said Acts, or any or either of them, may apply, the incumbent of such new parish or district (if any burial ground has been or shall be provided under the herein recited Acts for the burial of the dead, or any or either of them, for any parish or parishes, out of rates to which such new parish or district, or any part thereof, shall have contributed, or contribute or be liable) shall, with respect to the burial in such last-mentioned burial ground of the remains of the parishioners or inhabitants of such new parish or district, or of such part thereof as shall have contributed or contribute as aforesaid, as the case may be, perform the same duties, and have the same rights, privileges, and authorities, and be entitled to the same fees, and also the clerk and sexton of such new parish or district shall, when necessary, respectively perform the same duties, and be entitled to the same fees, in respect of such burials, as if the said burial ground were exclusively the burial ground of such new parish or district, subject nevertheless to all provisions to which the incumbents, clerks, and sextons of original parishes are respectively subject in and by the said burials or any or either of them; provided also that nothing herein contained shall affect the rights or privileges of any existing incumbent, clerk, or sexton without the consent of such incumbent, clerk, or sexton."

who was clerk and sexton of the parish of A., having brought an action for money had and received against the defendant, the clerk and sexton of the chapel, for the fees received by him for christenings, burials, and marriages, it was held (1) that the action for money had and received would lie for those fees; (2) that this being a "district chapelry" was not within the operation of s. 10 of 59 Geo. 3, c. 134, and therefore that the plaintiff, as clerk and sexton of the parish, was entitled to the fees arising at the chapel. "The present chapel and cemetery," said Pollock, C.B., delivering the judgment of the court, "is a district chapel of ease, erected under the 16th section of the 59 Geo. 3. In the subsequent Church Building Acts, 2 & 3 Vict. c. 49, and 14 & 15 Vict. c. 97, they are designated as district chapels, and the districts are termed district chapelries. It is clear, therefore, that these district chapels are not within the operation of the 10th section of the 59 Geo. 3; and we do not find a provision in any subsequent Act for taking those fees arising at the chapels from the parish clerk and sexton in parishes where there is a district chapel. We are, therefore, of opinion that these fees still belong to the present clerk, and consequently he is entitled to our judgment for the whole of the fees mentioned in the case."

[BLACKBURN, J.—If the sexton of Blackburn is entitled to the fees, it is quite clear that nobody else can.] The case cited is a decision that he is entitled. [LUSH, J.—That would get rid, then, of the first count in the declaration. It is a very different matter as to the second count.] The second count is founded on the fifth section of 20 & 21 Vict. c. 81, already referred to, it is submitted, does not entitle the plaintiff to the fees claimed by him. *Day v. Peacock*, 34 L. J. 225, was also referred to.

Manisty, Q.C. (with him *Forbes*) for the plaintiff, in support of the declaration, referred to sect. 11 of the 19 and 20 Vict. c. 104, empowering the commissioners, if they think fit, upon the application of the incumbent of any church or chapel to which a district shall belong, with the consent in writing of the bishop of the diocese, to make an order, under their common seal, authorising the publication of banns of matrimony and the solemnisation of marriages, baptisms, churchings, and burials; and providing that all the fees payable for the performance of said offices, as well as all the mortuary and other ecclesiastical fees, dues, oblations, or offerings arising within the limits of the district, shall be payable and be paid to the incumbent of such district. [LUSH, J.—That applies to places that had not the right before. As to other places, sect. 15 enacts that "the incumbent of every new parish created, or hereafter to be created, &c., shall, saving the rights of the bishop of the diocese, have sole and exclusive cure of souls, and the exclusive right of performing all ecclesiastical offices within the limits of the same, for the resident inhabitants therein, who shall for all ecclesiastical purposes be parishioners thereof, and of no other parish; and such new parish shall, for the like purposes, have and possess all and the same rights and privileges, and be affected with such and the same liabilities as are incident or belong to a distinct and separate parish, and to no other liabilities," &c.] Then sect. 12 provides that the reserved fees are to belong to the original incumbent and clerk respectively until the first avoidance,

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and then to the incumbent and clerk of the new parish. [BLACKBURN, J.—If the old sexton were living, he being sexton of the old common law parish of Blackburn, embracing the church of St. John the Evangelist, the case might be different from what it is at present; but he being dead, and no one occupying his position, the plaintiff's title seems to be clear.]

COCKBURN, C.J.: We are all agreed that the plaintiff is entitled to judgment on the second count of the declaration.

E. G. Williams asked for judgment for the defendant on the first count.

Manisty, Q.C., did not object to judgment being given *pro forma* for the defendant on the first count, provided it was not taken to be a binding decision against the plaintiff on that count.

COCKBURN, C.J.—Then let judgment be entered *pro forma* for the defendant on the first count, it being understood that the judgment on that count is only formal, and that we give no decision upon it.

Judgment accordingly.

Attorneys for the plaintiff, Shaw and Tremellen.
Attorneys for the defendants, Bower and Cotton

Friday, Jan. 24, 1873.

SYERS v. CONQUEST.

Music—Other public entertainments of the like kind—House "kept" for—Licence—Performance on one day only in the year—Penalty—25 Geo. 2, c. 36, s. 2.

A house is not "kept for public dancing or other public entertainment of the like kind" within the meaning of sect. 2 of 25 Geo. 2, c. 36, if a concert to which the public are admitted on payment of money is given on one day in the year, although the house may be used on other days in the year for dramatic entertainments under a licence from the Lord Chamberlain.

DECLARATION, that the defendant, after the passing of an Act of Parliament, made and passed in the twenty-fifth year of the reign of his late Majesty Geo. the II., to wit, on the 22nd Feb. 1872, in the parish of St. Luke, in the county of Middlesex, kept a house, room, or other place for music, dancing, and other public entertainment of the like kind within twenty miles of the cities of London and Westminster, without a licence had for that purpose from the last preceding Michaelmas Quarter Sessions of the Peace, holden for the said county of Middlesex, in which the said house, room, or other place was situate, signified under the hands of four or more of the justices there assembled, against the form of the said statute, whereby and by force of the said statute the defendant forfeited and became liable to pay to the plaintiff, who sued for the same, the sum of 100l., yet the defendant had not paid the said sum of 100l., &c.

Plea, not guilty (by stat. 21 Jac. 1, Public Act, ch. 4, s. 4), on which plea issue was joined.

It appeared at the trial (before Quain, J.) that Mr. Conquest, the defendant, was the lessee of a theatre, called the Grecian Theatre, situate in the City-road, for which theatre he held a licence from the Lord Chamberlain under sect. 2 of 6 & 7 Vict. c. 68. The licence from the Lord Chamberlain excepted from the days on which theatrical

performances might take place in the theatre Good Friday and Ash Wednesday. On Ash Wednesday of the year 1872 (Feb. 22) a large concert, to which the public were admitted on payment of money, was given in the Grecian Theatre; and it was in respect of this concert that the present action was brought by the plaintiff to recover the penalty mentioned in sect. 2 of 25 Geo. 2, c. 36. The defendant, besides the licence for the Grecian Theatre which he held from the Lord Chamberlain, held also a licence for the Eagle Tavern from the Middlesex magistrates under the Act last mentioned, this licence including the "other buildings and appurtenances" belonging to the tavern. This licence also excluded from the days on which performances might be given, Ash Wednesday among other days. The Grecian Theatre before mentioned, and also a dancing-room, were erected, as separate buildings, on the ground belonging to the tavern. The plaintiff having been nonsuited at the trial, a rule *nisi* was obtained to enter a verdict for him for the sum of 100l.

Sect. 2 of 25 Geo. 2, c. 36, enacts "that from and after the 1st day of December, 1752, any house, room, garden, or other place kept for public dancing, music, or other public entertainment of the like kind, in the cities of London and Westminster, or within twenty miles thereof, without a licence had for that purpose from the last preceding Michaelmas Quarter Sessions of peace to be holden for the county, city, riding, liberty, or division in which such house, room, garden, or other place is situate (who are hereby authorised and empowered to grant such licences as they in their discretion shall think proper), signified under the hands and seals of four or more of the justices there assembled, shall be deemed a disorderly house or place, &c.; and it shall and may be lawful to and for any constable or other person being thereunto authorised by warrant under the hand and seal of one or more of His Majesty's justices of the peace of the county, city, riding, division, or liberty where such house or place shall be situate, to enter such house or place and to seize every person who shall be found therein, in order that they may be dealt with according to law; and every person keeping such house, room, garden, or other place without such licence as aforesaid, shall forfeit the sum of one hundred pounds to such person as will sue for the same, and be otherwise punishable as the law directs in cases of disorderly houses."

Cole, Q.C. and C. H. Anderson, showed cause against the rule, and contended that the Grecian Theatre was not "kept" by the defendant "for public dancing, music, or other public entertainment of the like kind," within the meaning of sect. 2 of 25 Geo. 2, c. 36. The single musical performance on Ash Wednesday cannot be regarded as such a keeping. In *Marks v. Benjamin* (5 M. & W. 565), where a nonsuit was set aside, music, dancing, and masquerades took place on several occasions at the house, and the room was let to a dancing master and others, who sold tickets and received money for admission at the door. Lord Abinger said: "The meaning of the Act is perfectly plain; the house, &c., must be kept for and dedicated to the purpose thereby prohibited among others; and the mere incidental use of it in that manner would not make the party liable." So Farke, B.: "There is no doubt or difference of

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opinion as to the law. In the first place, the house or room must be kept with the defendant's knowledge; secondly, it must be kept for the purposes prohibited by the statute—there must be something like an *habitual* keeping of it, which, however, need not be at stated intervals; thirdly, it must be public, &c." In *Shutt v. Lewis* (5 Esp. 128) the room had been taken from the defendant, the owner of a public-house, by a Jew for eight days, the period of the Jewish Passover, for the entertainment of people of the Jewish persuasion during that period. It appeared that money was taken at the door for admission, which was paid for the fiddler. Lord Ellenborough directed a verdict for the defendant, on the ground that this appeared to be merely a temporary appropriation of the room to that mode of entertainment, and that it was proved not to be used for any such purpose at other times; and that this could not be a keeping of a house for public dancing and music, the room not being appropriated to any such purposes, but used at all other times as part of the public house. *Gregory v. Tuffs* (6 C. & P. 271) is an authority to the same effect, where Lord Lyndhurst, C. B., in summing up to the jury said, "I agree entirely with the learned counsel for the defendant, that the mere occasional or accidental use of a room for the purpose of music or dancing, is not within this Act of Parliament." From these authorities, it is manifest that in respect of the single musical performance on Ash Wednesday, the defendant cannot be held to have "kept" a house for musical or other entertainment of the like kind within the meaning of the statute. Nor can the plaintiff rely on the theatrical performance carried on on other nights under the licence of the Lord Chamberlain, to show that the house is kept by the defendant for the prohibited purpose. Finally, it is submitted that the licence granted by the magistrates to the Eagle Tavern, includes the whole of the buildings, and therefore embraces the Grecian Theatre. There is nothing inconsistent in the magistrates giving one licence and the Lord Chamberlain another.

Day Q.C. and *Bridgman*, in support of the rule, did not dispute that in order to bring the case within the Act, the house must be kept ordinarily or usually for the purposes mentioned in the Act; but contended that stage plays fell within the words "other public entertainments of the like kind," and as the house was confessedly kept for the purpose of stage plays on other days of the year, the case came within the statute, and the defendant was liable to the penalty imposed by it. If stage plays did not come within the words "other public entertainment of the like kind," the 4th section of the Act would be unnecessary, providing "that nothing in this Act contained shall extend or be construed to extend to the theatres Royal in Drury Lane and Covent Garden, or the theatre commonly called the King's Theatre in the Haymarket, or any of them, nor to such performances and public entertainments as are or shall be lawfully exercised and carried on under or by virtue of letters patents or licence of the Crown, or the licence of the Lord Chamberlain of his Majesty's household, anything herein contained notwithstanding." This section was necessary in order to exempt stage plays at any of the theatres mentioned in it, from the operation of the enactment in sect. 2. [COCKBURN, C.J.—Is not the answer to this argument, that stage plays had

already been put under the control of the Lord Chamberlain by a previous Act of Parliament?] That the object of sect. 4 was to prevent plays at the theatres mentioned in it from coming within the second section was the opinion of Martin, B. in *Brown v. Nugent* (L. Rep. 7 Q. B. 592; 26 L. T. Rep. N. S. 880). His lordship said, "what 'public entertainment of a like kind' meant, I should have thought, was shown by sect. 4 of the Act, which provides that the Act shall not apply to Covent Garden, Drury Lane, or the Haymarket, theatres. So that public entertainments of a like kind mean dramatic entertainments." Taking these dramatic entertainments in conjunction with the musical entertainments on Ash Wednesday, it is submitted that the case is brought within the second section of the Act, and the plaintiff is, therefore, entitled to recover the penalty.

COCKBURN, C. J.—We are all of opinion that this rule must be discharged. It is an undisputed fact that the concert, in respect of which this action for a penalty is brought, took place upon one night only within the licensing year; and the cases cited, especially that of *Marks v. Benjamin* (5 M. & W. 585), establish the position that a single isolated opening of a house, or other building, for a musical performance, is not within the statute of 25 Geo. 2, c. 36, which makes it an offence, to which a penalty attaches, to keep a house, within certain prescribed limits, for any of the purposes specified in the Act without a licence from the magistrates. I think that this is a fatal objection to the present action, because, as I have already said, it is clear that in the present case there was only a single opening within the licensing year, on which music and dancing took place. It was ingeniously argued by Mr. Day in support of the action, that since performances in the theatre in which this concert was given are constantly going on throughout the year, when a concert is given there it is not to be treated as an occasional or isolated use of the building for that purpose, but that the building must be taken to be habitually used for theatrical and musical entertainments; that the words of the statute, "other public entertainments of the like kind," include dramatic performances, and that, therefore, the Grecian theatre, as it is kept for public entertainments within the meaning of the Act on other days of the year was, on the night of the musical performance, kept for public music without a licence. But I think this cannot be the proper construction to be put upon the statute. I think that the lawful performance of stage plays during the year cannot be coupled with the concert given on Ash Wednesday in order to show that the theatre was kept without a licence for an entertainment forbidden by the statute. The two licences are quite distinct. The theatrical entertainments given in this theatre are within the Lord Chamberlain's licence, and are perfectly legal and proper. No exception can be taken to the use of the building in that respect. I do not think that these theatrical entertainments can be brought within the words of the statute, "other public entertainment of the like kind," so as to be coupled with entertainments of music and dancing. By those words is meant something similar to music and dancing—things of a kind which have nothing similar to theatrical performances; and for this reason that by a prior Act of Parliament, (10 Geo. 2, c. 28), performances of this kind were

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put under the control of the Lord Chamberlain. Sect. 4 of 25 Geo. 2, c. 36, but for which, it has been contended, theatrical performances would be within the Act, has not, I think, the effects attributed to it. The intention of the Legislature in that enactment was to make certain pattern theatres which were licensed either by the Lord Chamberlain or by letters patent or licence from the Crown. The object of the 4th section was to prevent this Act from applying to these theatres at all, as they were otherwise protected from the mischief against which the Act was intended to provide. There was, therefore, no occasion to interfere with theatres of this kind, by rendering it necessary for them to get additional licences from justices of the peace. The 4th section of 25 Geo. 2, c. 36, adds, then, nothing to the case of the plaintiff; and we must take it that the performance, in respect of which the action for the penalty is brought, was a single performance in a place which, it is true, was not licensed for music and dancing, unless we should hold that the magistrate's licence for the Eagle Tavern covered the whole of the premises—a point which it is not necessary for us to determine, though I am rather inclined to think that it does. Giving a single entertainment of this kind does not bring the party giving it within the penalty imposed by the statute. I think, therefore, that my learned brother was right in directing a nonsuit, and that the rule to set aside the nonsuit must be discharged.

MELLOR, J.—I am of the same opinion. I can see nothing inconsistent in the Lord Chamberlain's granting a licence for dramatic performances to a room to which the magistrates have given a licence for music and dancing. But it is not necessary to decide this point, for it is clear that a keeping of a house for musical performances must mean something more than a single performance given for a particular purpose on one day within the licensing year. It must mean, at all events, a performance given on more than one day. On how many days it must be repeated, in order to bring it within the statute, it is not necessary to decide. There seems to me to be nothing to show that the house was kept for the purpose of musical performances. Can it be said that we may add on to this single performance the performances which took place under the Lord Chamberlain's licence in order to show that the house was kept for the purpose of musical performances? This argument is subtle and ingenious, but I think it is not sound. Mr. Day represents a party who says he is aggrieved by the fact that his musical and dancing licence exempts Ash Wednesday, the day on which the musical performance complained of took place. This, however, is not a matter which we can consider, though it may be a proper subject for the consideration of the magistrates at their licensing sessions. I am of opinion that the nonsuit was right, and that the rule must be discharged.

QUAIN, J.—I quite agree with the other members of the court, that the rule to set aside the nonsuit in the present case must be discharged. In my judgment, it is clear on the very face of the Act of Parliament that its provisions were not intended to apply to stage plays, or the places where they were performed, because these were already regulated by the 10 Geo. 2, c. 28, and were sufficiently provided for by that Act. The words of sect. 2 of the 25 Geo. 2, c. 36 are that "any

house, room, garden, or other place, kept for public dancing, music, or other public entertainment of the like kind, &c." Giving the ordinary construction to this, and taking the latter words *ejusdem generis* with those that go before, I should say that the musical performance in the present case was not *ejusdem generis* with those previously mentioned in this enactment. Such must be an entertainment for music and dancing, excluding stage plays. To bring the case within the statute there must be an habitual keeping for the purpose expressed; and I am of opinion that, in order to make this out, you cannot call in aid the lawful user of the place for stage plays under the licence of the Lord Chamberlain. Then the 4th section has been relied on, which says "that nothing in this Act contained shall extend, or be construed to extend, to the theatres royal in Drury-lane and Covent-garden, or the theatre commonly called the King's Theatre in the Haymarket, or any of them; nor to such performances and public entertainments as are or shall be lawfully exercised and carried on under, or by virtue of, letters patent, or licence of the Crown, or the licence of the Lord Chamberlain of his Majesty's household, anything herein contained notwithstanding." This extends the exemption not only to stage plays, but to every other kind of public entertainment which the Lord Chamberlain may licence. There were formerly during Passion Week several public entertainments, not stage plays, which went on with the licence of the Lord Chamberlain. Whatever is done with that licence is not, by virtue of this enactment, to fall within the provisions of the statute. The Act is intended to apply to all other entertainments of a like kind with dancing and music, which are not licensed by him. The plaintiff has not brought the present case within the Act of Parliament, inasmuch as he has not shown an habitual use by the defendant of the house for the purpose of music and dancing; and he cannot bring in aid of his contention the use of the house on other nights for the purpose of stage plays under the Lord Chamberlain's licence.

Rule discharged.

Attorney for plaintiff, T. L. Allen.

Attorney for defendant, Tanqueray Willaume, and Hanbury.

Jan. 17, and April 22, 1873.

LAURENCE v. JENKINS.

Obligation to keep fence in repair—Negligence of another person—Liability for escape of cattle.

Defendant sold the foliage of his wood to a person who negligently broke down a fence between plaintiff's and defendant's land in removing his purchase. Defendant's cows escaped through the gap into plaintiff's wood, and died in consequence of eating yew leaves there. Plaintiff sued in a County Court for damages alleged to be in consequence of defendant's neglect to repair the fence. The judge found as a fact that there was an obligation on the part of the defendant to repair and keep in repair this fence for the purpose of preventing cattle lawfully being in the plaintiff's close from escaping out of the same into the defendant's close. He also found that the escape of the cows was caused by the negligence of the purchaser of defendant's foliage, and that the

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plaintiff had no knowledge of the fence having been broken before the death of the cows; Held that upon these facts the defendant was liable for the damage claimed.

APPEAL from judgment of the County Court Judge of Monmouthshire, holden at Newport.

This was an action brought by the plaintiff to recover 40*l.* damages against the defendant for the loss of two cows of the plaintiff under the circumstances hereinafter mentioned.

The following is a copy of the plaint:—

In the County Court of Monmouthshire, holden at Newport, between Henry Laurence, plaintiff, and Alexander Howell Jenkins, defendant.

The plaintiff claims 40*l.* the damages sustained by reason of two of his cows on or about 27th Dec. 1871, being killed from eating the foliage of a yew tree which had been then recently felled in a wood of the defendant which adjoins the plaintiff's land, and into which wood the said cows escaped from the plaintiff's said land in consequence of the neglect of the defendant to repair a fence belonging to him dividing the wood and land aforesaid, and which fence the defendant of right ought to maintain in repair.

During all the time hereinafter mentioned, the plaintiff was possessed of and occupied a close of land, being part of a farm called Ty Isha farm in the county of Monmouth, and the defendant was possessed of and occupied another close of land (being woodland) adjoining the close of the plaintiff, and separated therefrom by a fence which was situate on the defendant's close, and was the property of the defendant.

In the month of Oct. 1871, the defendant sold the foliage of the wood on his close to one Higgins, who, accordingly, by his servants, felled the trees and underwood growing thereon; but the defendant did not part with any portion of the soil of his close, which he continued to occupy as aforesaid.

A short time before 27th Dec. 1871, some servants of Higgins felled a certain beech tree standing near the fence in such a manner that it fell over the fence and broke down a large part thereof. The beech tree was felled in a negligent manner.

Whilst the beech tree lay on the fence, the branches of the tree filled up the gap made by its fall; but a few days afterwards those branches were removed by some servants of Higgins, and after they were so removed, until 27th Dec. there was a considerable gap or opening in the fence sufficiently large for cattle to pass from one close to the other through the same; during all which time the fence was out of repair, but it was not brought to the knowledge of the defendant or his bailiff that the fence had been so broken.

On the 26th Dec. some servants of Higgins felled a certain yew tree, being a few yards from the fence, and near the spot where the beech tree had been felled. The yew tree was allowed to remain during the night of the 26th in the place where it had been felled.

During the night of the 26th, the plaintiff's cows then being lawfully upon the plaintiff's close, escaped through the said gap or opening in the fence out of the close of the plaintiff into that of the defendant, and in the morning of the 27th they were found on the close of the defendant near the yew tree.

About mid-day on the 27th the cows died; and the County Court judge found that they died from

eating some of the foliage of the yew tree, which, when eaten to excess, is destructive to cattle. At that time of the year there was very little verdure or green food in the fields, and the cows, from being foddered on dry food, were the more inclined to browse the green foliage.

Evidence was given that for more than forty years the fence had been repaired whenever repairs were necessary by the owner and occupiers of the defendant's wood, and also that on several occasions during the last nineteen years the fence had been repaired by the defendant and his predecessors in estate, upon notice being given to him or his bailiff by the occupier for the time being of the plaintiff's close; whenever the fence was so repaired it was for the purpose of preventing cattle, lawfully being in the plaintiff's close, from escaping out of the same into the close of the defendant.

It was contended for the plaintiff (1) that the facts established an obligation on the part of the defendant to repair and keep in repair the fence for the purposes aforesaid; (2) that the damage was not too remote to enable the plaintiff to maintain this action; (3) that the defendant was liable in this action. Each of these points was contested by or on behalf of the defendant, who also contended that the damage was attributable to the felling of the yew tree, relying on *Butler v. Hunter* (31 L. J. 214, Ex.).

The judge found as a fact that there was an obligation on the part of the defendant to repair and keep in repair the said fence, for the purpose of preventing cattle, lawfully being in the plaintiff's close, from escaping out of the same into the close of the defendant.

He also considered that the damage was not too remote to enable the plaintiff to maintain this action.

And he found as a fact that the escape of the cows from their own pasture was caused by the negligence of the servants of Higgins, either in not so felling the beech as to prevent its falling on the hedge, or, if that was not preventible, in not temporarily fencing round the gap until the tree could be moved, and the gap be properly stopped; and he was of opinion that it was the duty of Higgins to so cut and remove the wood as not to injure the rights of the plaintiff. He also found that neither defendant nor his bailiff, to whom the management of this woodland was intrusted, received notice of the fence having been broken down, and he held, on the authority of *Langmeid v. Holliday* (6 Ex. 766), and *Butler v. Hunter* (7 H. & N. 826), that Mr. Higgins, and not the defendant, was responsible for the loss of the cows, as the result of his servant's negligence, and directed a nonsuit to be entered.

In case of this decision being reversed on appeal, he assessed the plaintiff's damages at 40*l.*

The question for the opinion of the Court of Queen's Bench was whether the defendant was liable in this action.

Herrell, Q.C. (with him *Petheram*) argued for the plaintiff.—The plaintiff's right to have the fence kept in repair by the defendant, as described in this case, is called by Gale a spurious kind of easement. He says (Gale on Easements, 4th edit. p. 460): "The only general obligation with respect to fences imposed by the common law is that every proprietor of land should prevent, by fences or other means, his cattle from trespassing on the land of his neighbours. There may, however, be

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a spurious kind of easement, obliging an owner of land to keep his fences in a state of repair, not only sufficiently to restrain his own cattle within bounds, but also those of his neighbours; and rendering him liable for any injury which his neighbour's cattle may sustain in consequence of the non-repair of the fences, which, unless an easement had been acquired, he 'clearly would not be.' The defendant's liability in this case was the same as if he had contracted with the defendant to keep this fence in repair. It is stated in Bullen and Leake's *Precedents of Pleading*, p. 329: "The general rule of law is that the owner of cattle is bound to take care that they do not trespass on the land of others. But the owner of land may be bound by prescription or otherwise to maintain and repair a fence for the benefit of the owner of the adjoining land, who may have a corresponding right to have the fence so maintained and repaired."

Michael for defendant.—My contention is that, although the case finds that it was the defendant's duty to keep the fence in repair, yet this breach of duty was occasioned by a third party, and there was no notice to the defendant. Putting this fence out of repair was not within the authority given by the defendant to Higgins. Pollock, C.B. said, in *Hole v. Sittingbourne and Sheerness Railway Company* (6 H. & N. 488, 497): "Where the act complained of is purely collateral, and arises incidentally in the course of the performance of the work, the employer is not liable, because he never authorised that act—the remedy is against the person who did it." It was held in *Boyle v. Tamlyn* (6 B. & C. 329), that the doing of occasional repairs was not evidence of a bargain to keep a fence in repair; and even if this be sufficient to establish the defendant's duty to repair this fence, the fact of his having had no notice that it was broken, shows that a reasonable time to repair it had not elapsed from its fall. [*Herschell*: I contend that the duty to repair was absolute, and existed immediately the fence was out of repair.] The case does not find enough to show how long the breach in the fence existed, and ought to go back to the judge.

Herschell in reply.—This was an absolute duty to keep in repair.

COCKBURN, C.J.—I think the question whether this spurious kind of easement carries with it an unqualified duty to keep in repair is of considerable importance. We will take time to consider it before we send the case back: for if the obligation be absolute, we shall require no further information.

Cour. adv. vult.

April 22.—MELLOR, J. delivered the judgment of the court (Cockburn, C.J., Mellor and Archibald, JJ.):—The only point in this case as to which we felt any degree of hesitation at the time of the argument was the question whether or not the defendant was entitled to a reasonable time to repair the fence after he might or ought to be taken to have had notice that it had been broken down. For, assuming that the obligation to which he was subject was to maintain at all times, and without notice to repair it, a sufficient fence for the benefit of the plaintiff's close, we had no doubt that the learned judge of the County Court was wrong in holding that the defendant was not legally responsible for the loss of the plaintiff's cows. We concur in opinion with the learned judge that the damage was not too remote, but we

think that the cases cited by him (*Langmeid v. Holliday*, 6 Ex. 761, and *Buller v. Hunter*, 7 H. & N. 826), are inapplicable; and without expressing any opinion as to whether an action might not also have been maintainable against Higgins, we are of opinion that if the obligation to maintain the fence be such as we have assumed, the defendant would be liable in this action. On further consideration we have come to the conclusion, upon the evidence set forth in the case, that the defendant was bound, at his peril, to maintain at all times, and without notice to repair it, a sufficient fence; and that, except in the case of damage by the act of God or *vis major*, to which different considerations would apply, he would be answerable for damage sustained by cattle escaping from the plaintiff's close by reason of the defective state of the fence, and proximately due to that cause. At common law the owners of adjoining closes are not bound to fence either against or for the benefit of each other; but in the absence of fences, each owner is bound to prevent his cattle or other animals from trespassing on his neighbour's premises. By prescription, however, a landowner may be bound to maintain a fence upon his land for the benefit of the occupier of the adjoining close. This is described by Gale, in his work on *Easements*, as in the nature of a spurious easement (4th edit. p. 460, *Star v. Rokeby* Salk. 355; *Boyle v. Tamlyn*, 6 B. & C. 329), affecting the land of the party who is bound to maintain the fence. A party entitled by prescription to the benefit of the fence might formerly have compelled the adjoining owner to repair it by means of a writ of *curia claudenda* (Fitzherbert, Nat. Brev. 127), and have recovered damages as well for the non-repair; and a plea in trespass for injury done by cattle that the plaintiff is bound by prescription to fence against the defendant's cattle, is a good plea (*Nowell v. Smith*, Cro. Eliz. 709); the party bound by prescription to maintain the fence being answerable to the owner for whose benefit it is maintained for all damage reasonably attributable to its defective condition. It was held, therefore, in an *Anonymous Case* (1 Ventr. 264) that where a horse of the plaintiff escaped into the defendant's field through defect of a fence which the defendant was bound to maintain, and was killed by falling into a ditch in defendant's field, the defendant was liable. And in a later case (*Booth v. Wilson*, 1 B. & Ald. 59), that it made no difference that the plaintiff was only a gratuitous bailee of the horse which escaped and was killed. The same view of the law was acted upon in the case of *Powell v. Salisbury* (2 Yo. & Jer. 391) where the defendant was held liable for the loss of cattle which escaped from an adjoining field through a defective fence which he was bound to repair, and were killed on his premises by the falling of a haystack. In all these cases, however, the prescription to maintain and repair obviously implies the pre-existence of the fence, and the right consequently to have it always existing as a fence; in other words, in a condition sufficient to protect the owner entitled to it from trespasses by his neighbour's cattle, and renders it, we think, incumbent on the party upon whom the prescriptive obligation is imposed to repair it in time to prevent its becoming defective, and subjects him also to all risks of injury that may be done to it by strangers or trespassers. We think, therefore, that as the true nature of the prescription is that the defen-

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dant was bound at his own risk to have a sufficient fence always existing, he was liable to the plaintiff, notwithstanding he had no knowledge of the injury done to the fence, and consequently that the decision of the County Court should be reversed, and judgment given for the plaintiff.

Judgment for the plaintiff.

Attorneys for plaintiff: *Jones and Starling* for *Cathcart and Vaughan*, Newport, Monmouthshire.
Attorneys for defendant: *White and Sons*.

Wednesday, April 23, 1873.

BURTON v. EYDEN.

Friendly Society—Sickness—Right of lunatic member to relief.—18 & 19 Vict. c. 63, s. 9.

18 & 19 Vict. c. 63, s. 9. sub-sect. 2, states the objects of *Friendly Societies* to be (amongst others) for the relief or maintenance of the members in old age, sickness, or widowhood.

One of the rules of a friendly society provided that each member should receive 8s. per week during any sickness or accident that may befall him. Another rule provided for a sickness lasting longer than a month, and another that notice in writing was to be sent when a member became sick.

Held that lunacy was a sickness within the meaning of the Act of Parliament and these rules; and that a lunatic member was entitled to relief from the society.

This was a case stated by two of Her Majesty's Justices of the Peace in and for the county of Northampton, under the statute 20 & 21 Vict. c. 43, on the application in writing of the appellant, who was dissatisfied with their determination upon the question of law, which arose, as hereinafter stated, on the 2nd July 1871, at Towcester, in the said county, the appellant having duly entered into a recognizance to prosecute the appeal.

Upon the hearing of a certain information presented by the appellant (as parent and next friend of Samuel Burton, a member of the Stoke Bruern Friendly Society) against the said Samuel Eyden, the Secretary of the said society, for that the said Samuel Burton, the member of the said society, who was then insane and an inmate of the Northampton General Lunatic Asylum, and as such sick and entitled to relief out of the society, which relief has been refused to him, and that he is entitled to 8s. a-week from the 30th of April last from the funds of the said society. The magistrates dismissed the said summons on the ground that insanity was not a sickness entitling the said Samuel Burton to relief under the rules of the said society.

And the appellant being dissatisfied with their determination upon the hearing of the information, as being erroneous in point of law, the justices stated and signed the following case.

Upon the hearing of the information it was proved on the part of the appellant or admitted by the respondent, and found as a fact:—

That the rules annexed were the rules of the said friendly society, and that the said Samuel Burton was and is a member of the said society.

That the said Samuel Burton declared upon the sick fund of the said society by sending a certificate to the trustees thereof, signed by James Parsons Knott, the usual medical officer of the said society, in the words and figures following:—

THE STOKES SOCIETY.

April 30th '72.

This certifies that Samuel Burton is unable to follow his employment, from general weakness and a disease of the mind.

J. P. KNOTT.

That the said Samuel Burton was, shortly after the date of the said certificate, confined as a lunatic at the Northampton County Lunatic Asylum, where he still remains confined as a lunatic.

That the said Samuel Burton has not, by himself or his friends, received any pecuniary aid from the said society, and that the said society has refused to make any such payment.

It was admitted by the appellant and respondent, or found as a fact, that all proper notices of illness had been sent on behalf of the said Samuel Burton to the said society.

The justices being of opinion that insanity was not a sickness which entitled the member to relief from the said society under its rules, dismissed the summons.

The question of law arising on the above statement for the opinion of the court was, whether the above facts justified a dismissal of the summons or not.

The rules annexed commenced with a preamble, as follows:—

Whereas it is a laudable custom in Great Britain for divers artists and other disposed persons to meet and form themselves into societies for the relief of such members as, by illness or accident, shall not be able to work at their usual employment.

The following were the material rules:—

Rule 11. That if any member remove from his present place of abode to any part of England, he shall be allowed two months to send his contribution-money in, or forfeit 1s. 6d.; but if he neglect to send it in three months, he shall be excluded. And if the person absent shall duly send his contribution, and be there taken sick and unable to work at his trade, he shall send a certificate, signed by the minister, churchwarden, and doctor of the parish where he resides, certifying how long he hath been ill, and what his disorder is. But if such member's illness shall continue for more than a month, he shall send a certificate every month, as above; and on the receipt of such certificate, he shall receive his money the same as if he was present.

Rule 13. That no member shall be entitled to any benefit from this society till one year be expired from the day of his entrance, and all his contributions, &c., to that time be cleared off; he shall then receive 8s. per week during any sickness or accident that may befall him, unless by rioting or drunkenness (the venereal disease excepted), which shall be carried to him by the stewards weekly, who are required to visit and enquire after the state of the sick, for which they shall receive 3d. per mile from the box for their trouble, and accordingly make their report to this society; in case of failure, to forfeit for each offence 1s. 6d.

Rule 14. That when any member declares on the box, he shall send a written report to the stewards, stating when he declares on the box, and another stating when he declares off, and the said member is capable to work at his trade or any other business at three days from the time that he declares on the box, by declaring off to the stewards, shall be allowed half a week's benefit from the society.

Rule 24. It is agreed by this society that no member shall receive any benefit from this society while he is voluntarily inoculated for the small-pox, nor shall any person be admitted a member who hath any bodily infirmity upon him, except in such cases as may appear to the society to be noways likely to affect the box and may be approved of by a majority of the members; but if any person be afflicted with any invisible disorder, and clandestinely enters this society as a sound member, he shall when found out be excluded.

Rule 28. That when any member falls sick, he shall send a written report to the stewards, and the sick mem-

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ber shall send for the doctor, and if such doctor neglects to visit such member for the space of one day from the report given in by the stewards, he shall forfeit the sum of 2s. 6d.

Metcalf, Q.C. argued for the appellant.—This question, although often raised before judges of the County Courts, has never been decided by Superior Court. The nearest authority is *E. v. Guardians of Manchester* (6 E. & B. 919, where lunacy seems to have been considered sickness, under sect. 4 of 9 & 10 Vict. c. 68; but it was doubted whether the section was applicable to a lunatic at all. The words are, "No warrant shall be granted for the removal of any person becoming chargeable in respect of relief made necessary by sickness or accident, unless the justices granting the warrant shall state in such warrant that they are satisfied that the sickness or accident will produce permanent disability." Under the same section, in *Reg. v. The Inhabitants of Bucknell* (3 E. & B. 587) it was held that incurable blindness was sickness. Lord Campbell said, in the written judgment of the court, p. 595: "It seems impossible to give any definition of sickness which will not include blindness. A disease which is incurable or mortal is not the less sickness."

E. Thomas for the respondent.—These rules throughout contemplate the grant of relief merely during temporary disability; and the objects for which it is lawful to establish a friendly society are stated in 18 & 19 Vict. c. 63, s. 9, sub-sec. 2, to be, "For the relief or maintenance of the members, their husbands, wives, children, brothers or sisters, nephews or nieces, in old age, sickness, or widowhood, or the endowment of members or nominees of members at any age." In a note to this clause, in Tidd Pratt's "Law relating to Friendly Societies" (p. 5), the case of *Reg. v. Guardians of Manchester* is cited as an authority that lunacy was not in any case to be regarded as sickness under the Act there discussed; and *Reg. v. Huddersfield* (7 E. & B. 798) is cited to show that pregnancy also was not sickness; and that by sickness is meant a state of bodily disease, being a derangement of the functions of the body. It appears from 26 L. J. 3, M. C., in a note to *Reg. v. Guardians of Manchester*, that the court were, in another case, *Hunslet v. Dewsbury*, clearly of opinion that lunacy of a temporary nature was not within the 4th section of the Irremovability Act. [BLACKBURN J.—But you have to show that lunacy is not sickness within the meaning of these rules and the Friendly Societies' Acts.] Friendly societies were never intended to provide for pauper lunatics. [QUAIN, J.—How can you distinguish lunacy from incurable blindness, which was held to be sickness in *Reg. v. The Inhabitants of Bucknell*?] The rules are inconsistent with any intention to give relief to insane persons. By Rule 11, a sick member is to send a certificate, and by Rules 14 and 28, he is to send a written report to the stewards. [BLACKBURN, J.—The rules do not require the writing to be by the hand of the sick member.]

Metcalf was not heard in reply.

BLACKBURN, J.—I think lunacy is a sickness within the meaning of the Friendly Societies' Acts and the rules of this society. The Act 18 & 19 Vict. c. 63, s. 9, sub-s. 2, says the objects of these societies may be for the relief or maintenance of members "in old age, sickness, or widowhood." Now, lunacy is the effect of a

diseased mind or body, and must, in my opinion, come within the meaning of sickness. Moreover, it is not likely to be more permanent than the conditions for relief combined with sickness, viz., old age and widowhood. Certainly Rule 11 of this society seems to contemplate sickness of about a month in duration; but neither that rule nor any other which we have seen excludes relief in this case. The pauper cases cited are authorities as far as they go. Their effect seems to me to be, that lunacy is a sickness, although not such a sickness as that described in the statute. If it be desired to give no relief to insane members, rules of a society may easily be made to bar lunacy. The rules in this case do not do so, and our judgment must be for the appellant.

QUAIN, J.—I am of the same opinion. I think insanity must be taken to be a sickness within the meaning of the Act of Parliament and the rules of this society.

ARCHIBALD, J.—I am of the same opinion.

Remitted to the Justices.

Attorney for appellant, *Robert Metcalf*, for *W. Whitton*, *Towcester*.

Attorney for respondent, *J. V. Franklin*.

Wednesday, April 30, 1873.

MARKET HARBOROUGH AND BRAMPTON TURNPIKE TRUSTEES (apps.), v. KETTERING DISTRICT HIGHWAY BOARD (resps.).

Turnpike trust—Application of tolls—4 & 5 Vict. c. 59—4 & 5 Vict. c. xxxv.

Upon an information preferred by the respondents against the appellants, under 4 & 5 Vict. c. 59, s. 1, charging that portions of certain public highways were out of repair, that such highways were part of the appellants' trust, and that the trustees were chargeable with the repairs thereof, the justices refused the order required. The local Act (4 & 5 Vict. c. xxxv. s. 18), provides that the appellants shall apply moneys received by them in the first place "in paying and discharging any interest which may from time to time be owing in respect of any money which may have been borrowed on the credit of the tolls authorised to be taken; secondly, in defraying the expenses of improving, maintaining, and keeping in repair such road, and in putting this Act into execution with reference thereto: and, thirdly, in reducing, paying off, and discharging the several principal sums which have been borrowed on the credit of the tolls authorised to be taken." Arrears of interest were due from the trust which were as large as the money in the hands of the trustees.

Held, that the interest as it accrued only, and not the arrears, ought to be discharged before the cost of repairs; and that the justices were right in refusing to make an order upon the respondents.

CASE stated by the justices of the peace for the county of Northampton, acting for the division of Kettering:—

At a special sessions for highway purposes held at Kettering on the 15th May 1872, an information was exhibited by Mr. Geoffrey Hawkins, clerk to the trustees of the Market Harborough and Brampton Turnpike Trust, under 4 & 5 Vict. c. 59 (continued by 34 & 35 Vict. c. 95), that the funds of the trust were insufficient for the repair of the

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road within eight several parishes in the Kettering Highway District, and praying for an order of contribution.

The justices examined the state of the revenues and debts of the trust, and, the condition of repairs, length of road, &c.; when it appeared that a sum of 1115*l.* 10*s.* 2*d.* was due for arrears of interest owing in respect of money borrowed on credit of the tolls up to the 6th April 1871, that a further sum of 524*l.* 14*s.* 9*d.* was due for the year's interest to 6th April 1872, and that the interest from that date to the end of the year, 1872 (the rate being reduced to 2 per cent. by a provisional order) would be 187*l.* 1*s.* 2*d.* It further appeared that the income for the current year exceeded the estimated expenditure, including in such expenditure the year's interest from 31st Dec. 1871 to 31st Dec. 1872; but the trustees proposed to pay out of the present year's income a sum of 854*l.* 12*s.* 11*d.* for arrears of interest due prior to 31st Dec. 1871; after payment of which a deficiency of upwards of 800*l.* was shown for the present year.

The estimated expenses of repairing the road for the current year were 1100*l.*, and of putting the act into execution, 205*l.* 10*s.*

The application clause in the local act provides (4 Vict. c. xxxv. s. 18).—"That all moneys which shall be received by the said trustees by virtue of this Act upon the roads included in the said recited Acts hereby repealed, shall be applied in the first place, after payment of the expenses of obtaining and passing this Act, in paying and discharging any interest which may from time to time be owing in respect of any money which may have been borrowed on the credit of the tolls authorized to be taken by the said recited Acts hereby repealed. Secondly, in defraying the expenses of improving, maintaining, and keeping in repair such road, and in putting this Act into execution with reference thereto; and, thirdly, in reducing, paying off, and discharging the several principal sums which have been borrowed on the credit of the tolls authorized to be taken by the said recited Acts hereby repealed."

It was contended on the part of the highway board, that the direction, contained in the above clause for payment in the first place of any interest which might from time to time be owing in respect of any money borrowed on credit of the tolls, rendered it obligatory on the trustees to pay the interest from year to year out of the current year's income, and that in default of so doing they were not at liberty to apply the income of 1872 on payment of arrears of interest in priority to the current expenses of maintaining the road.

Special attention was drawn to the fact that if the funds of the trust during the present year should be rendered deficient by payment out of the year's income of the arrear of interest of former years, the burden would fall upon the district fund of the highway board under the Act passed last session (34 & 35 Vict. c. 115, s. 15), instead of upon the rates of the several parishes through which the road passes, upon which it would have fallen had any deficiency been occasioned in former years by reason of payment of the interest from year to year as it became due.

The case of *The Bruton Turnpike Trustees v. The Wincanton Highway Board* (L. Rep. Q.B. 437), was cited by the clerk to the trustees in favour of an order being made; and the case of *Reg. v. Hut-*

chinson (4 E. & B. 200), was cited on the part of the highway board.

The justices dismissed the information on the ground that the arrears of interest ought to have been paid out of the former year's income, in which case the funds of the trust would not have been deficient for the present year's expenditure; and that the trustees having allowed the interest to fall into arrear contrary to the provisions contained in the application clause, were not at liberty to apply the income of 1872 in payment of arrears of interest in priority to the current expenses of maintaining the road.

The informant being dissatisfied with the determination of the justices as being erroneous in point of law, applied to them to state and sign a case for the opinion of the Court of Queen's Bench.

If the court should be of opinion that under the circumstances above stated, and according to the right construction of the application clause contained in the local Act, the trustees having in former years allowed the interest to fall into arrear, were at liberty to apply the income of 1872 in payment of arrears of interest in priority to the current expenses of maintaining the road, then the decision of the said justices to be reversed, and the application to be reheard; but if the court should be of a contrary opinion, then the decision of the said justices to be confirmed.

Manisty, Q.C. (with him *Speke*) argued for the appellants.—The local Act, in *The Bruton Turnpike Trustees v. The Wincanton Highway Board*, provided that the tolls were to be applied in the first place in payment of the costs of the Act; in the next place, in paying and discharging all interest now due and owing, and which shall hereafter become due upon any mortgage or securities of the tolls hereby granted, and in defraying the expenses of erecting toll houses, &c., and of widening, repairing, &c., the roads; and, lastly, in reducing, paying off, and discharging the several sums of money due on any mortgage or securities, and also other debts now due, or hereafter to become due. The Court of Queen's Bench there held that statute to mean that the creditors should be paid their interest before any of the money was applied to the roads: and the fair meaning of the words in this case, "any interest which may from time to time be owing in respect of any money which may have been borrowed on the credit of the tolls," seems also to include the arrears of interest as well as that which accrues during the actual year. The words of the statute in *Reg. v. Hutchinson* do not expressly allude to interest owing, being merely "the remainder of such moneys shall (after payment of necessary expenses, &c.) from time to time be applied in keeping down the interest of the principal moneys advanced or borrowed on account of the said bridge and road, and which may be borrowed on the credit of this Act, and in amending, making, altering, turning, widening, improving, and keeping in repair the said road, and in otherwise putting this Act into execution." The court there held that the words "keeping down the interest," which do not occur in the Market Harborough Act, meant paying the annual interest as it accrued, and did not include paying arrears of interest. It does not follow, however, that the words here should mean the same thing.

Cave for respondents:—The construction which

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the justices have put upon this Act is in accordance with justice and is consistent with the case of *Reg. v. Hutchinson*. Neither that case, however, nor that relied upon by the other side, is exactly on all fours with the present, and there is no other authority at all near the point. In *Reg. v. South Shields Turpike Trusts* (3 E. & B. 599), similar acts were considered, and a payment of arrears by the trustees was held to be improper; but the Act in that case put the repairs even before the payment of interest as it accrued.

Manist in reply.

BLACKBURN, J.—In this case we have come to the conclusion that the justices were right, and that their decision should be affirmed. The question submitted to us turns entirely upon the construction of the local Act, although there have been cases upon somewhat similar provisions in other Acts. The question is whether the tolls authorised to be raised may be applied to arrears of interest upon money borrowed, and in what order with respect to the repairs of the roads. In one of the two cases considered, *Reg. v. Hutchinson*, it was held upon the local Act, that the words, "keeping down the interest," referred only to interest as it accrued, and not to arrears; in the other case, *Bruton v. Wincanton*, the construction put upon the Act was the other way, and the words, "all interest now due and owing," were held to include arrears. The words in the Act applying to the present case are "any interest which may from time to time be owing," and we conclude upon the whole scope of the Act that they do not intend any other than the interest as it accrued in each year, to be paid before the repairs of the road. The preamble of 4 & 5 Vict. c. xxxv, recites that, "considerable sums of money have been advanced upon the credit of the tolls authorised to be taken by the said Acts, which money still remains owing, together with an arrear of interest thereon, and such money cannot be paid off, or the interest thereof discharged, nor can the said road be effectually improved and kept in repair, unless further powers are granted." Section 18 proceeds to the application of the tolls in order to carry out these purposes. It says all moneys shall be applied in the first place in paying and discharging any interest which may, from time to time, be owing in respect of any money which may have been borrowed; secondly, in repairing the road; and, thirdly, in reducing, paying off, and discharging the several principal sums which have been borrowed on the credit of the tolls authorised to be taken. Now, this section does not in terms say what is to be done with the arrears of interest, but it speaks of interest, which may, from time to time, be owing, as if the Legislature did not intend that the interest should be left in arrear. If it were allowed that the tolls should pay arrears of interest before repairs required by the Act, these repairs might be thrown upon subsequent ratepayers of the district, and they would necessitate a retrospective rate. Bye-gone arrears of interest must come to be paid like any debt under the Act, and when there is a surplus not required for repairs which must be done. In *Reg. v. Hutchinson* the words were "keeping down the interest," but they do not, I think, materially differ from the words here. The words in the present Act are, in my opinion, nearer to those in *Reg. v. Hutchinson* than to those in the *Bruton* case, and the arrears

of interest must, therefore, be paid after the repairs of the road.

QUAIN and ARCHIBALD, JJ. concurred.

Judgment for respondents.

Attorneys for appellants, *Milne, Riddle and Mellor*, for *Archbould*, and *Hawkins*, Thrapston.

Attorneys for respondents, *Ware and Hawes*.

Monday, April 28, 1873.

COOK (app.) v. MONTAGUE (resp.).

Appeal allowed with costs—Costs of court below—Delay in application—20 & 21 Vict. c. 43, s. 6.

Three terms after a decision of justices was reversed with costs upon a case stated under 20 & 21 Vict. c. 43, the appellant applied for his costs in the court below.

Held, that although the court had, by sect. 6, a discretion over such costs at the disposal of an appeal, it should be exercised only in a strong case of vexation or oppression; and that such delay without fraud effectually precluded it.

THIS was a case stated by three justices of the peace, acting in and for the city and borough of Bath, in the county of Somerset, under the statute 20 & 21 Vict. c. 43.

The justices had made an order against the appellant under the Nuisances Removal Act, 1855, sect. 12, as the owner of premises upon which a foul and offensive privy existed, so as to be a nuisance. The appellant was receiver of the rent of the house as agent of the ground landlord from a person called Hancock, who held a lease of the whole house for twenty-one years; this lessee had underlet a part of the house to a Mrs. Kingston as yearly tenant. The privy was within the part of the house let to Mrs. Kingston, and was used exclusively by her, Hancock having no access to it.

On the 24th April 1872 this case stated came on to be argued by way of appeal, and the court (Blackburn, Hannen, and Quain, JJ.) held that the appellant was not the owner of the premises on which the nuisance arose, within the definition of the word in sect. 2 of the said Act of 1855: (Reported L. Rep. 7 Q. B. 418; 26 L. T. Rep. N. S. 471).

The court made an order that the judgment or determination of John Hulbert, William Hunt, and William Thompson, esquires, three of Her Majesty's justices of the peace, in and for the city and borough of Bath, in the county of Somerset, upon the hearing of an information and complaint preferred by the respondent against the appellant for allowing the following nuisance to exist on his premises, No. 13, Union-street, in the said city and borough, viz., a foul and offensive privy for want of a syphon-pan and supply of water, in respect of which this case has been stated—be reversed with costs, to be paid by the said respondent to the said appellant or his attorney, such costs if necessary to be taxed by the coroner and attorney of this court.

Upon taxation the appellant was allowed his costs of the appeal, but not any costs of the summons, no question as to costs having been reserved by the justices.

On the 28th Jan. last *Bailey*, on behalf of the appellant obtained a rule *nisi* calling upon the respondent to show cause why the rule made the 24th April in the last Easter Term should not be amended, by ordering the respondent to pay to

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the appellant the costs of the hearing of the summons before the justices on which the special case in this prosecution was stated, or why a rule should not be granted ordering the respondent to pay to the said appellant such costs.

Murch showed cause—20 & 21 Vict. c. 43—which is the Act under which the appeal was brought to this court—provides by sect. 6, that “the court to which a case is transmitted under this Act shall hear and determine the question or questions of law arising thereon, and shall thereupon reverse, affirm, or amend the determination in respect of which the case has been stated, or remit the matter to the justice or justices with the opinion of the court thereon, or may make such other order in relation to the matter, and may make such orders as to costs as to the court may seem fit; and all such orders shall be final and conclusive on all parties.” These costs can only relate to the appeal, for this court has no jurisdiction over the costs of the court below; but even if the jurisdiction exists, it is too late now for an amendment of the order of the court. In *Caswell v. Cook* (12 C. B., N. S., 242) Byles J. said, “it is a most inconvenient thing to come and ask for costs in the term after the case was disposed of, and when the application is necessarily made to a court somewhat differently constituted from that which pronounced the judgment.” A similar application was refused on the same ground in *Budenberg v. Roberts*. L. Rep. 2 C. P. 292. *A fortiori* then this application, which comes on to be argued four terms after the decision of the appeal, should be refused [QUAIN J.—I thought when the rule was moved that it was too late, but it was suggested that there was some excuse for the delay]. That is now denied.

Bailey supported the rule:—I should have thought that the order of this court would necessarily give the appellant the cost of the summons. [BLACKBURN, J. Then you should have moved to review the taxation.] The masters however state that it is their practice to limit such an order to the costs of appeal only: and there are many analogous authorities as to County Court cases, that the delay which has taken place is not too long to preclude an amendment in the order now. *Morris v. Bosworth* (2 E. & B. 213), was upon an award made on the 9th June 1852; the amount being less than 20*l.*, and the parties living more than twenty miles apart, a summons was taken out in Feb. 1853, under 13 & 14 Vict. c. 61, s. 13, to recover plaintiff's costs; it was held not to be too late: and in *Reid v. Gardner* (8 Ex. 651) a verdict of 2*l.* was found and accepted by plaintiff, and just a year afterwards a similar summons under 15 & 16 Vict. c. 54, s. 4, was held to be in time. In *Ashby v. Sedgwick* (28 L. T. Rep. 185), Malins, V.C. laid down “That the court had the power to and would, except under special circumstances, allow to a successful appellant from the decision of a County Court judge his costs of the appeal, as well as his costs in the court below; that in these cases, where the subject matter in dispute was small, it would frequently amount to a denial of justice, if the successful appellant were saddled with his costs of the appeal; and directed defendant to pay the costs of the plaintiff in the County Court and the costs of the appeal.” This judgment was founded upon the common law authorities of which *Schroder v. Ward* (13 C. B., N. S., 410; 7 L. T. Rep. N. S. 725), was cited: there Willes, J. in a considered judgment of the court

said, “We reverse the decision with costs. And we lay it down as a general rule that the costs of appeal will always be allowed, unless there are special circumstances; and those special circumstances must be substantial.” The words of the County Court Act in that appeal are almost identical with those here. So in *Gage v. Collins* (L. Rep. 2 C. P. 381), the court upon appeal reversed a County Court judgment, and ordered a new trial; holding that the whole judgment, including that part of it which related to the costs, was thereby reversed. [QUAIN, J. All these cases merely reverse the order of the court below; that is, they direct that the appellants shall not, as ordered by the court below, pay the respondents' costs in that court. Is there any decision of an appeal court ordering the respondent to pay the appellant's costs in the court below?] That was done in *Alcock v. Delay*, 4 E. & B. 660, when Lord Campbell concluded his judgment, “There must be a new trial; and the costs of the first trial and of the appeal must be paid by the respondents.” [QUAIN, J. The Queen's Coroner says the practice of the court is to the contrary.]

BLACKBURN, J.—I do not think there can be any doubt that this rule should be discharged. The 6th section of 20 & 21 Vict. c. 43, enables the court to make such orders as to costs as to the court may seem fit. In the present case the order upon this appeal was in favour of the appellant with costs, which means, according to the practice of the court, the costs of the appeal only. Generally, the costs below are in the discretion of the justices, and they would not be likely to give the appellant his costs before them; and that is the only case in which upon allowance of a reversal of the judgment below ought not also to reverse the order as to costs. I will not say that under this 6th section if a strong case of vexation or oppression were brought before us, we might not order that the respondent should pay the appellant's costs before the justices: but that would be at the hearing of the appeal, and we certainly would not interfere with the ordinary course four terms after the case has been decided; unless, perhaps, there were grounds of fraud for the delay, which are not established here.

QUAIN, J.—I am of opinion that this rule should be discharged. It is a rule obtained last term to amend an order of this court made in the month of April of last year. The two cases cited from the Common Pleas, *Caswell v. Cook*, and *Budenberg v. Roberts*, are clear authorities that we ought not to amend an order as to costs after so long a delay; at all events unless fraud be shown. If a strong case for doing so be established we might perhaps deal with the costs below as now requested, but there is nothing to show that this is such a case.

ARCHIBALD, J.—I am of the same opinion. Under sect. 6 of 20 & 21 Vict. c. 43, I think it is in our discretion to make an order as to the appellant's costs below upon the disposal of the case: but there seems to have been in this case no reason for doing so, even if the delay did not entirely preclude it.

Rule discharged with costs.

Attorneys for appellant, *T. White and Sons*, for G. H. Cook, Bath.

Attorneys for respondent, *Dobinson and Gears* for F. H. Moger, Bath.

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JONES v. COOPER.

[Q. B.]

Wednesday, April 30, 1873.

JONES v. COOPER.

Licensing Act, 1872—Conviction during current licence—Right accrued.

The appellant was convicted by justices under the Licensing Act, 1872, sect. 24, for unlawfully allowing beer to be consumed on his premises at the hour of two in the morning of the 18th Sept. 1872. The Licensing Act 1872 came into operation on 10th Aug. 1872, but the appellant held a licence authorising him to sell by retail exciseable liquors, without limitation of hours except on Sundays, which was expressed to continue in force until 10th Oct. 1872.

Held (by Blackburn and Archibald JJ., dissentiente Quain, J.), that the Licensing Act, 1872, applied to current licensees from the passing of the Act, as well as to future licensees.

THIS was a case stated by justices for the borough of Kidderminster, in the county of Worcester, under the statute 20 & 21 Vict. c. 43, for the purpose of obtaining the opinion of the court on a question of law, which arose as hereinafter stated.

At a petty session, holden at the Guildhall, Kidderminster, in and for the said borough of Kidderminster, on 27th Sept. 1872, an information was heard preferred by Paul Stephen Cooper (hereinafter called the respondent) against Joseph Jones (hereinafter called the appellant), under the 24th sect of an Act of Parliament passed in the year 1872, 35 & 36 Vict. c. 94, intituled, "An Act for Regulating the Sale of Intoxicating Liquors," and which received the Royal assent on 10th Aug. 1872, and is called the Licensing Act 1872.

The following is a copy of sect. 24 of the Act:—

Subject as hereinafter mentioned, all premises on which intoxicating liquors are sold, or exposed for sale by retail, shall be closed as follows, that is to say:

(1.) [This subsection relates to the City of London, or the liberties thereof, and does not apply in any way to the present case.]

(2.) If situated beyond the city of London and the liberties thereof, and the parishes or places subject to the jurisdiction of the Metropolitan Board of Works, or beyond the four mile radius from Charing-cross, on Sunday, Christmas Day, and Good Friday, during the whole day, before the hour of half-past twelve (or if the licensing justices direct, one) in the afternoon, and between the hours of half-past two (or if one be the hour of opening, then three) and six in the afternoon, and after the hour of ten (or if the licensing justices direct, any hour not earlier than nine, and not later than eleven) at night, and on all other days before the hour of six (or if the licensing justices direct, any hour not earlier than five, and not later than seven) in the morning, and after the hour of eleven (or if the licensing justices direct, any hour not earlier than ten and not later than twelve) at night.

Any person who sells or exposes for sale, or opens or keeps open, any premises for the sale of intoxicating liquors during the time that such premises are directed to be closed by or in pursuance of this section, or during such time as aforesaid allows any intoxicating liquors to be consumed on such premises, shall, for the first offence be liable to a penalty not exceeding 10*l.*, and for any subsequent offence to a penalty not exceeding 20*l.* Any conviction for an offence against this section shall be recorded on the license of the person convicted, unless the convicting magistrate or justices shall otherwise direct.

None of the provisions contained in this section shall preclude a person licensed to sell any intoxicating liquor to be consumed on the premises from selling such liquor to *bona fide* travellers, or to persons lodging in his house. Nothing in this section contained shall preclude the sale at any time, at a railway station, of intoxicating liquors

to persons arriving at or departing from such station by railroad.

An order for the alteration of the closing hours in pursuance of subsection two of this section may be made by the licensing justices at any General Annual Licensing Meeting, or any adjournment thereof, held in pursuance of the Act of 9 Geo. 4, c. 61; and also in Middlesex or Surrey, at any time, before the next General Annual Licensing Meeting at any special sessions summoned for the purpose, provided that twenty-one days at the least before any such meeting or adjournment, notice be given, in the same manner as is prescribed by the last-mentioned act for the holding of such meeting or adjournment, that the alteration of the closing hours will then be considered: Provided that no order allowing licensed premises to remain open after the hours of ten at night, on Sunday, Christmas day, or Good Friday, or after the hour of eleven at night on other days, shall, as to such allowance, apply to premises in respect of which a certificate is in force, under The Wine and Beerhouse Acts 1869 and 1870.

Provided further, that premises in respect of which such certificate is in force, if situated in a town containing less than 2500 inhabitants, and beyond the city of London, and the liberties thereof, and the parishes or places subject to the jurisdiction of the Metropolitan Board of Works, or beyond the four-mile radius from Charing-cross, shall not on any day be open after the hour of ten at night.

Any order made by the licensing justices for the alteration of closing hours, shall not come into operation until the expiration of one month after the date thereof, and in the meantime shall be advertised in such manner as the licensing justices shall direct.

The borough of Kidderminster contains a population of upwards of 19,000, and is situated beyond all the places mentioned in sub-section 2.

No alteration has been made by the licensing justices for extending the hours for keeping open licensed premises beyond the times fixed by the Act.

The information against the appellant was dated 23rd Sept. 1872, and stated that on the 18th September, 1872, at the borough of Kidderminster, in the county of Worcester, one Joseph Jones, then being a duly licensed ale-house keeper, at his house and premises there situate, known by the sign of the Land Oak, did then and there unlawfully allow intoxicating liquor to wit, beer, to be consumed on his said premises before the hour of six in the morning of the said day, to wit, at the hour of two in the morning by persons not being *bona fide* travellers, or persons lodging in his said house, contrary to the statute in that case made and provided.

The appellant held a licence from the Justices, granted to him on the 25th Aug. 1871, of which the following is a copy, and which was renewed by the Justices since the passing of the Licensing Act, 1872, namely on the 30th Aug. 1872, for the ensuing year.

The following is a copy of the licence granted to appellant in 1871:

[Boro' of Kidderminster, county of Worcester.] At the general annual licensing meeting of Her Majesty's Justices for the borough of Kidderminster, in the county of Worcester, holden at the Guildhall, in the borough of Kidderminster, on the 25th Aug. 1871, for the purpose of granting licences to persons keeping inns, alehouses, and victualling-houses, to sell exciseable liquors by retail to be drunk or consumed on their premises. We being three of Her Majesty's justices of the peace acting for the said borough, and being the majority of those assembled at the said meeting, do hereby authorise and empower Joseph Jones, now dwelling at Land Oak in the said borough, and keeping an inn, alehouse, or victualling-house, at the sign of the "Land Oak" in the said borough, to sell by retail therein, and in the premises thereunto belonging, all such exciseable liquors as the said Joseph Jones shall be licensed and empowered to sell under the authority

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and permission of any excise licence, and to permit all such liquors to be drunk or consumed in his said house, or in the premises thereunto belonging; provided that he do not fraudulently dilute or adulterate the same, or sell the same knowing them to have been fraudulently diluted or adulterated, and do not use in the selling thereof any weights or measures that are not of the legal standard, and do not wilfully or knowingly permit drunkenness or other disorderly conduct in his house or premises, and do not knowingly suffer any unlawful games, or any gaming whatsoever, therein, and do not knowingly permit or suffer persons of notoriously bad character to assemble and meet together therein; and do not keep open his house except for the reception of travellers; nor permit or suffer any beer, or other excisable liquor, to be conveyed from or out of his premises during the usual hours of the morning and afternoon Divine Service in the church or chapel of the parish, or place, in which his house is situated, on Sundays, Christmas Day, or Good Friday: but do maintain good order and rule therein; and this licence shall continue in force from the 10th Oct. next until the expiration of one whole year thence next ensuing and no longer. Provided that the said Joseph Jones shall not in the meantime become a sheriff's officer, or officer executing the powers of any court of justice: in either of which cases this licence shall be void.

Given under our hands and seal on the day and at the place first above written—Samuel Lovey (L.S.), William Cowen (L.S.), C. E. Jeffries (L.S.).

Upon the hearing of the information, evidence was given in support of it sufficient to satisfy the magistrates that the appellant was guilty of the offence with which he was charged.

Upon the hearing the appellant was present with his attorney, who did not dispute the facts as proved by the respondent; but he contended that the appellant was entitled under the licence of 1871 to keep his house open at all times except Sundays, Good Fridays, and Christmas day, as mentioned in the licence, notwithstanding that the Act of 1872 came into operation on the day on which it received the Royal assent, viz., the 10th Aug., and notwithstanding the 24th sect. of the said Act before mentioned fixing the hours of closing; and he contended that the appellant had acquired such right under such licence, and under subsect. 3 of sect. 75 (the repealing section) of the Licensing Act 1872.

The following is the repealing section (75) of the Licensing Act 1872:

The several Acts set forth in the second schedule hereto shall be repealed to the extent to which such Acts aret herein expressed to be repealed, and in particular there shall be repealed so much of the Wine and Beer-houses Acts as makes such Acts temporary in their duration, and the said Acts shall henceforth be perpetual.

Provided that the repeal enacted in this Act shall not affect:

First,—Any security given before this Act comes into operation.

Secondly,—Anything duly done before this Act comes into operation.

Thirdly,—Any right acquired or liability accrued before this Act comes into operation.

Fourthly,—Any removal of a licence or certificate in pursuance of the second section of Intoxicating Liquor Licensing Suspension Act 1871.

Fifthly,—Any penalty, forfeiture, or other punishment incurred, or to be incurred, in respect of any offence committed before this Act comes into operation.

Sixthly,—The institution of any legal proceeding, or any other remedy for ascertaining, enforcing, or recovering any such liability, penalty, forfeiture, or punishment as aforesaid.

Provided also that in the case of persons intending to apply for Billiard Licences under the Act of 8 & 9 Vict. c. 109, intituled An Act to amend the law concerning games and wagers, or for the transfer of such licences, the same notices shall be given as are by this Act required in the case of licences as defined by this Act, or as near thereto as circumstances admit; and any

person convicted of an offence against the tenor of a billiard licence, or of any offence declared by the last mentioned Act to be an offence against the tenor of a licence as defined by this Act, shall be punished under this Act in the same manner in all respects as a licensed person within the meaning of this Act is punishable under this Act for suffering any gaming or any unlawful game to be carried on on his premises; and in construing the last mentioned Act any reference to the Intoxicating Liquor Licensing Act 1828, shall be construed to refer to that Act as amended by this Act.

The repealed sections of 9 Geo. 4., under which the licence of 1871 was granted, are 6, 10, 11, so much of sect. 13 as relates to the form of licence, sections 18, 19, 20, 21, 22, 23, 25, 26, 27, 28, 29, except so far as the three last-mentioned sections relate to the renewal of licences, or to the transfer of licences under sects. 4 and 14 of the same Act; also sects. 31, 32, 33, and 34.

Notwithstanding the contention on the part of the appellant's attorney, the justices, being of opinion that the terms of the licence granted to the appellant at the general annual licensing meeting, in 1871, in so far as it was repealed, altered, or varied by the Licensing Act 1872, took effect from the passing of the Licensing Act 1872, held that the said appellant did not acquire any right within the meaning of the word, as used in sub-sect. 3 of sect. 75 of the said Act under such licence to allow intoxicating liquors to be consumed on his premises during the prohibited hours mentioned in the 24th section of the Licensing Act, 1872; and they accordingly gave their determination against the said appellant, and convicted him in the penalty of 40s. and costs, or, in default of payment, to be imprisoned in the House of Correction at Worcester, and there kept to hard labour for the space of fourteen days, unless the said several sums should be sooner paid; and they ordered the conviction of the said appellant to be indorsed on his licence.

The question of law for the opinion of the court was as follows:

Whether the appellant under the licence granted to him at the general annual licensing meeting, held on the 25th Aug. 1871 (expiring 10th Oct. 1872), could still keep his house open as before the passing of the Licensing Act 1872 (and under the circumstances stated in this case) until the 10th Oct. 1872, as a right acquired under such licence coming within the terms of sub-section 3 of sect. 75 of the Licensing Act 1872.

If the court should be of opinion that the justices were right in convicting the appellant, as before stated, then the conviction was to stand; but if the court should be of opinion otherwise, then the conviction against the appellant was to be quashed.

And the court is humbly solicited, according to the power vested in the court by the said statute 20 & 21 Vict. c. 43, to remit the case to them the justices, with the opinion of the court thereon, or to make such other order as to the court may seem fit.

T. S. Pritchard argued for the appellant according to the contention before the justices: he also relied upon sect. 48, by which "every licence granted after the commencement of this Act shall be in such form as may from time to time be prescribed by a Secretary of State. Provided, that licences granted at any general annual licensing meeting or adjournment thereof, between the 20th Aug. and the end of Sept. 1872, shall be in the forms heretofore in use, but any conditions con-

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tained in any licence so granted, which are contrary to the provisions of this Act, shall be of no effect."

The respondent did not appear.

BLACKBURN, J.—I think in this case the construction of the Licensing Act is not very clear. We have had reason before to know that the Act was not carefully drawn, and there is certainly some difficulty in the point here raised. It is contended that the appellant under his licence of 1871, took a vested interest until that licence expired, which was not before Oct. 1872. The 23rd section of the Licensing Act 1872, provides power to justices to close licensed houses in case of riot, and imposes a penalty not exceeding £50 on any person keeping his premises open during any time at which the justices have ordered them to be closed. Part of this is a mere re-enactment of the old law, and part of it is new legislation. It seems quite plain that the latter part, which is new, came into operation with the former, immediately upon the passing of the Act. The 24th section causes the closing of these houses at an hour earlier than that required by licences of the previous year, and it interferes with the vested rights of licensed victuallers. The Legislature at first sight, therefore, would be expected to say that they should have some notice of the change, and one looks naturally for some further provision; but nothing of the kind is expressly stated. The 2nd sub-section relates to places beyond the Metropolitan district, and fixes definite times for closing, with alternative hours if the licensing justices direct. Subsequently, it provides that any order by justices for alteration of closing hours shall not come into operation until a month after it is made; but it does not seem to me to affect the time at which the Act generally is to come into operation: it merely prevents the justices' direction as to different hours from coming into force for a month. The provisions as to closing premises, are without condition of any kind, except as to the alternative hours which justices may fix, and I can see nothing to limit the operation of the Act after its commencement in places where the licensing justices have not adopted any hours for closing, different from those fixed by the Act. There is no condition in the old licence that the appellant shall be allowed to open his house to any particular time, and no hour has been specially adopted by the justices in his district. I think, therefore, that in his case, the Act came into operation at once upon its passing. I cannot see that the 48th section affects this matter, for it relates only to licences granted between the 20th Aug. and the end of Sept. in the year 1872. I think, therefore, the justices were right, although I cannot say that the matter is free from doubt.

QUAIN, J.—I am sorry I cannot agree with my brother Blackburn. I do not think the Act was intended to apply to the then current licences. It is a recognised principle of legislation that vested rights should be attended to, and there are no express words applying to this case. By his old licence the appellant had a right to keep open his house during all hours of the week, except at certain times on Sundays, as long as the licence lasted. In the 24th section, the Legislature deals with licences granted by justices having power to alter the hours for opening and closing, and it strikes me that the section relates to future licences only. I am fortified in that opinion by

the 48th section which provides that licences granted in Aug. after the 20th, and in Sept. 1872 "shall be in the forms heretofore in use, but any conditions contained in any licence so granted which are contrary to the provisions of this Act shall be of no effect." Now if the statute itself had destroyed such conditions in all licences, these words would be wholly unnecessary, and indeed could not apply; if the 24th section was intended to come into operation on the 10th August, a licence granted between the 20th Aug. and the end of September, although in the old form, would have no effect so far as related to any conditions it contained contrary to the provisions of this Act; and the proviso in this 48th section would be superfluous. Again, it is argued that sect 75, which repeals previous licensing Acts, but saves, amongst other things "(3) Any right acquired, or liability accrued, before this Act comes into operation," does not apply to licences then current. On this point my opinion is not strong; I entertain some doubt whether this case comes within either of the exceptions to that section; the statute 9 Geo. 4, c. 61, which authorises the licence at that time enjoyed by the appellant, and which empowered him to keep his house open at all hours on week days, is expressly repealed by that section, and it seems to me, although I have not a strong opinion about it, that this is a right which the appellant acquired under that statute. At all events there is some foundation for the argument that this right is saved by the proviso to this repeal clause. When I consider the importance of this privilege to the appellant, and the serious penalty imposed upon a breach of the new conditions by indorsement of a conviction upon the licence, and because there are no words in the Act expressly curtailing the effect of previous licences, I conclude that this is a case not within the Act, and that the appellant ought not to have been convicted.

ARCHIBALD, J.—I agree with my brother Blackburn; I think the 24th section was intended to come into force immediately upon the passing of the Act, and without any order of justices. A certain time, a month's notice, is prescribed if the licensing justices alter the hours. There is nothing but I can see in the preamble, or in the enacting part of the statute, to confine the application of this legislation to future licences. It might have been equitable to protect licences in existence under former Acts, but I think as it is drawn we are bound to give effect to this Act in relation to all licences. The strongest argument against this view, as it seems to me, is that deduced from the 48th section; but it is not sufficient to override the express provisions of the 24th. As to the repealing section, I think the 24th must take effect without reference to any repeal of former Acts, and moreover I do not think this was a right acquired within the meaning of the saving clause relied upon. It appears to me that the conviction was right.

Judgment for respondent.

Attorneys for appellant, H. J. and T. Child, for Saunders, Jun., Kidderminster.

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REG. v. THE MAYOR, &c., OF LIVERPOOL.

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Monday, May 5, 1873.

REG. v. THE MAYOR, &c., OF LIVERPOOL.

Municipal corporation—Application of borough funds—Public benefit of inhabitants—Surplus—5 & 6 Will. 4, c. 76, s. 92.

During the progress of the Liverpool Tramways Act 1871 through Parliament, the Liverpool Town Council authorised the Town Clerk to make terms for the purchase of tramways with the company promoting the Bill. Amongst other terms of arrangement he agreed that the corporation should pay the expenses of the Bill if they resolved to take the tramways according to their powers in the Bill. The council consented to these terms, and after the Act was passed resolved to take the tramways; they afterwards resolved to pay the expenses agreed to. The surplus of the borough funds in the year of these resolutions was less than the amount of the expenses, but in the subsequent years the surplus was greater than that amount.

Held upon mandamus to the Town Council to pay these expenses that there was nothing in the Municipal Corporations Act 1835 to prevent the payment of this claim.

On the 30th Jan. H. Lloyd, Q.C. on behalf of the Liverpool Tramways Company obtained a rule nisi calling upon the mayor, aldermen, and councillors of the borough of Liverpool to show cause why a writ of mandamus should not issue directed to them, commanding them to make and deliver to the treasurer of the said borough an order in writing, duly signed and countersigned, as directed by the Act of 5 & 6 Will. 4, c. 76, s. 59, for payment by him to the Liverpool Tramways Company of the sum of 3421l. 6s. 10d. in respect of the expenses incurred in passing The Liverpool Tramways Act 1871, and of the said company's application for a provisional order.

The Liverpool Tramways Company was incorporated by an Act passed in 1868, by which the said company was authorised to construct certain tramways in the borough of Liverpool, and by the 70th section the company was required to assent to any application that might be made to Parliament by the corporation of Liverpool for the purchase of the company's tramways within eleven years of the passing of the Act.

In the year 1870 the company obtained another Act authorising an extension of one of their lines, power being given to the corporation, as in the former Act of 1868, to purchase the extension.

In 1871 a Bill was promoted by the said company for the purpose of enabling the company to construct several other tramways in Liverpool and the neighbourhood. The company had also duly taken the necessary steps preliminary to an application to the Board of Trade for a provisional order under the Tramways Act 1870 authorising the construction of the same tramways.

During the progress of the said Bill through Parliament sundry negotiations took place between the directors of the said company, and the general and parliamentary committee of the council of the borough of Liverpool, and in February 1871 an interview took place between a deputation appointed for the purpose by the said parliamentary committee on behalf of the said council, and the chairman and solicitor of the said company. At this interview terms of arrangement were dis-

cussed, and eventually agreed upon, by which a clause was to be inserted in the Act entitling the corporation to a transfer of the company's powers with respect to all the lines, except that along Whitechapel, "upon notice within six months after the passing of the Act, upon payment of the company's parliamentary expenses incurred in obtaining the Act of 1871, and in connection with the application for the provisional order."

On the 8th March 1871, a resolution was duly passed by the council of the borough, "That the recommendation to withdraw further opposition to the Liverpool Tramways Bill on the tramways company acceding to the terms of arrangement recommended by the committee, and securing their insertion in the Bill, be approved."

Subsequently an agreement was finally settled and agreed to, and one part was signed for the corporation of Liverpool by the town clerk. In this agreement the terms of arrangement previously mentioned were embodied, and in pursuance of the agreement sections 7 and 27 were inserted in the Bill which was afterwards passed on the 24th July, 1871, 34 & 35 Vict. c. clvii, (The Liverpool Tramways Act 1871).

Although no mention is made in the Act of Parliament as to the agreement by the corporation to pay the expenses of promoting the Act, it formed part of the agreement signed by the town clerk, and it was stated in two reports drawn by the town clerk upon direction of the council.

On the 4th Oct. 1871, the council duly resolved, "That the council do hereby elect to assume the the powers to construct and maintain the tramways within the borough (except the Whitechapel route) authorised by the Liverpool Tramways Act 1871, pursuant to the provisions for that purpose contained in the 7th section of that Act." Upon notice of this resolution to the said company, the expenses payable by the corporation under the aforesaid agreement, were referred to an arbitrator, Mr. Hall, who settled them at 3421l. 6s. 10d.

In 1872 the Corporation of Liverpool obtained the passing of the Liverpool Tramways (Purchase) Act, enabling them to carry out the above resolution of the council.

On the 14th Aug. 1872, the council duly passed a resolution "That the account of expenses of obtaining the Act (of 1871) as allowed, amounting to 3421l. 6s. 10d., and Mr. Hall's charges 34l. 5s. 2d., be paid."

Objection to the payment of this sum to the said company was afterwards made by some ratepayers, and no order or writing for payment of the said sum had been signed by three members of the council, and countersigned by the town clerk, as required by 5 & 6 Will. 4, c. 76, s. 59, for the payment of borough funds. The corporation now refused payment.

It was stated in the affidavit of the chairman of the said company, that he believed that from the 14th Aug. 1872 hitherto, there had always been a surplus of the Liverpool Borough Fund more than sufficient for the amount claimed; it appeared, however, by the affidavit of the borough treasurer, that on the said 14th Aug. 1872, the surplus of the borough fund, which had not been applied under the direction or by resolution of the council, for the public benefit of the inhabitants, and improvement of the said borough, amounted to the sum of 81l. 14s. 6d., and no more; and that the amount of the

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surplus not applied as aforesaid, on the 18th April 1873, the date of the affidavit, was 3876l. 3s. 11d.

The town clerk of the borough of Liverpool stated by affidavit, that the question of paying the costs claimed by the Tramway Company out of the surplus income of the borough fund, was not raised or considered at the meeting of the council on the said 14th Aug. 1872, and that all grants or payments from time to time made out of the said surplus income, are always expressed to be so made in the respective resolutions authorising such payments.

By sect. 33 of the Liverpool Tramways Act 1871, "All costs, charges, and expenses of and incident to the preparing for, obtaining, and passing of this Act, or otherwise in relation thereto, shall be paid by the company."

Milward, Q. C., Herschell, Q. C., and Gully showed cause on behalf of the Liverpool Town Council.—The arrangement by the town clerk, and the resolution of the council both required a provision in the local Act for the payment of these costs; and whatever was the object of omitting to insert such a clause, it clearly was never intended to pledge the surplus of the borough fund, the existence of which at that time could not have been known. Moreover the surplus of the year in which the resolution to pay these costs was passed, amounted to about 80l., and the case therefore comes within the authority of *Reg. v. The Mayor of Sheffield* (L. Rep. 6 Q. B. 652). There some orders of a town council for the payment of the expenses of the opposition before Parliament of a water Bill, were moved for on *certiorari*, and it was held that, assuming the objects for which the expenses were incurred to be for the public benefit of the inhabitants of the borough, yet they could not come within the clause which enabled the town council to apply the funds for the public benefit of the inhabitants of the borough, as there was no surplus. That clause in sect. 92 of the Municipal Corporation Act 1835 (5 & 6 Will 4, c. 76), which provides for the application of a borough fund in payment of salaries of the officers, expenses of burgess lists, prosecutions, &c., "and of all other expenses not herein otherwise provided for, which shall be necessarily incurred in carrying into effect the provisions of this Act; and in case the borough fund shall be more than sufficient for the purposes aforesaid, the surplus thereof shall be applied, under the direction of the council, for the public benefit of the inhabitants and improvement of the borough." It may also be contended that this was not an expenditure for the public benefit of the inhabitants or the improvement of the borough; the opposition, indeed, on the part of the ratepayers is on this ground. Further, this rule does not apply for the remedy provided by 7 Will. 4 & 1 Vict. c. 78, s. 44, for such a matter as this.

H. Lloyd, Q. C., Pope, Q. C., and B. G. Williams, appeared to support the rule, but were not heard.

BLACKBURN, J.—The question whether this is the right remedy to adopt under the circumstances is for the prosecutors to decide at their peril; all that we are required to do now is to give judgment on the merits of the case. It seems that a resolution by the town council was passed approving of the terms of arrangement entered into by the town clerk with the tramways company, by which, amongst other things, the corporation was to pay the expenses of the com-

pany's Act of Parliament, if the corporation should resolve to take the tramways. The corporation knowing the terms of the agreement resolved to take the tramways, obtained an Act for the purpose, and afterwards resolved to pay the expenses of the company's Act as fixed by arbitration. The question now raised is, whether the town council has power to pay this sum. The general rule is, that bodies corporate must fulfil their contracts unless forbidden distinctly by some statute. Here this municipal corporation is subject to 4 & 5 Will. 4, c. 76, and the amount claimed cannot be paid out of the borough fund as an expense necessarily incurred in carrying into effect the provisions of that Act; but the 92nd section proceeds to provide for a surplus which is to be applied under the direction of the council for the public benefit of the inhabitants and improvement of the borough. It seems to me that the *Sheffield* case goes no further than this; if there is no surplus, an expense which is not within the terms, "carrying into effect the provisions of the Act," cannot be paid by order of the council out of the borough funds. Here, however, there is annually a large surplus, and although in one particular year it might be insufficient for this claim, there can be no doubt that the great borough of Liverpool can pay as much without a special borough rate. It is said that it ought to be expressly resolved to pay this particular sum out of the surplus, but although that may be the usual practice, it is nowhere rendered necessary. I construe the Act to mean that when a town council has contracted a debt for the benefit or improvement of the inhabitants of the borough, there is nothing to prevent its being paid whenever there is a surplus after satisfaction of the provisions of the Act. No subsequent town council can repudiate their predecessors' debts. Then is this a contract for the public benefit of the inhabitants and improvement of the borough? The council have admitted it to be so by agreeing to take the tramways; and the Legislature has so held by passing these Acts. I see no reason why the corporation should not pay the money claimed. The rule for a *mandamus* therefore must be absolute.

QUAIN, J.—I am entirely of the same opinion. I see nothing to prevent the corporation from paying: the council resolved that the town clerk should be authorized to enter into this agreement, and subsequently confirmed the terms of it. I assume from the affidavits that at some time, since the liability was incurred, there has been a sufficient surplus to pay it off. The question of the policy of the expenditure is one for the corporation, subject to the sanction of the Legislature; we must now take it to have been for the public benefit of the inhabitants, and, if so, why should not the corporation pay costs which they would have themselves incurred if they had promoted the Bill? I am clearly of opinion that there is nothing illegal in the council's now paying the claim of the tramway company.

ARCHIBALD, J.—I am of the same opinion. I cannot agree that a contract of this kind is to be fulfilled only if the money be expressly agreed to be paid out of surplus. To contend that there can be no surplus until the accounts are audited is the same thing as to say that a man has no balance at his banker's until his book is made up. If it can be shown that this expenditure was not for the public benefit, the corporation will have an oppor-

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tunity of doing so upon the return to the *mandamus*.

Rule absolute.

Attorneys for the prosecutors, *G. L. P. Eyre and Co. for Garnett and Tarbet*, Liverpool.

Attorneys for the defendants, *F. Venn and Son*, for *J. Rayner*, Town Clerk, Liverpool.

COURT OF COMMON PLEAS.

Reported by H. F. POOLLEY and JOHN ROSE, Esqrs.,
Barristers-at-Law.

Nov. 16, 1872, and Feb. 24, 1873.

HARVEY v. WALTERS.

Easement—Eavesdrop—Change in the mode of enjoyment—Trespass.

The plaintiff had by user acquired a right to have his eaves and gutter project over the defendant's land, and to enjoy an eavesdrop therefrom upon the defendant's land. He subsequently altered the position of his eaves and gutter by raising his wall three or four courses of bricks, and replacing the eaves and gutter at this higher elevation:

Held, that there being no evidence to show that any greater burden was cast upon the servient tenement by the alteration, the plaintiff had not thereby lost his easement.

Thomas v. Thomas (2 C. M. & R. 34), followed.

THE declaration stated: First count.—That the plaintiff was possessed of a messuage, to wit, a brewhouse, and was entitled to have the light and air enter therein through a certain window in the said brewhouse, and the defendant prevented and obstructed the light and air from entering through the said window into the said brewhouse, by erecting a wall near to and against the said window, whereby the said brewhouse had been rendered dark, unwholesome, and of less value, and the plaintiff would have to incur expense in opening other windows to obtain light and air in the said brewhouse.

Second count.—That the plaintiff was possessed of a messuage, to wit, a brewery, and also of a messuage, to wit, a stable, and that before and at the time of the grievance thereafter alleged, there had been for the necessary use and enjoyment of the said brewery and stable a certain drain, channel, or watercourse, whereby all or a part of the surplus or refuse water arising in the said brewery and stable was used to flow and be carried off, and still of right ought to flow and be carried off therefrom; yet the defendant, well knowing the right of the plaintiff to the said use of the drain, channel, or watercourse as aforesaid, wrongfully and injuriously stopped up and destroyed the same, whereby the said surplus and refuse water was prevented from flowing and being carried away, as it was used and of right ought to be, and was thrown back in the said brewery and stable, rendering the same unwholesome and unfit to be used for the accustomed purpose.

Third count.—That the plaintiff was possessed of a messuage, to wit, a brewery, and a messuage, to wit, a stable, and was entitled to have the rain water that did and might from time to time naturally fall upon certain roofs, part of the said brewery and stable, drop from the eaves of the said roofs upon the land adjoining the said brewery and stable, and to have the said eaves project over the said land, and the defendant wrongfully removed

the said eaves, and by building on the said land close to and higher than the said roofs, prevented the said roofs from having such eaves as aforesaid projecting over the said land, and prevented such rain water as aforesaid from dropping from the said eaves upon the said land, and penned back the same upon the said roofs, whereby the plaintiff's said brewery was rendered wet and unhealthy, and was permanently injured and lessened in value.

Fourth count.—That the plaintiff was possessed of a brewery, and the defendant so negligently conducted herself in and about the erection of buildings in close proximity to the said brewery, that the walls and roofs of the said brewery were injured by the said negligence of the defendant, and the tiles of the said roof, and the spouts for carrying off the rain from the said roof, were damaged, and divers bricks, tiles, mortar, and rubbish fell from the said buildings into and upon the said brewery of the plaintiff, and injured the same, and damaged the goods of the plaintiff therein, whereby the plaintiff was put to expense in repairing the said damage, and lost his said goods and the use of his said brewery for a long time.

Fifth count.—That the plaintiff was possessed of a brewery, and the defendant wrongfully injured the roof of the same by casting and throwing, and causing and procuring to be cast and thrown thereon large quantities of rubbish, whereby the said roof was injured, and certain beer which the plaintiff was lawfully brewing in the said brewery was deteriorated and rendered of no value.

The pleas were: First, not guilty; secondly, not possessed; third plea to second and third counts, that the plaintiff was not entitled as alleged; fourth plea to fifth count, that at the time of the alleged grievance she was possessed of lands adjoining the said brewery, and the plaintiff had wrongfully placed certain tiles and spouting, and a certain part of the roof in the said count mentioned, so that the said tiles and spouting and the said part of the said roof overhung and encumbered the said land of the defendant, wherefore the defendant, as she lawfully might, for the cause aforesaid, removed the said tiles and spouting, and the said part of the said roof, from and off her said land to a small and convenient distance into and upon the said premises of the plaintiff, which was then a convenient place for putting the same, and there left them for the plaintiff's use, doing no unnecessary damage in that behalf, and in removing the said tiles and spouting, and the said part of the said roof, necessarily and unavoidably suffered and permitted certain small portions of the said tiles and spouting, and of the said part of the said roof to fall upon the other parts of the said roof not so removed as aforesaid, which were the alleged grievances in he said count complained of.

The action was tried at the Nottingham Spring Assizes 1872, before Quain, J., when a verdict was found for the plaintiff for 40s. upon the issues joined as to the eaves and gutter, subject to leave reserved to the defendant to move to enter the verdict for her upon those issues, on the ground that the plaintiff, by raising his roof, has lost the right to project his eaves and gutter over the defendant's land. It appeared from the evidence at the trial that the plaintiff and defendant were adjoining owners, and that the plaintiff had acquired by user the right to have the eaves of his

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building project over the defendant's land, but that some time before the action he had taken down his old eaves and rebuilt his wall to a greater height by three or four courses of bricks than its former height, and replaced eaves of the same description and dimensions on the top of the new wall. Upon this the defendant removed some of the plaintiff's spouting, and put back the eaves.

A rule nisi having been obtained, in pursuance of the leave reserved,

Field, Q.C. (with him *J. C. Lawrence* and *Kennedy*), for the plaintiff, showed cause.—There is no dispute that the plaintiff had for a long time enjoyed the right of eavesdrop from his roof on the defendant's land and had thereby acquired an easement. The only question is whether by raising the roof he had lost this easement. The evidence showed that the raising of the wall was to the extent of three or four courses of bricks only, and that the eaves after the alteration occupied exactly the same position with respect to the wall as before. The jury were not asked whether the alteration increased or varied the charge upon the servient tenement. I contend that inasmuch as there was no proof that the alteration injuriously affected the defendant's property, the easement was not lost. So far from his property being injuriously affected, it seems likely that the additional height of the wall (supposing it produced any appreciable effect) would cause the water to become more dispersed in falling, and therefore less likely to cause damage. The mere fact of an alteration having been made does not throw upon the plaintiff the onus of proving that the alteration was harmless or inappreciable. *Thomas v. Thomas* (2 Cr. M. & R. 34) was a case very similar to the present, and indeed is not distinguishable from it. There the plaintiff's wall had been covered with pantiles, which projected several inches, and upon the building being accidentally burnt, the wall was raised about three feet and thatched, the thatch projecting some inches further than the pantiles had done. It was insisted, with regard to the eavesdropping, that by the alteration made by the plaintiff in the height of the wall, and the substitution of the thatched for the tiled roof, the right to the easement had ceased. But the court held that the right was not destroyed. According to the civil law, the easement of "stillicidium" was not lost by raising the height of the eaves, on the ground that the servitude thereby became lighter. "Stillicidium, quoquo modo acquisitum sit, altius tolli potest; levior enim fit eo facto servitus—cum quod ex alto cadet lenius et interdum directum, nec perveniet ad locum servientem—inferius dimitti non potest, quia fit gravior servitus, id est pro stillicidio flumen. Eadem causâ retro duci potest stillicidium; quia in nostro magis incipit cadere; produci non potest, ne in alio loco cadat stillicidium quam in quo posita servitus est; lenius facere poterimus, acrius non. Et omnino sciendum est meliorem vicini conditionem fieri posse, deteriorem non posse: nisi aliquid nominatim, servitute imponenda, immutatum fuerit." (L. 20, § 5 ff, de serv. præd. urb., cited in *Gale on Easements*, 4th edit, p. 559.)

Hale v. Oldroyd, 14 M. & W. 789;

Hall v. Swift, 4 Bing. N. C. 381, were also cited.

Cave, for the defendant.—The alteration made by the plaintiff in the position of the eaves changed

the mode of enjoyment of the easement, and thereby destroyed it. In *Thomas v. Thomas*, the point for which that case has been cited appears to have been very slightly urged, and consequently but little considered by the court: (*Gale on Easements*, 4th edit. p. 554.) By putting out new eaves in a fresh place the plaintiff committed an actual trespass, for "cujus est solum, ejus est usque ad cælum." In *Fay v. Prentice* (1 C. B. 835), where the plaintiff had erected a cornice on his messuage, which projected over the defendant's garden, *Maule, J.*, said: "I think there is no doubt that trespass would lie here." The principles of law with regard to loss of an easement by encroachment are thus stated by Mr. Gale: "It is directly admitted in many of these cases, and in none is it denied—that the right of the owner of the dominant tenement to make alterations in the mode of his enjoyment is in all cases subject to the condition, that no additional restriction or burden be thereby imposed on the servient heritage—and although when the amount of excess can be ascertained and separated, as in the case of estovers, such excess alone is bad, and the original right will nevertheless remain; yet in those cases, where the original and excessive uses are so blended together that it would be impossible, or even difficult to separate them, and to impede the one without at the same time affecting the enjoyment of the other, the right to enjoy the easement at all appears to be lost so long as the dominant tenement remains in its altered form. It is admitted by the Court of King's Bench, in the case of *Garritt v. Sharp* (3 Ad. & Ell. 325; 4 Nev. & M. 834), that 'the mode of enjoying an easement might be so changed as to defeat the right altogether;' and it would seem on principle that this consequence should ensue, at all events to the above extent, wherever a material injury is caused to the owner of the servient tenement by the alteration, and the original and usurped enjoyments are so mixed together as to be incapable of being separately opposed." (*Gale on Easements*, p. 555.) The onus is always thrown on the person who chooses to make such a change to show that he is not exceeding the grounds of the original grant. By the civil law, if the owner of the dominant tenement changed his roof from one of tile to one of plank, he lost his easement. "Si antea ex tegula cassitaverit stillicidium, postea ex tabulato vel ex alia materie cassitare non potest." (L. 20, § 4 ff, de serv. præd. urb. cited in *Gale on Easements*, p. 559.)

Field, Q.C., in reply, cited *Pickering v. Rudd* (4 Campb. 219). There the defendant had nailed upon his house a board, which projected several inches from the wall, and so far overhung the defendant's garden. Lord Ellenborough thought that it was not a trespass to interfere with the column of air superincumbent on the close. His Lordship thought that if it were so, an aeronaut would be liable to an action of trespass *quare clausum fregit* at the suit of the occupier of every field over which his balloon passed; and that if any damage arose, the remedy was by action on the case. [*BOVILL, C.J.*—At that time it was not so clearly understood that it was a trespass to interfere with air.]

Feb. 24, 1873.—The judgment of the COURT (*Bovill, C.J.*, *Grove* and *Denman, JJ.*), was delivered by *GROVE, J.*—This action was tried before *Quain, J.*, at the Nottingham Spring Assizes for 1872, when a verdict was found for

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the plaintiff, subject to a point reserved upon the third count of the declaration, which was for an interference with a right of eavesdropping from a roof of the plaintiff's upon the defendant's premises. A rule was subsequently obtained by Mr. Cave, on the part of the defendant, to enter the verdict for her upon the issues on this point, on the ground that the plaintiff, by raising his roof, had lost his right to project his eaves and gutters over the defendant's land, and that is the only point which is open to the defendant upon the present rule. The question was reserved at the trial, in order to enable the defendant to take the opinion of the court upon the point raised in *Thomas v. Thomas* (2 Cr. M. & R. 34). But for the alteration, the right to the easement was established by the evidence and the verdict of the jury. In 1867 the plaintiff made some alteration in his building, by which the eaves were raised higher by three or four courses of bricks; but the extent of projection of the eaves remained as before the alteration. Things being in this state, the defendant, shortly before the time of the action, removed some spouting, and put back the eaves to make room for some buildings which she erected, and thereby damaged the plaintiff by causing the water which had flowed off to percolate into crevices, and obliging him to construct a new gutter along the roof. It was contended by Mr. Cave, on behalf of the defendant, that by the change in the position of the eaves in 1867, the mode of enjoyment was changed, and the easement destroyed. Mr. Field, on the other hand, contended, on the authority of *Thomas v. Thomas*, that, there being no substantial variance in the enjoyment, the right to the easement was not affected. In that case, which was very similar to the present, and not distinguishable in principle from it, it was held that the raising a wall about three feet, from which water dropped on the servient tenement, and also slightly increasing the projections by substituting thatch for pantiles, did not destroy the easement. It was, however, urged by Mr. Cave, that on the principle of *cujus est solum ejus est usque ad cælum*, there was no trespass in this case which the person trespassed on had a right to abate. Mr. Field, *contra*, contended that the point did not arise upon the rule, and that in the case of *Pickering v. Rudd* (4 Campb. 219), Lord Ellenborough held, that for nailing a board so as to overhang the plaintiff's close, the proper remedy was case and not trespass, and assuming the point as to trespass to be open to the defendant upon this rule, which was granted only on the point reserved at the trial, the original projection would seem to be the real trespass, and the projection above it a mere user of the space taken possession of by such trespass. The real, and indeed the only point reserved however, is, whether the easement was destroyed by the alteration. It is difficult to see how the mere raising of the eaves, which would if anything cause the water falling from them to become more dispersed, could affect injuriously the defendant's property. No real difference was pointed out to us in the effect of the slight raising of the height of the eaves, and it did not appear that any greater burden was thereby cast upon the servient tenement, and in the civil law it was considered that the raising of the eaves diminished instead of increasing the burthen of the *servitus* in the passage cited by Mr. Field. It appears to us that to hold that any, even the

slightest, variation in the enjoyment of an easement, would destroy the easement, would virtually do away with all easements, as by the effect of natural causes some change must take place; thus water percolating or flowing would produce some wear and tear, and alter the height or width of the conduit, so would weather, alternations of heat and cold, &c. In the case of ancient lights, changes in the transparency of glass, wear and tear of frames, growths of shrubs, &c., would produce effects which would vary the character of the enjoyment. In the user of a footpath, the footsteps would never be in the same line or confined accurately to the same width of road. We are of opinion that the question here, as in *Hall v. Swift* (4 Bing. N. C. 381), and other cases, is, whether there has been a substantial variance in the mode or extent of user or enjoyment of the easement, so as to throw a greater burthen on the servient tenement. In the language of Sir Richard Kindersley, and which was adopted by the Master of the Rolls in the late case of *Heath v. Bucknall* (20 L. T. Rep. N. S. 550; 8 L. Rep. Eq. 5), there must be an additional or different servitude, and the change must be material either in the nature or in the quantum of the servitude imposed. It was not suggested, nor was there any evidence, that any such additional burthen had been cast upon the defendant's premises by the alteration in this case, and therefore we are of opinion that the defendant is not entitled to have that verdict entered in her favour upon the issues in question, and that the present rule must be discharged.

Rule discharged.

Attorneys for plaintiff, *Field, Roscoe, and Co.*

Attorneys for defendant, *Purkis and Perry*, for *W. Williams*, Nottingham.

Wednesday, April 7, 1873.

HARDWICKE (app.) v. BROWN (resp.).

Town councillor — Composition with creditors — Disqualification — Resignation of office — Publication thereof — Re-election — Eligibility for — 5 & 6 Will. 4, c. 76, s. 52; 32 & 33 Vict. c. 62, s. 21; 32 & 33 Vict. c. 71, s. 126.

Respondent, a town councillor of a municipal borough, agreed with his creditors under sect. 126 of the Bankruptcy Act 1869, that they should accept a composition of 3s. 6d. in the pound, payable in instalments secured by the promissory notes of sureties. He then sent in his resignation to the town council; they passed a resolution accepting the same, and, without declaring the office void, held another election, at which the respondent was again elected by a majority of votes. 5 & 6 Will. 4, c. 76 (The Municipal Corporations Act 1846, s. 52), enacts that if any person holding the office of councillor for any borough be declared bankrupt, or shall compound by deed with his creditors, he shall thereupon immediately become disqualified, and shall cease to hold the office, and the council thereupon shall forthwith declare the said office to be void, and shall signify the same by notice in writing affixed in some public place; and the said office shall thereupon become void; but every person so becoming disqualified, and ceasing to hold such office, shall, on obtaining his certificate, or on payment of his debts in full, be capable of being re-elected. By sect. 62 of the Debtors' Act 1869, the above provision as to disqualification of town councillors is ex-

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tended to every composition under the Bankruptcy Act 1869, whether by deed or otherwise. On petition against the election and a case stated, Held, that the respondent was, by the composition, disqualified, and therefore could not resign the office he had ceased to hold; that as the council had not declared the office to be void according to the provisions of 5 & 6 Will. 4, c. 76, s. 52, no valid election could take place; and that the respondent had not become capable of being re-elected within the terms of that section as extended by the Debtors' and Bankruptcy Acts 1869.

A PETITION under the Corrupt Practices Municipal Election Act 1872, was duly presented by the petitioners against the return of the respondent as councillor for the ward of East All Saints, in the borough of Newcastle-upon-Tyne, at an election holden on the 18th Nov. 1872, on the ground that the respondent was disqualified under the circumstances hereinafter stated. And in accordance with the provisions of the Corrupt Practices Municipal Election Acts 1872, sect. 15, sub-sect. 6, and pursuant to an order of Byles, J., dated the 2nd Jan. 1873, the following special case was stated for the opinion of the Court of Common Pleas:—

1. The respondent, Mr. Peter Brown, of Newcastle-upon-Tyne, merchant, was duly elected councillor for the ward of East All Saints, in the borough of Newcastle-upon-Tyne, at an election holden the 1st Nov. 1870, and continued in the said office until his resignation, which took place under the circumstances hereinafter stated.

2. On the 30th July 1872, the respondent and Mr. John Henry Brown, with whom he was at that time in partnership, filed a joint petition under sects. 125 and 126 of the Bankruptcy Act 1869, in the County Court of Northumberland, holden at Newcastle, for the liquidation of their affairs by arrangement or composition with their creditors.

Proceedings were accordingly taken under sect. 126 for a composition of their debts, and at an adjourned meeting of their creditors held on the 12th Sept. 1872, resolutions were passed in the manner provided by the aforesaid 126th section of the said Act of 1869, whereby it was agreed that a composition should be accepted by the said creditors of 3s. 6d. in the pound, payable and secured as appearing in the resolution to that effect. A copy of this resolution was in the appendix to this case. The confirming resolution was duly registered on the 23rd Sept. 1872.

3. Copies of the petition and resolution and other proceedings in the said composition, omitting the names of the assenting creditors, were appended to, and to be taken as part of this case.

4. The respondent and the several persons mentioned in the said resolution, had at the date of the presenting of the petition, the subject of this case, duly performed the several requirements and conditions contained therein, so far as the same had to be performed at the said date, but the respondent had not paid his debts in full.

5. On or about the 4th Nov. 1872, the respondent placed his resignation of his said office in the hands of the town clerk, and announced his said resignation by advertisement on the 6th Nov. following, and by the same advertisement offered himself for re-election in pursuance of a requisition signed by a large number of the inhabitants of the said East All Saints ward.

6. On the 9th Nov. 1872, the annual meeting of the town council was held, and a letter from the respondent resigning his said office was read; thereupon it was moved and seconded that the resignation be accepted. A member of the council thereupon called attention to the circumstances of the proceedings by composition above-mentioned, and to the provisions of the Debtors' Act 1869, s. 21, and the 5 & 6 Will. 4, c. 76, ss. 52, 53, and moved as an amendment: That the respondent, one of the members of this council for the ward of East All Saints, in the borough, having compounded with his creditors under the Bankruptcy Act 1869, this council doth hereby declare his said office of councillor to be void; that the mayor, and the mover, and the seconder of this resolution be, and they are hereby requested to sign, and that the town clerk be, and he is hereby instructed to countersign, a notice declaring the said office to be void, and that such notice be affixed in some public place within the borough. This amendment was not seconded, and the motion that the resignation of the respondent be accepted was carried, and the council did not declare the said office void.

On the 18th Nov. 1872, an election was held for the office of town councillor for the said ward of East All Saints, to fill the vacancy caused as was alleged, by the respondent's resignation. The respondent and other candidates were duly nominated for the said office, and the respondent obtained a majority of 176 votes, 682 votes being given for the respondent, and 546 for the candidate next in order, and the respondent was thereupon declared duly elected by the returning officer.

8. The petitioners contended that the respondent, under the circumstances hereinbefore stated, was disqualified at the time of the said election, by virtue of the provisions of the Municipal Corporation Act (5 & 6 Will. 4, c. 76) ss. 52 and 53, and of the Debtors' Act 1869 (32 & 33 Vict. c. 62) s. 21.

They also contended that the election was irregular and void, in consequence of the council having omitted to declare the said office void in accordance with the 52nd section of the 5 & 6 Will. 4, c. 76 (a).

(a) 5 & 6 Will. 4, c. 76 (The Municipal Corporations Act 1846), s. 52: "Provided always and be it enacted that if any person holding the office of mayor, alderman, or councillor for any borough, shall be declared bankrupt, or shall apply to take the benefit of any Act for the relief of insolvent debtors, or shall compound by deed with his creditors, . . . then and in every such case such person shall thereupon immediately become disqualified, and shall cease to hold the office of such mayor, alderman, or councillor as aforesaid, . . . and the council thereupon shall forthwith declare the said office to be void, and shall signify the same by notice in writing under the hands of three or more of them, countersigned by the town clerk, to be affixed in some public place within the borough, and the said office shall thereupon become void; but every person so becoming disqualified and ceasing to hold such office on account of his having been declared bankrupt or of his applying to take the benefit of any Act for the relief of insolvent debtors, or having compounded with his creditors as aforesaid, shall, on obtaining his certificate, or on payment of his debts in full, be capable (if otherwise qualified) of being re-elected to such office."

6 & 7 Will. 4, c. 104, s. 8, after reciting that no provision is made in the Municipal Corporations Act 1846, for resigning any corporate office on payment of a fine or otherwise, enacts, "that every person elected into any corporate office in any of the said boroughs" (in the schedule to 5 & 6 Will. 4, c. 76 mentioned) "may at any time resign such office on payment of the fine which he

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The questions for the opinion of the court were, first, whether at the time of the said election the respondent was or was not disqualified for election to the said office of town councillor; secondly, whether the election was or was not irregular and void, in consequence of the town council having omitted to declare the said office void as mentioned in the case.

If the court should be of opinion in the affirmative of either or both of these questions, then the respondent should be declared not to have been duly elected, and the said election should be declared void.

If the court should be of opinion in the negative upon both the said questions, the said election should stand and be confirmed.

And it was agreed that the court should make such order as to costs as in their discretion should seem meet.

In the appendix were set out the proceedings under the Bankruptcy Act 1869, and, among them, a resolution by a statutory majority of creditors at a meeting of 22nd Aug. 1872, and by adjournment on the 12th Sept. 1872, whereby they resolved as follows: first, that a composition of 3s. 6d. in the pound shall be accepted in satisfaction of the debts due to the creditors from the said John Henry Brown and Peter Brown. Secondly, that such composition be payable as follows: The sum of 1s. payable at six months from the date of the registration of the resolution confirming this resolution; the sum of 1s. at twelve months from the said date; the sum of 6d. at eighteen months from the said date; the further sum of 6d. at twenty-four months from the said date; and the sum of 6d. at thirty months after the said date. Thirdly, that the said composition and the several instalments thereof be secured by the joint and several promissory notes of the debtors, and certain persons named, and otherwise. Fourthly, fifthly, and sixthly, appointing a trustee, &c.

21st Sept. confirmation by the creditors of the above resolution.

Henry James, Q.C. (with him *F. M. White*) for the petitioner.—First, the respondent was not qualified for election. He has compounded with his creditors. 5 & 6 Will. 4, c. 76, s. 52, disqualifies a town councillor who shall "compound by deed with his creditors," and 32 & 33 Vict. c. 62 (The Debtors Act 1869), s. 21, extends the above sect. 52 "to every arrangement by a town councillor with his creditors under the Bankruptcy Act 1869, whether the same is made by deed or otherwise."

would have been liable to pay for non-acceptance of the same office."

32 & 33 Vict. c. 62 (The Debtors' Act 1869) s. 21, enacts that "The provisions of 5 & 6 Will. 4, c. 76, ss. 52 and 53, as to the disqualification of mayors, aldermen, and town councillors having been declared bankrupt, or having compounded by deed with their creditors, shall extend to every arrangement or composition by a mayor, alderman, or town councillor, with his creditors, under the Bankruptcy Act 1869, whether the same is made by deed or otherwise."

32 & 33 Vict. c. 71, s. 125, provides for liquidation by arrangement of the affairs of a debtor, the appointment of a trustee, the management of the debtor's affairs and his discharge. Sub-sect. 10 enacts, that the trustee shall report to the registrar the discharge of the debtor, and a certificate of such discharge given by the registrar shall have the same effect as an order of discharge given to a bankrupt under this Act. Sect. 126, provides for composition with creditors to be effected by resolution passed by them, &c.

Nor was the respondent capable of being re-elected under the proviso of sect. 52 of the Municipal Corporations Act, for there has been "no payment of his debts in full." If the Legislature intended to make payment of a composition equivalent to payment in full they would have expressly declared it. The intention of the enactment was that municipal offices should be held by solvent persons. Moreover, these proceedings being by way of composition under sect. 126 of the Bankruptcy Act 1869, and not by way of bankruptcy or liquidation by arrangement, the debtor was unable to obtain any discharge which might be treated as a certificate under the earlier Bankruptcy Statutes, and so requalify him within the proviso of sect. 52. Secondly, this was a void election, for the office was not vacant, as the respondent, being disqualified, was not in a position to resign; yet he assumed to do so, and the council accepted such attempted resignation. But they did not publish the statutory notice according to sect. 52 of 5 & 6 Will. 4, c. 76, necessary to render the office void: (*Reg. v. Mayor, &c., of Leeds*, 7 A. & E. 963). He might have legally resigned on payment of a fine by force of 6 & 7 Will. 4, c. 104, s. 8, but he has paid no such fine.

Herschell, Q.C. (with him *Grantham*) for the respondent.—The election was good, and the respondent duly elected. The whole provisions respecting, not only compositions with creditors but, bankruptcy, referred to in sect. 52 of the Municipal Corporations Act 1846, have been extended by the recent legislation. All proceedings by way of composition, liquidation by arrangement, and bankruptcy have been intentionally put on the same footing, and rendered equivalent to the former certificates of discharge, so as to remove the anomaly arising from that Act. If the respondent has either in effect got his discharge in bankruptcy or has paid his debts in full, he is re-eligible. Sect. 28 of the Debtors Act 1869, shows that there may be a composition under a bankruptcy proper, by the trustee accepting a composition. It would be strange if such an arrangement by the trustee made the debtor re-eligible, when a composition without bankruptcy did not. Under the composition section it is the acceptance by the creditors of the accord and satisfaction which is a bar to the debts, not payment in full. Suppose an agreement for a composition by creditors not by deed and not within sect. 126 of the Bankruptcy Act. That clearly would not disqualify the debtor under sect. 52 of the Municipal Corporations Act 1846. The creditors having accepted the promissory notes, is a satisfaction like payment of the composition. Moreover, it is "payment of the debts in full," for such payments need not necessarily be in cash. (He also contended that the office became void by the resignation.)

No reply.

BOVILL, C.J.—By sect. 21 of the Debtors' Act 1869 the provisions of the Municipal Corporations Act, in sects. 52 and 53, as to the disqualification of mayors, aldermen, and town councillors having been declared bankrupt, or having compounded by deed with their creditors, are extended to every arrangement or composition with their creditors, whether the same is made by deed or otherwise. That extension of the provisions of the 5 & 6 Will. 4, c. 76, must be taken to apply, as far as applicable, to the new state of things under the Bankruptcy Act 1869. In that Act there are three kinds of proceedings, viz., an ordinary bank-

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ruptcy, liquidation by arrangement (which is a quasi-bankruptcy), and, thirdly, a composition. The ordinary bankruptcy, and liquidation by arrangement are immediately under the supervision of the Court of Bankruptcy, and are followed by an order of discharge or by something equivalent thereto. But with respect to a composition, no such order is provided. By the Debtors' Act 1869 a distinction is also made between an ordinary bankruptcy and a liquidation by arrangement and a composition; for instance, by sect. 12, of that Act certain punishment is provided for offences committed by absconding with property in cases where a person is adjudged a bankrupt, or his affairs are liquidated by arrangement; but no such provision is made with respect to a person compounding with creditors. How are we to apply the 72nd section of the Act of Will. 4? [His Lordship read the section.] Now, the first question is, what is the effect of bankruptcy or composition by deed under that statute, there being part of the enactment *per quod* the officer disqualified shall cease to hold office, and another part which provides that the office shall "thereupon" become void? It is difficult to see what was the precise intention of the Legislature in making this enactment. Does it mean to say the office shall be void absolutely on the happening of the disqualification, or upon the happening of the disqualification and notice given thereof? It is impossible to reconcile all the provisions of that section; but I think the reasonable construction is to say that on the bankruptcy or composition by deed the party is to become disqualified, and to cease to act in his office. This is quite consistent with the office not being void for the purposes of a new election. Under these circumstances the office would not become void unless notice were given, and as no notice was given in this case, perhaps the office would not be void within the operation of the section. It is contended, however, that there was, in reality, a vacancy created without respect to any such notice being given, on the ground that there was a resignation of the office before notice given, and that was accepted by the corporate body of the borough. Now assuming (what I believe to be the correct view of the law) that there might be a resignation of a corporate officer provided the resignation was accepted by the body, the question arises whether the respondent was in a position to send in a resignation? The view I take of the case answers this, for if he has ceased to hold office, and has no power to exercise its functions, he would have no power to assume that he held the office, and therefore no power to resign. Therefore I think the respondent had no power to resign, and the corporate body no power to accept his resignation. The only mode of creating the vacancy for a new election would be by notice under sect. 52 of the Municipal Corporations Act. I next come to the question whether the disqualification is removed, and whether at the time of this case the respondent was entitled to be elected. That must depend on the latter part of sect. 52, which enacts that the bankrupt or compounding municipal officer "shall, on obtaining his certificate, or on payment of his debts in full, be capable (if otherwise qualified) of being re-elected to such office." Here the respondent has not been declared bankrupt within the meaning of this section, or within sect. 21 of the Debtors' Act 1869. He has

not taken the benefit of any Insolvent Act for the relief of insolvent debtors; but is a person who has compounded with his creditors. Under the Municipal Corporations Act such composition must be by deed, but by the later statute the provisions are expressly extended to every composition "whether by deed or otherwise." It must be an arrangement under the Bankruptcy Act. It was under that Act. The creditors did assent, but not by deed. Therefore I think the case is within the effect and operation of sect. 52 of the Municipal Corporations Act. Then this being a composition, has he "obtained his certificate or paid his debts in full?" It was argued that "obtaining a certificate" is a term applicable to bankruptcy, and that there being no such certificate now, anything equivalent will do. Assume that is so, either that an order of discharge or resolution of creditors would be equivalent to a certificate, where is there anything to show that in case of settlement of the composition it is equivalent to a certificate? Here is a mere resolution for a composition and no discharge, and I think that resolution is placed on the same footing as a composition by deed. Then, can it be said the respondent has paid his debts in full? It seems to me that sect. 52 expressly draws the distinction between composition and payment of debts in full. It is said that what is equivalent to a discharge will suffice. I do not think so, for a composition by deed was binding on the parties as a resolution is now, but yet the former Act said there must be payment in full. Payment in full means payment of the whole amount as opposed to payment of part. Consequently, in my opinion, our judgment should be in favour of the appellant.

KEATING, J.—I am entirely of the same opinion. It appears to me this is a very clear case. Sect. 52 of the Municipal Corporations Act provides that in case a town councillor shall be declared bankrupt, "or shall compound by deed with his creditors," he shall thereupon immediately become disqualified, and shall cease to hold the office, and the council thereupon shall forthwith declare the said office to be void, and shall signify the same by notice in writing under the hand of three or more of them, countersigned by the town clerk, to be affixed in some public place within the borough, and the said office shall thereupon become void." A subsequent Act extended the provisions of this section, which applied only to such a composition with creditors as was made by deed, to persons compounding without deed. Now this later Act must have had in contemplation a compounding under the Bankruptcy Act 1869, and therefore the present respondent who entered into a composition under sect. 126, clearly is brought within the provisions of sect. 52 of the Municipal Corporations Act. If so, then he ceases to hold the office of town councillor. Well, having ceased to hold that office, it became the duty of the mayor and council of the borough to declare the office to be void, and to signify that by notice in writing, and the said office would thereupon have become void. They take, however, a different course, and the respondent having written a letter of resignation, they accept that resignation under the impression that thereby they had got rid of the provisions of sect. 52 with respect to the composition by the respondent with his creditors. I entirely agree with my Lord in the construction he has put upon this section, which at first sight seems a little ambiguous, for it appears that a composi-

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tion being entered into it would, in fact, avoid the office; but it may well be read, as it has been by the Lord Chief Justice, to mean only that the respondent should cease to exercise the duties of his municipal office, and that the vacating of the office would only be consequent on the declaration by the council and publication thereof. If that be so, the office was not *prima facie* void. The present election cannot be good unless it was competent to the town council to make a good election. Now I do not think it can be argued that a town councillor who has been declared by statute to be disqualified can resign his office. It follows, as a necessary consequence, that the present election must be void, for it only proceeded on the supposition that there had been a resignation, and an acceptance of such resignation. Therefore the real question as to whether he became restored or requalified, as it were, scarcely arises. But if it did arise, I quite agree with my Lord that the respondent has not freed himself from the provisions in the earlier part of sect. 52 of the Municipal Corporations' Act, by anything done under his composition, so as to have the effect of requalification. The statute says he shall be requalified if, being a bankrupt, he obtains a certificate, or, if compounding, on payment of his debts in full. Clearly he has not obtained a certificate. If he had compounded or proceeded to liquidation under sect. 125 of the Bankruptcy Act 1869, then undoubtedly it would have been the argument that his discharge under the provisions of that section might fairly have been considered equivalent to a certificate in bankruptcy. But that point does not arise, because his composition was under sect. 126. Now, as my Lord has pointed out, the provisions with respect to such a composition, are materially different from those of sect. 52 in the Municipal Corporations Act. It is unnecessary to consider the effect of payment of the composition in full, because the respondent did not pay it, or any part of it, at the time of the election. Therefore, we are not called upon to say that payment of debts in full would be satisfied by an arrangement under which he agreed to pay certain instalments amounting to a very small part of the whole debts, even although some or all of the instalments had been discharged. Consequently, I think this election could not be good and was void, and that the petitioner is entitled to our judgment in his favour.

HONYMAN, J.—I am of the same opinion. Mr. James contended that the election was void on two grounds: first, that the respondent was disqualified; secondly, that the office was not vacant at the time the election took place. Now, it will be observed that sect. 28 of the Municipal Corporations Act, which states matters disqualifying persons from being elected mayor, or councillor, is not at all like sect. 52. Yet still I take it that when a section says persons shall be re-eligible, it is tantamount to saying they shall be disqualified if they do not comply with the conditions of requalification. That being so, sect. 52 is extended by the later Act to any kind of composition with creditors under the Bankruptcy Act 1869, and the respondent has therefore made a composition within the terms of sect. 52 of the Municipal Corporations Act. It is at all times difficult to say that one has ceased to hold an office and yet the office is not void. But, as it has been well pointed out, an office may be filled by a person who is nevertheless dis-

qualified from acting therein. I think a man cannot resign that office which he is incapable of lawfully filling, and therefore it was incompetent to the town council to accept the attempted resignation. Therefore, the respondent falls within the provisions of the Municipal Corporations Act as being a person who has become disqualified. Then it is said by the Act of Parliament that every person so disqualified shall be re-elected if he complies with certain conditions. But this composition was not tantamount to a discharge in bankruptcy or payment in full.

Judgment for the appellants.

Attorneys for the appellant, *Hillier, Fenwick, and Co.*

Attorney for the respondent, *Rice.*

Thursday April 22, 1873.

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Contagious Diseases (Animals) Act 1869 (32 & 33 Vict. c. 70, s. 75)—Animals order—Neglect to give notice of disease among animals—Knowledge is essential.

The Animals Order, sect. 19, of the Privy Council, made under the authority of the Contagious Diseases (Animals) Act 1869 (32 & 33 Vict. c. 70) provides that any person in charge or possession of a diseased animal shall give notice to a police constable of the fact of the animal being so affected.

Before a person can be convicted before a magistrate for a breach of the above enactment, it is necessary to prove that the accused was aware that the animal was suffering from a contagious disorder.

Case stated by the justices of the county of Buckingham for the decision of the Court of Common Pleas, under 20 & 21 Vict. c. 43.

At the petty sessions holden at Newport Pagnell, in the county of Buckingham, on the 2nd Oct. last, a certain information or complaint preferred by John Hall, of Newport Pagnell aforesaid inspector of police, hereinafter called the respondent, against William Nicholls, of Moulse-buildings, in the said county, cattle dealer, hereinafter called the appellant, came on for hearing before the justices.

2. Upon the hearing of the said information and complaint it was proved to us by the evidence of the said respondent that on the 3rd August he (the said respondent) saw in a field in the occupation of the appellant, five animals, apparently suffering from the foot and mouth complaint, and that the appellant had not given any notice to the respondent, that the said animals were so suffering. Upon cross-examination by the appellant's advocate, the respondent admitted that he did not call the attention of the appellant, nor any of his servants, to the animals.

3. It was also proved to us by a veterinary surgeon that on the 7th August he, at the request of the respondent, inspected the five animals, and that they were then in the same field, in the occupation of the appellant, and suffering from the foot and mouth complaint.

4. It was contended, on the part of the appellant, first, that before he could be convicted of the offence alleged, it must be proved that the said animals were so affected with the foot and mouth disease to his knowledge, and that there

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was no evidence adduced to prove that; secondly, that it was consistent with the evidence that the appellant might have given the required notice to some police constable, other than the respondent; and, thirdly, that as it was proved that the inspector of police knew on the 17th Aug. that the five animals belonging to the appellant were suffering from the said complaint the appellant was not guilty of any offence in neglecting himself to give notice; the object of the order in council being that the police should be furnished with information to enable them to supply statistics to the Privy Council.

5. We overruled the said objection and convicted the said appellant of the said offence adjudging him to pay the sum of 10*l.* by way of penalty, and the sum of 3*l.* 13*s.* by way of costs, but the appellant being dissatisfied with our decision, as being erroneous in point of law, made application in writing to us to state and sign a case pursuant to 20 & 21 Vict. c. 43, setting forth the terms of our determination in order that he might take the opinion of Her Majesty's Court of Common Pleas at Westminster; therefore, we consented to this application, and have stated the above case for the opinion of the said court.

6. Upon the evidence before us we find as a fact that the animals in question were on the 7th August in the possession of the appellant, and that they were then suffering with a contagious or infectious disease, called the foot and mouth disease; and that the appellant did not then, or at any time afterwards, himself give notice to the respondent of the facts of the said animals being so affected, and we held that it was unnecessary to prove that the appellant knew that the animals were so affected, or to give affirmative evidence that he had not given notice to other police constables, but there was no evidence before us to show that the appellant knew that the said animals were so affected until he was served with a summons for the said alleged offence.

7. We also find as a fact on the 7th August one of the police constables of the county of Buckingham, namely the respondent, did know that the said animals were so affected. The questions therefore for the opinion of the Court of Common Pleas are as follows: First, Whether in order to convict the appellants of the said offence it was sufficient to prove that the said animals were affected as aforesaid, and that the appellant did not give notice, without giving evidence that the appellant knew they were so affected; secondly, Whether in order to prove that the appellant did not give notice as required by the said order in council, it was sufficient to prove that he did not give notice to the inspector of the district; thirdly, whether as the inspector of police was aware that the said animals were so affected, it was necessary for the appellant to give him notice of the fact. If the court shall answer the said questions in the affirmative the said conviction is to be affirmed. If the court shall answer either of the said questions in the negative the said conviction is to be quashed.

7. By the 103rd section of the Contagious Diseases (Animals) Act (32 & 33 Vict. c. 70), it is enacted that if any person acts in contravention of, or is guilty of, any offence under this Act, or any order or regulation made by the Privy Council or a local authority in pursuance of this Act, he shall for every such offence (except as otherwise pro-

vided in this Act, and except where a less penalty is provided in any such order or regulation) be liable to a penalty not exceeding 20*l.*, and then the 19th paragraph of the order in council orders that every person having in his possession or under his charge an animal (including a horse) affected with a contagious or infectious disease, shall observe the following rules:—First, he shall as far as practicable keep such animals separate from animals not so affected. Secondly, he shall with all practicable speed give notice to a police constable of the fact of the animal being so affected. Such police constable shall forthwith give notice thereof to the inspector of the local authority, who shall forthwith report the same to the local authority, and, except in the case of the foot and mouth disease, to the Privy Council.

Graham (Raymond with him).—The question is whether the appellant knew that the animals were afflicted with a contagious disease. Foot and mouth disease is included within the term contagious or infectious disease by the 6th section of 32 & 33 Vict. c. 70; but I contend that before the appellant's case can be brought within the 19th paragraph of the order in council it must be proved that he had knowledge of the existence of a contagious and infectious disease among his animals, and this the order in council contemplates. If it were otherwise, if he leaves home he may be fined in his absence. So a salesman who sells in a public market meat which is afterwards found to be unfit for food, but which he had no means of knowing or reason to suspect was otherwise than good, is not liable to an action upon an implied warranty: (*Emerton v. Matthews*, 7 H. & N. 586; 5 L. T. Rep. N.S. 681. See also *Core v. James*, L. Rep. 7 Q. B. 135).

Merewether for the respondent.—The offence here charged is not communicating with a constable. The magistrate called on the prosecutor to show that no notice had been given to the rural policeman. It would be absurd to have to give any other policeman notice. The order in council was passed to attempt to put a stop to cattle diseases, and if the onus is put on the prosecution in every case of proving that a farmer knew that his animals were diseased, it would render nugatory all legislation on the subject. He need only get out of the way, and the police could not prove the case. The court will look at the circumstances under which this statute and the orders in council were passed, for if this were construed strictly as a penal statute no effect could be given to the orders.

KEATING, J.—In this case three questions are referred to us for our opinion by the magistrate who convicted the appellant under the Contagious Diseases Act. The questions say that if the court answer all the questions in the affirmative the conviction is to stand, but if we answer any one question in the negative, the conviction is to be quashed. I am therefore of opinion that it should be quashed. The first and most important question is, whether in order to convict the appellant it was sufficient to prove that the animals were affected with a contagious and infectious disorder, and that the appellant did not give notice; without giving evidence that the appellant knew they were so affected. Now, by Act of Parliament, the Privy Council may make any order which has a binding effect, and any contravention of which may be punished by a fine of 20*l.* The Act is in the

nature of a penal statute, and is penal in the consequences, and by it an obligation is cast upon him to give notice with all practicable speed to a police constable of any animal belonging to him which is affected with a contagious disease. The question for us is founded on the information laid before the magistrate, that he did not give notice, contrary to the order of the Privy Council; and it must be taken by us that he had no knowledge that the animals were affected. Does that bring the case within the statute? the animals being in a field in his occupation, and he having no knowledge of disease in the animals, I am of opinion he cannot be convicted, for I think knowledge is essential. The words of the order in council are that he shall with all practicable speed give notice to the policeman, but I find it difficult to conceive that a man is to give notice of a fact of which he may be ignorant. A number of cases have been suggested by which the statute may be evaded; but that we cannot help. We must construe the statutes according to their intent, and, looking at the wording of the present statute, coupled with the order in council which forms part of it, the objects in view when it was passed, and the surrounding enactments, and also that it is a penal statute, there is no doubt that knowledge is essential, and some evidence must be given of it to justify a magistrate in convicting under it. Although we regret the facility our decision may give to persons to evade the statute, we cannot help that; and the Lords of the Privy Council can in their discretion alter their regulations. This, however, is a matter beyond our jurisdiction, all we have to do is to say that this information must be quashed.

HONYMAN J.—I am of the same opinion. I only wish to add one word with respect to a remark which Mr. Merewether made, which is that we express no opinion at all on the question that if the appellant went away and left his animals in charge of another who failed to give notice that he would not be answerable.

Conviction quashed, with costs.

Attorney for appellant, Rogers for Stimson, Bedford.

Attorney for respondent, King and McMillan for Tinsling.

EXCHEQUER CHAMBER.

Reported by T. W. SAUNDERS, Esq., Barrister-at-Law.

Monday, May 12, 1873.

ERROR FROM THE EXCHEQUER.

(Before BLACKBURN, BRETT, GROVE, QUAIN, ARCHIBALD, and HONYMAN, JJ.)

THE SHEFFIELD WATER COMPANY v. BENNETT.

Water company—Power to charge water rates according to amount of rent—Rates paid by owner—Meaning of the word "rent."

By sect. 79 of the Sheffield Waterworks Act 1853 (16 & 17 Vict. c. xxv.), local and personal), the company are empowered to charge for the supply of water to the inhabitants at a rate per annum according to the rent per annum of the dwelling-house supplied, as follows, viz.:—"Where the rent shall not amount to 7l. per annum, at a rate not exceeding 6l. per cent. per annum upon such rent; where such rent shall amount to 7l., but not to 8l. per annum, at a rate not exceeding

8s. per annum; where such rent shall amount to 8l., but not to 10l. per annum, at a rate not exceeding 10s. per annum; where such rent shall amount to 10l., but not to 12l. per annum, at a rate not exceeding 12s. per annum," and so on in a graduating ascending scale up to a rent of 100l. and upwards per annum. The Waterworks Clauses Act 1847 (10 & 11 Vict. c. 17), which is incorporated with the above Act, enacts, by sect. 72, that the owners of all dwelling-houses occupied as separate tenements, the annual value of which shall not exceed the sum of 10l., shall be liable to the payment of the rates instead of the occupier.

The defendant, being the owner of several dwelling-houses in Sheffield, let to tenants, at weekly or monthly rents, the yearly aggregate amount of such rents respectively not exceeding the sum of 10l. by the year, the tenants of which dwelling-houses were supplied by the company with water at the defendant's request. The company claimed to charge the water rates in respect of the houses so supplied upon the rents or sums at which the same respectively were let, without making any deduction therefrom. The defendant, on the other hand, contended that the charge should be upon the annual value of the dwelling-houses, free of all tenants' rates and taxes, and that in ascertaining such value a deduction should be made from the rents or sums at which the same houses were respectively let, in respect of the amounts allowed or paid by him for poor's rates, district rates, and water rates, in respect of the said dwelling-houses respectively.

The court below having held that the word "rent," in sect. 79 of the local Act, meant the proper rent of a tenant paying the rates and charges regularly paid by the tenant, of which the actual rent, when the tenant does pay those rates and charges, is in general the proper criterion, and that therefore the contention of the defendant was right, and that he was entitled, before being charged with the water rates on the rent, to deduct from the actual amount of rent paid to him the sums allowed or paid by him for poor's rates, district rates, and water rates:

Held, that the decision of the court below was correct.

THIS was an appeal from the decision of the Court of Exchequer, in which judgment was given for the defendant. The facts were stated in the following special case:—

1. The plaintiffs (hereinafter called the company) were incorporated by an Act of Parliament passed in the year 1830, intituled, "An Act for supplying with Water the Town and Parish of Sheffield," and thereby powers were given to the company for supplying the town and parish of Sheffield with water.

2. In the year 1845 another Act was passed, intituled, "An Act for better supplying with Water the Town and Parish of Sheffield, in the County of York, and for amending the Act relating thereto." And thereby powers were given to the company to raise further capital and construct additional works.

3. In 1853, the Sheffield Waterworks Act 1853 was passed, whereby, after reciting the said Acts of 1830 and 1845, such last-mentioned Acts were repealed, subject to the provisions contained in the said Act of 1853.

4. By the 6th section of the said Act of 1853, the company was incorporated as from the passing of

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the said Act of 1830, and the said Act of 1853 contained the following provisions:—

Sect. 8. That the Companies Clauses Consolidation Act 1845, and the Lands Clauses Consolidation Act 1845, and the Waterworks Clauses Act 1847, except sect. 54 of the said last-mentioned Act, and save so far as any of the clauses in any of the said Acts may be expressly varied or excepted by this Act, shall be, and the same are, hereby incorporated with this Act.

Sect. 9. That notwithstanding the repeal of the respective recited Acts, the several clauses and provisions whatsoever in favour of the company respectively contained in any Act or Acts (other than the said recited Acts respectively), and which immediately before the passing of this Act are in force, shall continue and be in full force accordingly, and the company and their directors, officers, and servants, may and shall accordingly, and for the purposes of this Act, be entitled to and have, exercise, and enjoy under or by virtue of those clauses and provisions respectively, all such rights, interests, powers, authorities, and privileges whatsoever, as if this Act had not passed.

Sect. 79. That the company shall, and they are hereby required, to furnish a sufficient supply of water to every inhabitant occupying a private dwelling-house or part of a dwelling-house in any square, street, close, or lane of the town and borough of Sheffield aforesaid, and in any other place or places within the limits of this Act, where the pipes of the company are now or hereafter shall be laid for the use of his or her family, at the following rate per annum (that is to say):—

Where the rent of such dwelling-house or part of a dwelling-house shall not amount to 7l. per annum, at a rate not exceeding 6l. per centum per annum on such rent, but not in any such case to exceed the sum of 7s. 2d. per annum.

Where such rent shall amount to 7l. but not to 8l. per annum, at a rate not exceeding 8s. per annum.

Where such rent shall amount to 8l. per annum but not to 10l. per annum, at a rate not exceeding 10s. per annum.

Where such rent shall amount to 10l. but not to 12l. per annum, at a rate not exceeding 12s. per annum.

Where such rent shall amount to 12l. but not to 15l. per annum, at a rate not exceeding 14s. per annum.

Where such rent shall amount to 15l. but not to 18l. per annum, at a rate not exceeding 16s. per annum.

Where such rent shall amount to 18l. but not to 20l. per annum, at a rate not exceeding 18s. per annum.

Where such rent shall amount to 20l. but not to 25l. per annum, at a rate not exceeding 1l. per annum.

Where such rent shall amount to 25l. but not to 30l. per annum, at a rate not exceeding 1l. 5s. per annum.

Where such rent shall amount to 30l. but not to 35l. per annum, at a rate not exceeding 1l. 10s. per annum.

Where such rent shall amount to 35l. but not to 40l. per annum, at a rate not exceeding 1l. 15s. per annum.

Where such rent shall amount to 40l. but not to 50l. per annum, at a rate not exceeding 2l. per annum.

Where such rent shall amount to 50l. but not to 60l. per annum, at a rate not exceeding 2l. 5s. per annum.

Where such rent shall amount to 60l. but not to 70l. per annum, at a rate not exceeding 2l. 10s. per annum.

Where such rent shall amount to 70l. but not to 80l. per annum, at a rate not exceeding 2l. 15s. per annum.

Where such rent shall amount to 80l. but not to 100l. per annum, at a rate not exceeding 3l. per annum.

Where such rent shall amount to 100l. or upwards per annum, at a rate not exceeding 3l. per centum per annum on such rent.

Provided, nevertheless, that the company shall not be entitled to receive from any such inhabitant more than the sum of 6l. in any one year for such supply, nor shall such company be obliged to furnish such supply to any inhabitant for less than 7s. 2d. in any one year, unless they shall think fit so to do.

Sect. 80. That in cases where the landlord or owner of a number of houses let at rents not exceeding 7l. a year respectively, shall agree with the said company to pay the water rent for the same, the company shall not in such cases charge more than 6s. 4d. a year for each house for such supply, anything to the contrary in this Act contained notwithstanding.

5. In 1860 the Sheffield Waterworks Act 1860 was passed, whereby the limits of the Act of 1853 were

extended to include the parish of Ecclesfield as well as the town and borough of Sheffield.

6. In 1864, the Sheffield Waterworks Act 1864 was passed, the 105th section of which was as follows:—

The provisions of the Company's Act 1853, relative to the water rents or rates to be taken by the company, shall from and after the time for the first half-yearly collection of the company's water rents, after the passing of this Act, and thenceforth for a period of twenty-five years, have effect as if the several maximum water rents or rates in those provisions specified were increased in each instance by 25 per centum. Provided always, that all water rents, or rates authorised to be taken by this Act, or the Company's Act of 1853, for any purposes whatever, shall be charged to all persons impartially, and without favour, according to the scale of rents or rates specified as aforesaid, for the several purposes respectively, except that such rates may by agreement be reduced for the sanitary purposes of the town.

7. In 1867, the Sheffield Waterworks (Amendment) Act 1867 was passed, whereby the limits of the company's former Acts were further extended to include the township of Tinsley, in the parish of Rotherham, and the parish of Handsworth, all in the West Riding of the county of York, and the parish of Norton, the townships of Dore and Totley, in the parish of Dronfield, and the liberty or extra-parochial place of Beauchief, all in the county of Derby.

8. Copies of the said Acts of 1830, 1845, 1853, 1860, 1864, and 1867, accompany and are to form part of this case.

9. Under the powers conferred by the several special Acts before mentioned, the company is authorised to supply water within the following thirteen townships and places, namely: the townships of Upper Hallam, Nether Hallam, Ecclesall Bierlow, Sheffield, Brightside Bierlow, and Attercliffe, all in the parish of Sheffield, the parish of Ecclesfield, the township of Tinsley, in the parish of Rotherham, and the parish of Handsworth, all in the West Riding of the county of York, and the parish of Norton, the townships of Dore and Totley, in the parish of Dronfield, and the liberty or extra-parochial place of Beauchief, all in the county of Derby.

10. The company are now supplying water in all the said townships and places, except in the townships of Dore and Totley, and the liberty or extra-parochial place of Beauchief.

11. The dwelling-houses or tenements at present supplied by the company with water within the limits of their district are about 48,400 in number, of which about 30,000 are of an annual value not exceeding 10l. Of these houses some are occupied by the owners thereof.

12. The water rates payable to the company are due quarterly, on the 25th March, the 24th June, the 29th Sept., and the 25th Dec, in each year.

13. A separate poor's rate is levied in each of the townships, parishes, and places mentioned within the limits of the company's district. The poor rates in the said several townships, parishes, and places respectively, vary in amount from time to time, and at the same periods of time are larger in some of the said townships, parishes, and places, than in others.

14. The mode of ascertaining the rateable value of premises rateable to the poor's rate is not the same in the said several townships, parishes, and places, the consequence of which is, that the sums at which similar premises are rated are relatively

lower in some of such townships, parishes, and places, than in others.

15. The borough of Sheffield is co-extensive with the parish of Sheffield, and comprises the several townships of Upper Hallam, Nether Hallam, Ecclesall Bierlow, Sheffield, Brightside Bierlow, and Attercliffe.

16. The Local Government Acts have been applied to and are in force within the said borough of Sheffield, but not to or within any other of the townships, parishes, or places included within the limits of the company's district. General district rates, which may vary in amount from time to time, are levied under these Acts in the borough of Sheffield.

17. On the 20th Sept. 1865, after the Local Government Acts had been applied to the borough of Sheffield, the town council of Sheffield, which is the local board for the said borough, passed a resolution in the following words:—

It was ordered that the general district rate be laid and levied upon the owners instead of the occupiers, in cases where the rateable value of any premises, liable to assessment under the Local Government Act 1858, does not exceed the sum of 7*l.*, and that the same be assessed at the reduced estimate of three-fourths of the net annual value of such premises.

18. The defendant was, at Christmas-day 1870, and during the two quarters of a year then next following, the owner of the ninety-two dwelling-houses or tenements specified and described in the schedule marked A, which accompanies and is to form part of this case, and the same were let by him during such period, at the rents or sums and in the manner specified in the said schedule.

19. The occupiers of the said respective dwelling-houses or tenements were, at the request of the defendant, supplied with water by the company during the said two quarters of a year.

20. Sixteen of the said dwelling-houses or tenements are situate in the township of Sheffield, and the remainder of them are situate in the adjoining township of Brightside Bierlow.

21. During the two quarters of a year for which the water rates in question are claimed, the poor's rate levied in the township of Sheffield was after the rate of 2*s.* 10*d.* in the pound; and in the township of Brightside Bierlow, after the rate of 2*s.* 6*d.* in the pound.

22. During the same period the general district rate in the borough of Sheffield, under the Local Government Acts, was after the rate of 2*s.* in the pound, subject to the deduction mentioned in the aforesaid resolution of 20th Sept. 1865.

23. The company claim to charge the water rates in respect of the dwelling-houses or tenements in question upon the rents or sums at which the said dwelling-houses or tenements respectively were let, without making any deduction therefrom.

24. The defendant, on the other hand, contends that the water rates ought to be charged upon the annual value of the said dwelling-houses or tenements, free of all tenants' rates and taxes, and that in ascertaining such annual value, a deduction should be made from the rents or sums at which the said dwelling-houses or tenements are respectively let as aforesaid, in respect of the amounts allowed or paid by him for poor's rates, district rates, and water rates, in respect of the said dwelling-houses or tenements respectively (whether such allowance or payment is made by him by virtue of statutory obligations imposed upon him

in that behalf, or by reason of agreement voluntarily entered into between himself and his tenants).

25. The schedule hereinbefore referred to specifies and describes the dwelling-houses or tenements in question, and in addition to the matters before referred to, the gross estimated rental of the said dwelling-houses or tenements for the purposes of the poor rate, the sums at which the said dwelling-houses or tenements were respectively rated for poor's rate, the rates claimed to be deducted by the defendant from the rents or sums at which the said dwelling-houses or tenements respectively were let as hereinbefore mentioned, and other particulars relative to the question in dispute. The matters stated in or appearing from the said schedule are to be taken as correct. And it is admitted, that if the defendant is entitled to make the deductions he claims, the amounts mentioned in the said schedule, under the respective heads of poor's rate, district rate, and water rate, are the amounts proper to be deducted from the said rents or sums at which the said dwelling-houses or tenements are respectively let as aforesaid.

26. The sums in respect of which the above-mentioned deductions are claimed by the defendant were allowed or paid by the defendant, as specified in the said schedule, for poor's rates, district rates, and water rates respectively, either by virtue of statutory obligations imposed upon him in that behalf, or by reason of the terms (voluntarily agreed to between himself and his tenants) on which the said respective dwelling-houses or tenements were let by him. The statutory obligations above referred to are, as regards poor's rates: Sect. 1 of the Poor Rate Assessment and Collection Act 1869; as regards district rates, sect. 55 of the Local Government Act 1858; and as regards water rates, sect. 72 of the Waterworks Clauses Act 1847.

27. All the said dwelling-houses or tenements, in respect of which the water rates in question are claimed, were, during the period for which they are claimed, respectively let for terms not exceeding three months, within the meaning of the 1st section of the Poor Rate Assessment and Collection Act 1869. The 4th section of the last-mentioned Act has not been adopted in either of the townships of Sheffield and Brightside Bierlow.

28. The tenants of several of the said dwelling-houses or tenements, for which the water rates in question are claimed (namely, those numbered in the said schedule 11, 17, 18, 19, 20, and 21), held their respective dwelling-houses or tenements of the defendant on the terms, that they should not take advantage of the first section of the last-mentioned Act, but should pay their respective rents for the same, without deducting the sums paid by them for poor's rate.

29. The water rates in respect of all the said ninety-two dwelling-houses or tenements, for the quarter of a year next following Christmas day 1870, became due on the 25th March 1871, and the water rates for the same dwelling-houses or tenements for the next quarter of a year became due on the 24th June 1871.

30. The water rates in respect of the said dwelling-houses or tenements for the said two quarters of a year, amounted, according to the mode of computation adopted by the company, to 3*l.*; and according to the mode of computation contended for by the defendant, to 2*l.* 7*s.* 6*d.*

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31. The rents or sums at which the said dwelling-houses or tenements respectively let as aforesaid, are to be taken to be the full rents or sums obtainable for the said dwelling-houses or tenements respectively, upon the terms upon which the same are respectively let as aforesaid.

The question for the court is: Whether, in calculating the water rates, any deductions should be made from the rents or sums at which the said dwelling-houses or tenements are respectively let as aforesaid, in respect of the payments made or allowed by the defendant for poor's rates, district rates, and water rates, or any and which of them; in either and which of the following cases, namely: (A) In cases where the poor's rates, district rates, and water rates respectively, were allowed or paid by the defendant by virtue of statutory obligations in that behalf. (B) In cases where the poor's rates, district rates, and water rates respectively, were allowed or paid by the defendant by reason of the terms (voluntarily agreed to between himself and his tenants) on which the respective dwelling-houses or tenements were let by him.

If the court shall be of opinion that none of the aforesaid deductions ought to be made, the judgment is to be entered for the plaintiffs, with costs of suit, for the sum of 6*l.* 10*s.* over and above the 24*l.* 10*s.* paid into court.

If the court shall be of opinion that all the deductions claimed by the defendant, as appearing in the said schedule, ought to be made, then judgment is to be entered for the defendant, with costs of suit.

If the court shall be of opinion that some, but not all, of the deductions claimed by the defendant, as last aforesaid, ought to be made, then judgment is to be entered for the plaintiffs, with costs of suit, for such sum over and above the 24*l.* 10*s.* paid into court, as according to the judgment of the court, in that case remain due to the plaintiffs, such sum, in case of difference, to be settled by one of the masters of the court.

In deciding the above questions, the court is to be at liberty to draw inferences of fact.

Field, Q.C. (Kemplay, Q.C., and Barker with him), appeared for the plaintiffs, and contended that upon a proper construction of the Acts, no deductions should be made from the amount of rent paid in calculating the water rates, and he cited,

Rea v. St. Paul's, Deptford, 13 East, 320;

Rea v. The Inhabitants of Thurleston, 1 Bar. & Ad. 731 (Lord Tenterden's judgment);

Elstone v. Rose, 19 L. T. Rep. N. S. 280; 38 L. J.

6, Q. B.; L. Rep. 4 Q. B. 4;

Reg. v. The Overseers of Bilston, L. Rep. 1 Q. B. 18;

35 L. J. 73, M. C.;

Rook v. Mayor of Liverpool, 7 C. B., N. S., 240.

Manisty, Q.C. (Wills, Q.C., and Cave with him), was not called upon.

BLACKBURN, J.—In this case there are difficulties in the way of either construction, but we are all of opinion that the construction contended for by the plaintiffs is the more difficult one of the two, and that the judgment of the court below is most in accordance with reason and the probable meaning of the Legislature. (a) *Judgment for the defendant.*

Attorney for the plaintiff, *Blacklock Smith, Sheffield.*

Attorneys for the defendant, *Broomhead, Wightman, and Moore, Sheffield.*

(a) See the judgment of the court, 27 L. T. Rep. N. S. 203.

CROWN CASES RESERVED.

Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

Saturday, April 26, 1873.

(Before BOVILL, C.J., BRAMWELL, B., BLACKBURN, ARCHIBALD, and HONTYMAN, JJ.)

REG. v. A. H. MORTON.

Forgery—Deed—Clergy—Letters of orders—
24 & 25 Vict. c. 98, s. 20.

The forging of letters of orders issued by a bishop, certifying that on a day and at a place mentioned therein, A. B. was admitted into the holy order of deacons, according to the manner prescribed by the Church of England, and rightly and canonically ordained deacon, in testimony whereof the bishop had caused his episcopal seal to be affixed thereunto, is not the feloniously forging of a deed within the 24 & 25 Vict. c. 98, s. 20, although such forgery is a misdemeanor at common law.

CASE reserved for the opinion of this Court by Bramwell, B., at the Worcester Winter Assizes 1872.

The prisoner was tried and found guilty upon the following indictment:—

The jurors of our lady the Queen, upon their oath present that Thomas Keatinge, otherwise Arthur Henry Morton, on the 14th Aug. 1865, feloniously did forge a certain deed, purporting to be under the hand and seal of Lord Auckland, Bishop of Bath and Wells, which said forged deed was and is as follows [it was then set out *verbatim*], with intent thereby to defraud, against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity.

Second count.—And the jurors aforesaid, upon their oath aforesaid, do further present that the said Thomas Keatinge, otherwise Arthur Henry Morton, afterwards, to wit, on the day and year aforesaid, feloniously did forge a certain other deed, purporting to be letters of orders under the hand and seal of Lord Auckland, Bishop of Bath and Wells, with intent thereby then to defraud against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity.

Third count.—And the jurors aforesaid, upon their oath aforesaid, do further present that the said Thomas Keatinge, otherwise called Arthur Henry Morton, afterwards, to wit, on the day and year aforesaid, feloniously did offer, utter, dispose of, and put off a certain other forged deed, purporting to be under the hand and seal of Lord Auckland, Bishop of Bath and Wells, which said forged deed was and is as follows [it was then set out *verbatim*], with the intent thereby then to defraud, he the said Thomas Keatinge, otherwise called Arthur Henry Morton, at the time he so offered, uttered, disposed of, and put off the said last-mentioned forged deed as aforesaid, well knowing the same to be forged, against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity.

Fourth count.—And the jurors aforesaid, upon their oath aforesaid, do further present that the said Thomas Keatinge, otherwise called Arthur Henry Morton, afterwards, to wit, on the day and year aforesaid, feloniously did offer, utter, dispose of, and put off, a certain other forged deed, purport-

ing to be letters of orders under the hand and seal of Lord Auckland, Bishop of Bath and Wells, with intent thereby then to defraud, he the said Thomas Keatinge, otherwise called Arthur Henry Morton, at the time he so offered, uttered, disposed of, and put off the said last-mentioned forged deed as aforesaid, well knowing the same to be forged, against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity.

The document which the prisoner had forged, when produced, was as follows:—

At the request of the Lord Bishop of Melbourne.

By the tenor of these presents, we Auckland, by Divine permission Bishop of Bath and Wells, do make it known unto all men, that on Sunday, the twenty-third day of December, in the year of our Lord one thousand eight hundred and sixty-three, we, the bishop before mentioned, solemnly administering holy orders under the protection of the Almighty in our cathedral church of St. Andrew, in Wells, did admit our beloved in Christ, *Arthur Henry Morton, a Master of Arts* (of whose virtuous and pious life and conversation, and competent learning and knowledge in the Holy Scriptures we were well assured), into the holy order of deacons, according to the manner and form prescribed and used by the Church of England, and him the said *Arthur Henry Morton* did then and there rightly and canonically ordain deacon; he having first in our presence freely and voluntarily subscribed to the Thirty-nine Articles of Religion, and to the three articles contained in the thirty-sixth canon, and he likewise having taken the oaths appointed by law to be taken for and instead of the oath of supremacy. In testimony whereof we have caused our episcopal seal to be hereunto affixed, the day and year above written, and in the seventh year of our translation.

Seal of
The Bishop of
Bath and Wells.

AUCKLAND, The Seal of Baron Auckland, D.D. BATH AND WELLS.

The signature and the seal were the genuine signature and episcopal seal of Lord Auckland, Bishop of Bath and Wells, and the document was duly signed, sealed, and given out by him.

But when so given out, the name in it of the person ordained was Joseph Leycester Lyne, the year was 1860, and not 1863; and in the margin the letters dimissory were stated to be from the Bishop of Exeter, not Melbourne.

The forgery consisted in altering the name, adding a "Master of Arts," altering the year, and changing "Exeter" to "Melbourne." The alterations are underlined. It was proved that Lyne was ordained by imposition of hands, according to the service in the Prayer Book, and that this document had been delivered to him and afterwards stolen or taken from him without his consent. It was also proved that no other deed or document ordaining, or certifying the ordination, is ever made or given, though the fact of ordination is recorded in a book kept for that purpose. Doubting whether the document was a deed within the meaning of the statute, I now ask the opinion of the Court for the consideration of Crown Cases Reserved thereon. The prisoner is in gaol under sentence on two other indictments.

It will be observed that the document is correctly set forth in the first and third counts. It is, however, there called a deed. (See 1 Lev. 138; 3 Russell C. & M., 767; and stat. 24 & 25 Vict. c. 98, s. 20.)

(Signed) G. BRAMWELL.

W. Goodman, for the prisoner.—The prisoner has

been convicted on an indictment which charged him with feloniously forging and uttering a deed, knowing the same to be forged, against the form of the statute 24 & 25 Vict. c. 98, s. 20, which enacts that "Whosoever, with intent to defraud, shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any deed or any bond or writing obligatory, or shall forge any name, handwriting, or signature purporting to be the name, handwriting, or signature of a witness attesting the execution of any deed, bond, or writing obligatory, or shall offer, utter, dispose of, or put off any deed, bond, or writing obligatory, having thereon any such forged name, handwriting, or signature, knowing the same to be forged, shall be guilty of felony." No doubt the prisoner was guilty of the offence of forgery at common law, which is a misdemeanor, but the question here is whether the forging of these "letters of orders," as the document is technically termed, is a felonious forging of a deed within the above enactment. In 2 Russell on Crimes (4th edit., p. 767), it is said: "It is clearly agreed that at common law the counterfeiting of a matter of record is forgery, for since the law gives the highest credit to all records, it cannot but be of the utmost ill consequence to the public to have them either forged or falsified. Also it is agreed to be forgery to counterfeit any authentic matter of a public nature, as a privy seal, or a licence from the Barons of the Exchequer to compound a debt, or a certificate of holy orders, or a protection from a parliament man. It is also unquestionable that a man may be in like manner guilty of forgery at common law by forging a deed, and therefore it seems that one may be equally guilty by forging a will, which cannot be thought to be of less consequence than a deed." It is submitted that the forging of these letters of orders was not a felony under the above statute, as they were not a deed properly so called. The statute is penal, and to be construed strictly. The mere fact that the document was given out with a seal attached does not make it a deed. In *Brown v. Wavser* (4 East, 584) it was held that an award under seal was not a deed within the Stamp Act, not having been delivered as a deed. So in *Chanter v. Johnson* (14 M. & W. 408) it was held that a licence under seal to use a patented invention did not require to be stamped as a "deed not otherwise charged," under the 55 Geo. 3, c. 189, sched., part 1, tit. "Deed." Parke, B. there said: "The defendants say the instrument is a deed and ought to be stamped as such, but that is not so—it does not purport to be sealed and delivered as a deed; it rather resembles an award or a warrant of a magistrate, which, though under seal, are not deeds." In 1 Co. Inst., 35b, it is said: "A deed *factum*. This word (deed), in the understanding of the common law, is an instrument written on parchment or paper, whereunto ten things are necessarily incident, viz.; 1, writing; 2, on parchment or paper; 3, a person able to contract; 4, by a sufficient name; 5, a person able to be contracted with; 6, by a sufficient name; 7, a thing to be contracted for; 8, apt words required by law; 9, sealing; 10, delivery." Again, at 171 b, Lord Coke says: "*Fait-factum*, *Anglice* a deed, significeth in the common law an instrument consisting of three things, viz., writing, sealing, and delivery, comprehending a bargain or contract between party and party." So that at common law it would seem that an instrument to be a deed must pass some in-

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terest, and be in the nature of a contract. These letters of orders are only in the nature of a certificate that the person to whom they are given out has been ordained. Ordination is performed by the laying on of the hands of the bishop upon the head of the person to be made a deacon, and the letters of orders are only in the nature of a certificate that he has been ordained; and when the deacon becomes a curate, a licence is given to him by the bishop, which is in the nature of a grant, and contains a contract binding both on the curate and the incumbent of the benefice to whom he becomes curate. So in Com. Dig., Fait. A. 1, it is said, "A deed is a writing containing a contract, and signed, sealed, and delivered by the party (Co. Inst. 35b)." [BLACKBURN, J.—By the 33 & 34 Vict. c. 91, a clergyman may execute a deed of relinquishment of his rights, privileges, advantages, and exemptions belonging to his office. That is not a matter of contract. It seems difficult to say that an instrument is not a deed unless it contains a contract.] By a deed of relinquishment the clergyman passes away his interest. Spelman in his Glossary defines a deed thus:—"Factum a forensibus nostris dicitur scriptum solenne, quo firmatur donum, concessio, pactum, contractus. In Shep. Touch., cap. 4, it is said: "A deed is a writing or instrument, written on paper or parchment, sealed and delivered, to prove and testify the agreement of the parties, whose deed it is, to the things contained in the deed. The definitions of a deed, as given in Cruise's Dig., Tomlins' Law Dicty., 2 Black. Com. 497, by Stephens, were also cited. In *Rez v. Fauntleroy* (2 Bing. 413) it was held that the forging of a power of attorney for the transfer of Government Stock was the forging of a deed, but the power contained a covenant that the executors and administrators of the donor would confirm the transfer; so that there was a contract contained in it. A deed of feoffment, though not necessary to the transfer of the land, ordinarily contained the words, "dedi, concessi, confirmavi." This deed does not contain anything upon which an action could be maintained. [BLACKBURN, J.—Does it record or affirm the grant of anything?] The delivery of it is not essential. It is equivalent to a document which certifies that a person has passed some public examination. [BLACKBURN, J.—The 4 Hen. 7, c. 13, enacts, "that a person in orders, at the second time of asking his clergy, shall lose the benefit of his clergy if he do not show his letters of orders." This seems to show that they are evidence of title in some way.]

Jelf (*Amphlett* with him) for the prosecution.—The words of the 24 & 25 Vict. c. 98, s. 28, "deed, bond, or writing obligatory," are taken from 11 Geo. 4 & 1 Will. 4, c. 66, s. 10; but in the 5 Eliz. c. 14 (An Act against forgers of false deeds and writings), the preamble uses the words "charters, evidences, deeds, and writings," and sect. 2 the words, "deed, charter, or writing, sealed court roll, or the will of any person in writing." This seems to show the nature of the deeds intended, and that the forging of almost any kind of deed was contemplated. The case of *Rez v. Fauntleroy* decided that a power of attorney was a deed. Secondly, as to the nature of letters of orders; they are said to be the legal evidence of admission to the office of a deacon (Blunt's Law of the Church). [BOVILL, C.J.—No doubt one species of evidence.] The bishop's clerks or secre-

taries are not to receive above 6d. for any letters of orders; and for the sealing of such letters nothing shall be paid (3 Burn's Eccles. Law, tit. "Ordination," sect. b). And by Canon 137: "Every parson, vicar, and curate shall, at the bishop's first visitation, or at the next visitation after his admission, show and exhibit unto him his letters of orders, to be by him either allowed or (if there be just cause) disallowed and rejected; and being by him so approved, be signed by the registrar." [BOVILL, C.J.—That is simply directory.] And, further, by Canon 39: "No bishop shall institute any to a benefice who hath been ordained by any other bishop, except he first show unto him his letters of orders." [BLACKBURN, J.—In *Marshall v. The Bishop of Exeter* (31 L. J. 262, C. P.), the court of Exchequer Chamber held that the bishop was acting *ultra vires* in refusing to institute a clerk presented to a benefice because he did not produce letters of good behaviour from the bishop of the diocese in which he previously had a benefice.] Thirdly, as to the definition of a "deed." The definition of Lord Coke, which has been repeated in so many books, is too narrow. In Shep. Touch. cap. 4, after specifying several kinds of deeds, it is said: "There may be and are divers other kinds of deeds besides those which are named before; for every agreement put in writing, sealed and delivered, cometh a deed. And attornments, exchanges, surrenders, partitions, authorities, commissions, licences, revocations, and the like, are usually made, given, done, and granted by deed." Viner's Abr., Fait I., sub-sect. 4; Burrell's Law Dict. (American), tit. "Deed," were then cited. As to a deed of feoffment, which is like the present case, a feoffment was good without deed; and before the art of writing came into use, the delivery of seisin, in the presence of witnesses, was the only evidence of the grant. And when it afterwards became usual to put it into writing, the written instrument, which was called the charter or deed of feoffment, was not considered as conveying any estate or interest in the land, but merely as affording additional testimony of the transfer. In *Rez v. Lyon* (Russ. & Ry. 255), a power of attorney to receive prize money was held to be a deed.

Goodman, in reply.—The ancient deed of feoffment contained a warranty, and an action for breach of the warranty might have been maintained upon it. A deed of relinquishment by a clergyman under the 33 & 34 Vict. c. 91 is analogous to letters of orders, for it is only a deed by statute, not at common law. The statute 5 Eliz. c. 14, makes a distinction between a deed and a writing sealed. The words, "writing sealed" are omitted from the 24 & 25 Vict. c. 98, s. 20. The Probate Act (20 & 21 Vict. c. 77, s. 28) makes it a felony to forge the signature of any registrar, or any seal of the Court of Probate. The case of *Slater v. Smallbrook* was cited.

BOVILL, C.J.—The prisoner was indicted for forging a certain deed under the hand and seal of the Bishop of Bath and Wells, and which was set out *verbatim* in one count; and in a second he was indicted for forging a certain deed purporting to be letters of orders; and in other counts he was charged with uttering those documents, well knowing them to be forged. In all the counts the document was described as a deed, so as to bring the case within the 24 & 25 Vict. c. 98, which enacts that whosoever, with intent to defraud, shall forge or alter, or shall offer, utter, dispose of, or put off,

knowing the same to be forged or altered, "any deed, bond, or writing obligatory, &c., shall be guilty of felony." And the question is, whether the document in this case is a deed within the meaning of that statute? In form this document is usually known as letters of orders issued by a bishop, under his episcopal seal. It is necessary to see what is the real nature and character of the document. Now, the form and manner of ordination of deacons is prescribed and set forth in the Book of Common Prayer; and it appears that a person is admitted to the office of a deacon in the Church of England by the bishop in the face of the Church, and that the ceremony is to be performed either in the cathedral or a parish church, and that on the completion of the ceremony the person becomes a deacon in the Church of England. It is not necessary that there should be any deed, or document, or grant conferring the title to holy orders or to act as a deacon. From very early times it was the practice after ordination to issue letters of orders under the seal of the bishop, and their production was made necessary by the 4 Hen. 7, c. 13, to give a person in orders the benefit of clergy a second time. But letters of orders were not necessary to give a person the *status* of deacon. The letters of orders, which are in the usual form, states that the bishop did, at a specified time and place, admit the person named into the holy order of deacons, according to the manner and form prescribed by the Church of England, and concludes thus:—"In testimony whereof we have caused our episcopal seal to be hereunto affixed." Is that a document within the legal definition of the word "deed?" Generally speaking, a deed, as described in various authorities, is something in the nature of a contract between the parties to it, but it is clearly not confined to cases of contract only. There may be a deed, although no contract is contained in it, as, for example, a deed of feoffment. A deed may effectuate a gift, or grant, or obligation, or a mere authority, as a power of attorney (*Res v. Lyon* and *Res v. Fauntleroy*), and there may also be deeds of release and disclaimer. It seems to me that the meaning of the legal definition of a deed, to be gathered from the authorities, is a document under seal and delivered as a deed, or in the case of a feoffment, as a document authenticating the transfer of the land. Does this document purport to pass or create any interest? It seems to me that it does not. In the first place it does not profess to pass any interest, or create or give any title to anything, but only to certify that a certain ceremony has been performed, and a certain person admitted into the holy order of deacons. It confers nothing, and creates no right. It is but a certificate of the ceremony of ordination having been performed according to the rites and ceremonies of the Church of England, and of the person having been duly ordained and admitted to the holy office of deacons. There are many documents under seal which are not deeds, as an award under seal, a licence to use a patent under seal, a will under seal, and a magistrate's warrant; so, again, a certificate of admission to learned bodies or societies, under seal, such as the College of Physicians, which has never yet been suggested to be anything more than a certificate authenticating in a solemn manner the admission of a member to that body; so a certificate of proprietorship of joint-stock shares under the seal of the company, which is nothing more than a

certificate that the person is the holder of so much stock in the company. A case similar to the present is that of a probate of a will. On proof of a will, in former days, the archbishop or bishop issued a document under the episcopal seal, which certified that the will had been proved, and the fact that administration had been granted to the executors. And the present probate of a will is simply a certificate to that effect. Upon the whole, therefore, I am of opinion that letters of orders are not a deed within the 24 & 25 Vict. c. 98, s. 20, and that the conviction cannot be supported.

BLACKBURN, J.—I also think the conviction cannot be supported. It is not the mere putting of a seal on a document that will make it a deed. And I doubt whether letters of orders are deeds within the true definition of the word "deed." It seems to me that Spelman's definition, that a deed is a solemn writing, by which a gift, grant, agreement, or contract or something of that sort, is confirmed, comes nearest to the correct definition. I doubt whether the document in this case is a deed within that definition, but I am of opinion that it does not come within the words of the statute 24 & 25 Vict. c. 98, s. 20, "deed, bond, or writing obligatory," which means instruments of a similar kind, which pass an interest in a thing. This is a mere certificate of the passing of holy orders, and is not within that Act. At this moment I should be inclined to say that a probate does pass an interest to the person proving the will, but it is not necessary now to decide whether it would be a deed.

The rest of the Judges concurred.

Conviction quashed.

Saturday, April 26, 1873.

(Before BOVILL, C.J. BRAMWELL, B., BLACKBURN, ARCHIBALD, and HONTMAN, JJ.)

REG. v. HOLLIS and BLAKEMAN.

Noxious thing—Administration to procure mis-carriage—Evidence of being accessory—24 & 25 Vict. c. 100, s. 58.

A man and woman were jointly indicted for feloniously administering to C. a noxious thing to the jurors unknown with intent to procure mis-carriage.

C. being in the family way, went to the male prisoner, who said he would give her some stuff to put her right, and gave her a light coloured medicine, and told her to take two spoonfuls till she became in pain. She did so, and it made her ill. She then went to him again, and he said the safest course would be to get her a place to go to. He told her that he had found a place for her at L. and gave her some more of the stuff, which he said he wanted to take effect when she got there. They went together to L. and met the female prisoner, who said she had been down to the station several times the day before to meet them. C. then began to feel pain, and told the female prisoner. Then the male prisoner told what he had given C. They all went home to the female prisoner's, and the male prisoner then gave C. another bottle of similar stuff in the female prisoner's presence, and told her to take it like the other. She did so, and became very ill, and next day had a mis-carriage, the female prisoner attending her, and providing all things.

Held, that there was evidence that the stuff administered was a noxious thing within the said Act.

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Held also, that there was evidence of the female prisoner being an accessory before the fact, and a party therefore to the administration of the noxious thing.

THE two prisoners, William Hollis and Martha Blakeman, were tried and convicted before me at the Spring assizes for Staffordshire 1873, on an indictment charging them under the 24 & 25 Vict. c. 100, s. 58, with feloniously and unlawfully administering to one Sarah Jane Cherrington on the 5th Dec. 1872, at Stoke-upon-Trent, in the County of Stafford, a large quantity of a certain noxious thing to the jurors unknown, with intent in so doing to procure the miscarriage of her the said Sarah Jane Cherrington contrary to the statute.

The second count charged the prisoners with feloniously and unlawfully causing to be taken by the said Sarah Jane Cherrington a large quantity of a certain noxious thing to the jurors unknown, with the same intent as in the first count.

The third count charged the prisoners with feloniously and unlawfully causing the said Sarah Jane Cherrington to take and swallow down into her body a large quantity of a certain liquid to the jurors unknown with similar intent.

The material portion of the evidence upon which the prisoners were convicted was as follows:

Sarah Jane Cherrington deposed: In the autumn of last year I was cook at the Castle Hotel, Newcastle-under-Lyme. I found I was in the family way, and left in consequence. On Thursday, 21st Nov. 1872, I went to my brother's at Tunstall. On Saturday, 24th Nov. I went to the prisoner Hollis's, at Stoke, in the London Road. It is a house, not a shop. The father of the child took me there. I saw Hollis. I told him I was in the family way. He said he would soon put me right; that he would give me some stuff to put me right. I cannot say justly the answer I made. He gave me some stuff, a light-coloured medicine in a phial. I was to take two table spoonfuls till I became in pain. I told him I was gone about five months. I went back to my brother's with the bottle of medicine. I took one dose—two table spoonfuls. It had rather a bitter taste. It made me ill all that night and the next day. I destroyed the bottle. Hollis told me to do so. He told me to be very careful not to be found out. He had promised to come on the Wednesday morning to see me. He did not come then. On Wednesday I went to see him. He was out. I waited for him. He came in. He told me he had been at my brother's, at Tunstall, to see how I was. He said if he had known where I was going to, he should not have trusted me with the medicine. He asked me what I had done with the medicine? I told him I had taken one dose. I told him how ill it made me. He asked me what I had done with the bottle. I told him I had pulled out the cork and had thrown the medicine away, and the bottle after. He said I had done right. He said the safest thing would be for him to get me a place to go to. He knew of one at Longton. He wanted a guinea down for him to pay the woman himself. He said it would not be possible for me to have a baby alive after what I had taken. He said I should be able to go back to my situation in a few days. I arranged to go to him that day week. I went the Thursday week (5 Dec. 1872) to Stoke to Hollis's house. I said I was come to go to

Longton. He said he had expected me yesterday, and he had sent the person word. He asked me if I had the money. I said I had 19s. that was all I gave it to Hollis. He asked me into the kitchen. He brought me some medicine in a glass. He said he wanted it to take effect against I got there. I took it there—some kind of medicine. I went with him to Longton. At Longton station we met Mrs. Blakeman. Hollis said this is the woman I promised to bring yesterday. She said she had been down at the station several times yesterday. I was taken to some wine vaults. We had something to drink. I began to feel in pain then. I told Mrs. Blakeman I was so, and Hollis told her what he had given me. He said he wanted to get me home quickly. Mrs. Blakeman took me home. She told Hollis he had better walk behind as he was well known in Longton. He followed. We got to Mrs. Blakeman's in Caroline-street. He came in soon after. Hollis gave me in Mrs. Blakeman's presence some medicine in a bottle like the other. The bottle was full. He told me in Mrs. Blakeman's presence to take it like the other. He only stayed about five minutes. As soon as he was gone I took two table spoonfuls again. Mrs. Blakeman was not then present. Between eleven and twelve I felt too ill to keep up any longer. Mrs. Blakeman came up to me. I told her I was very ill. She made the bed afresh, and put blankets underneath—doubled it underneath. I was in great pain all night. Friday morning about eleven I miscarried. She came up afterwards. I told her how ill I was. She asked if it was all over. I said I thought it was. She looked, and dragged the blanket from underneath me. She put it underneath the other bed. I stayed there all day. Hollis came at night between five and six. He came up, Mrs. Blakeman with him. He asked me how I was. I told him I remained very bad. Mrs. Blakeman pulled the blanket from under the other bed and showed it to Hollis. He looked at it and said it was a little girl. I saw him put it in his pocket. He told Mrs. Blakeman to throw something behind the fire. Mrs. Blakeman gave me two pills. I staid at Mrs. Blakeman's three weeks ill. After that I went to Mr. Lawton's, Glebe Hotel, Stoke. I was there nine days. The arrangement was made for me by Hollis and Mrs. Blakeman. The latter told me my brother would not receive me, and therefore she had got me a place. This statement was not true. I saw both Hollis and Mrs. Blakeman there. He came first; I saw him at the back door. He came to know how I was going on. I told him I was still very poorly. He told me to keep quiet, not to speak about what had been the matter with me. Mrs. Blakeman also came up into my room; the servant brought her up. She told me I was not to let any of them know what had been the matter. Dr. Ashwell was attending me then. Hollis said I was not to say anything because the doctors were so against him. From Glebe Hotel I went back to Mrs. Blakeman's for six days. I wanted her to write to my brother. She would not. I went with her to Stoke, intending to go to my brother's. When I got to Stoke I had one hour to wait at the railway station. She said she would fetch Hollis to see me. She and Hollis came back. He asked where I was going; I said going to my brother's. He said it was silly; I should let all out.

It was also proved by Ann Cherrington, the

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sister in law of Sarah Jane Cherrington, that the prisoner Hollis called for Sarah Jane Cherrington on Wednesday the 27th November while she was out, and that he told the witness to ask her to come to Stoke next day. He said he had got a situation for her in Stoke. The witness asked who he was. He said it did not matter about his name or address. She must come to Stoke.

The witness further proved that Mrs. Blakeman came on Saturday after Sarah Jane Cherrington had left, and said Sarah had sent for her box. This was proved to be false. The witness told her that Sarah Jane Cherrington was pregnant, to which Mrs. Blakeman replied, "No, she is not, for she slept with me last night, and I know better. I will soon give her something to put her right when I get home." Witness asked her where she lived; she said, Wood-street, Hanley. This was false.

It was further proved that Hollis had asked, at the Glebe Hotel, to see Sarah Jane Cherrington, stating she was a relation of his wife's, which was false. And that Mrs. Blakeman had also called several times at the Glebe Hotel, and been up to Sarah Jane Cherrington's room.

It was further proved by a sergeant of police that, when he arrested Hollis and charged him with administering a noxious drug, &c., to Sarah Cherrington, he said, "It's a lie; I never gave her, or anyone else, anything of the sort. I don't even know such a party."

The same policeman proved that, on the 24th Feb. 1873, he apprehended Mrs. Blakeman, and charged her with aiding and abetting Hollis in administering a certain drug to one Sarah Cherrington, with intent, &c. She said, "What I am charged with is untrue; she never was ill in my house; she miscarried at Lawton's."

The policeman further proved that, on the 22nd Feb. he served Mrs. Blakeman with a summons to appear against Hollis. She then said Hollis had never been to her house. The policeman further proved that, on the 27th Feb. she asked him if she could see the chief superintendent, and that he took her there that night. She then asked him if he would give her the same chance as he did on Saturday, and added, "I wish I had told you the truth about it; Hollis did bring the girl to my house, and came to see her."

At the close of the case for the prosecution, it was submitted by the counsel for the prisoners that there was no evidence to go to the jury against either prisoner, as there was no proof that the bottle given by Hollis to Sarah Jane Cherrington contained any poison or other noxious thing, and further, that there was no evidence to fix the female prisoner.

I declined to stop the case but promised if necessary to reserve for the consideration of the court the question whether there was any evidence to go to the jury against both or either of the prisoners.

I left the case to the jury telling them that they could not convict either prisoner, unless they were satisfied that the stuff taken by Sarah Jane Cherrington was a poison or other noxious thing.

The jury found both prisoners guilty, and they were liberated on bail.

The opinion of this court is requested on the following points, viz.:—First, was there any evidence to go to the jury that the stuff taken by Sarah Jane Cherrington was a poison or other noxious thing; secondly, was there any evidence

to go to the jury in support of the charge against the female prisoner.

(Signed) GEORGE E. HONTMAN.

Bosanquet for the prisoner:—There was no evidence that the stuff administered was a poison or noxious thing within the meaning of the statute 24 & 25 Vict. c. 100. s. 58. The only evidence is that the prisoner Hollis gave the prosecutrix some stuff in a phial of a light colour and of a bitter taste. It was not shown what it was. *Reg. v. Isaacs*, 32 L. J. 52 M. C., shows that there must be evidence that the thing administered is noxious. [BRAMWELL, B.—A noxious thing within the statute means a thing that will produce the effect mentioned in the statute—that is, a miscarriage. This appears to have produced that effect. BLACKBURN, J.—There was some evidence that it was noxious]. Secondly, the illness was produced by the first administration of the stuff, and before the prosecutrix was introduced to the other prisoner, Blakeman, and there was no evidence that she was a party to that administration. [BOVILL, C. J.—There was evidence of concert. She went to meet the girl at the station, and Hollis told her what he had given the prosecutrix]. There was no evidence that the female prisoner (Blakeman) was a party to the administration of the stuff. [ARCHIBALD, J.—She made all the preparations for the miscarriage.] That would show her to have been an accessory after the fact. [BLACKBURN, J.—The case states, Hollis told the female prisoner what he had given the prosecutrix. When they got to Blakeman's house, Hollis gave the prosecutrix in Blakeman's presence some medicine in a bottle like the other, and told her in Blakeman's presence to take it like the other. She did so, and afterwards felt very ill and was in great pain.] This is not an indictment for a conspiracy to procure a miscarriage, but both are jointly charged with administering a noxious thing with intent to procure a miscarriage. It is submitted that the evidence proves administration by Hollis only.

No counsel appeared for the prosecution.

BOVILL, C.J.—We are all of opinion that the conviction was right, and ought to be affirmed. The evidence shows that the miscarriage was arranged through the instrumentality of Hollis, who administered the stuff, and some woman who was to procure the means of getting rid of the effects of the thing administered. There was evidence of the two prisoners having acted in concert, and both are answerable for whatever was done in furtherance of the common purposes. They were in communication, and both knew that the drug had been administered. Hollis found the drug, and Blakeman the room where the prosecutrix was taken to, and in a short time the effect intended was produced.

The rest of the court concurred.

Conviction affirmed.

Saturday, April 26, 1873.

(Before BOVILL, C.J., BRAMWELL, B., BLACKBURN, ARCHIBALD, and HONTMAN, JJ.)

REG. v. CHARLES SATCHWELL.

Arson—Stack of straw—24 & 25 Vict. c. 97, s. 17. The prisoner set fire to a quantity of straw placed in a lorry and left for the night in the yard of an inn on its way to market:

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Held, that upon these facts a conviction on an indictment charging him with setting fire to a stack of straw, could not be sustained.

CASE stated for the opinion of this court by Blackburn, J.—

At the last Summer Assizes for Warwick, the prisoner was tried before me for wilfully and maliciously setting fire to a stack of straw, the goods of William Allsop.

There was a second count for a previous conviction.

It was proved that the prisoner did wilfully and maliciously set fire to a quantity of straw, amounting to 22 cwt., which was packed on a lorry.

The straw had been placed on the lorry to convey to market, and brought six or seven miles on the way. The horses had been removed, and the lorry with the straw on it left for the night in the yard of an inn, ready to be taken on to market next morning.

I inclined to think that the straw being packed on a lorry, was not a stack within the meaning of the 24 & 25 Vict. c. 97, s. 17, and consequently, that the setting fire to it was not a felony; but the case being clear in fact, I directed a verdict of guilty, and sentenced the prisoner to seven years penal servitude, reserving the point, whether the setting fire to the straw was a felony.

(Signed) COLIN BLACKBURN.

No counsel appeared to argue on either side.

BOVILL, C.J.—We have considered this case, and are all of opinion that this conviction must be quashed. The prisoner was indicted for setting fire to a stack of straw, under the 24 & 25 Vict. c. 97, s. 17, and the question reserved is, whether the facts proved support an indictment for setting fire to a stack of straw. The statute enacts that whosoever shall unlawfully and maliciously set fire to any stack of corn, grain, pulse, tares, hay, straw, halm, stubble, or of any cultivated vegetable produce, or of furze, gorse, heath, fern, turf, peat, coals, charcoal, wood, or bark, or to any steer of wood or bark, shall be guilty of felony. That section refers specifically to certain things, the setting fire to which shall be felony. Now here, what the prisoner set fire to was not a stack in the ordinary sense of the word, but a quantity of straw. The case does not state whether that straw was brought from a stack or was to be taken to a stack. We think that this was not a stack of straw when set fire to, though it may have been once part of one; and that having, if it ever was a stack, been removed and placed on a lorry ready to be conveyed to market, it had ceased to be a stack. The case of *Reg. v. Aris* (6 Car & P. 348), was somewhat similar to the present, and so far as it goes confirms our opinion. In that case, one count of the indictment charged the prisoner with setting fire to a stack of wood, and the evidence was that at the time of the fire there were in a loft some straw and a score of faggots, which were piled up one upon another. The straw was burnt and some of the faggots, and Park, J., held, that this was not a stack of wood within the statute of 7 & 8 Geo. 4, c. 30, s. 17.

The rest of the Court concurred.

Conviction quashed.

Saturday, May 3, 1873.

(Before BOVILL, C.J., BRAMWELL, B., BLACKBURN, ARCHIBALD, and HONYMAN, JJ.)

REG. v. LINCE.

False pretences—Divisibility—Evidence.

The prisoner was convicted on an indictment charging that he did falsely pretend that he then lived at, and was the landlord of, a beerhouse, and thereby obtained goods.

The evidence was, that prisoner said he was the nephew of a man in prosecutor's employ, which was true; and that he lived at the beerhouse; but he did not say he was the landlord of that house; Prosecutor, in parting with his goods, was influenced both by the fact of his being the nephew of his servant, and the statement that he lived at the beerhouse, and that therefrom he believed him to be the landlord of the beerhouse:

Held, that it was immaterial that the prosecutor was partly influenced by the fact that the prisoner was the nephew of his servant:

Held, also, that the allegation that the prisoner lived at and was the landlord of the beerhouse was divisible, and that the part, "that he lived at the beerhouse," being false, he was rightly convicted.

CASE reserved for the opinion of this court.

The prisoner was indicted at the adjourned Epiphany Sessions, held at Chelmsford, on the 18th Feb. 1873, for that he did unlawfully, knowingly, and designedly, falsely pretend to one James Hutley, that he, the said William Lince, then lived at and was then the landlord of a certain beerhouse at Margaretting Tye, by means of which said false pretences the said William Lince did then and there unlawfully obtain from the said James Hutley eighty-six bushels of potatoes, with intent to defraud.

From the evidence it appeared that the prisoner was the owner of a van in which he lived, and which at the time in question was standing in a field in the occupation of the keeper of the beerhouse on Margaretting Tye. Prisoner had never resided in this beerhouse, but it was with the consent of the keeper of the said beerhouse that the van was standing in the field: and there had been money transactions between prisoner and the beerhouse keeper.

The prosecutor, James Hutley, stated that when the prisoner came to him to purchase the potatoes which were the subject of the charge, and which were sent to the prisoner and never paid for, he, the prisoner, told him he was the nephew of a man then in prosecutor's employ, and this turned out to be true; and he further told him that he lived at the beerhouse at Margaretting Tye, though he did not say he was the landlord of that house.

The prosecutor stated that when he sent the potatoes to the prisoner his mind was influenced by the belief that the prisoner was his servant's nephew, and that his mind was also influenced by the statement that he lived at the beerhouse at Margaretting Tye. The prisoner did not say he was the landlord of the beerhouse, but still he believed him to be the occupier of that house.

It was contended for the defence: First, that there is only one pretence stated in the indictment, namely, that prisoner lived at and was then the landlord of the beerhouse, that this assertion could not be divided, and that inasmuch as the evidence showed that the prisoner had not represented himself as the landlord, the prosecution

must fail; secondly, assuming that the assertion is divisible, and that the words, "he lived at," are a pretence, there is no evidence to show that the property was obtained by means of that pretence, the prosecutor saying that the belief that the prisoner was the nephew of his servant influenced his mind as well as the belief that he was the occupier of the beerhouse.

The chairman directed the jury to find the prisoner guilty, if they believed, first, that any false representation had been made; secondly, that the mind of the prosecutor had been influenced in a substantial degree to part with his property by that false pretence; thirdly, that there was fraudulent intent upon the part of the prisoner in the transaction. But that if they had reasonable doubts upon any one of these points, they were to acquit him.

The jury found the prisoner guilty, and the following points were thereupon reserved:—First, whether the charge could be sustained, the indictment stating the false pretence to be, that the prisoner "then lived and was then the landlord of a certain beerhouse," when the prisoner had never stated that he was the landlord of the beerhouse, but only that he lived there; secondly, whether a charge of obtaining goods by false pretences can be sustained when prosecutor admits that another circumstance influenced his mind in parting with his goods, as well as the alleged false pretence.

The prisoner was sentenced to six calendar months' hard labour, and being unable to find bail, he went to prison.

(Signed) J. W. PERRY WATLINGTON,
Chairman of the Essex Sessions.

No counsel appeared to argue for the prisoner.

G. Taylor, for the prosecution.—First, it is not necessary that all the false pretences alleged should be proved, but if part only be proved, and the prosecutor was induced thereby to part with his property, that is sufficient. [BLACKBURN, J.—What is the false pretence proved here? The prisoner never said that he occupied the beerhouse, and the prosecutor only states that his mind was influenced by the statement that he lived at the beerhouse. It is not found that the prisoner led him to believe that he was the landlord of the beerhouse.] The case does not profess to set out the whole of the evidence, and it was for the jury to determine whether the prisoner's statement could reasonably influence the prosecutor's mind. [BLACKBURN, J.—The case does not show that the jury were ever asked to determine that.] This is a case of variance merely, and the false pretence charged, that the prisoner lived at and was the landlord of a certain beerhouse, is divisible. In *Reg. v. Hewgill* (Dears. 315), it was held sufficient to set out in the indictment the actual substantial false pretence by which the property was obtained, and to prove the same, although other matters not alleged in some measure operated as an inducement upon the prosecutor's mind. Here it was proved that the prisoner said he lived at the beerhouse, and the jury have found that operated on the prosecutor's mind.

BOVILL, C.J.—There were two points contended for by the prisoner's counsel at the trial, and reserved for the consideration of this court. The first point was, whether the charge could be sustained, the indictment stating the false pretence to be, that "the prisoner then lived at and was then the landlord of a certain beerhouse," when the

prisoner had never stated that he was the landlord of the beerhouse, but only that he lived there. It is clearly sufficient to sustain an indictment to prove part only of the false pretences charged; and the question here is, whether the false pretences charged, viz., that the prisoner "then lived at and was the landlord of a certain beerhouse," is a statement of two facts, which are false. It seems to me that it is, and that they may be divided; and that if it is proved to be false as to one, the other need not be proved. The second point reserved was, whether a charge of obtaining goods by false pretences can be sustained when the prosecutor admits that another circumstance influenced his mind in parting with his goods, as well as the alleged false pretence. It has been long settled that it is immaterial that the prosecutor was influenced by other circumstances than the false pretence charged. If that were not so, an indictment for false pretences could scarcely ever be maintained, as a tradesman is generally more or less influenced by the profit he expects to make upon the transaction. The case of *Reg. v. Hewgill* is an authority in support of this view. I therefore think this conviction ought to be affirmed.

BLACKBURN, J.—The only doubt that I have had is, whether on the case it appears that the jury were sufficiently asked to find whether the prisoner's statement that he lived at the beerhouse, and whether it is sufficiently found that that false pretence influenced the prosecutor's mind. I think, however, that that point is not reserved.

Conviction affirmed.

V.C. BACON'S COURT.

Reported by the Hon. ROBERT BUTLER and F. GOULD,
Esq., Barristers-at-Law.

Feb. 28 and March 1, 1873.

THOMPSON v. THE PLANET BENEFIT BUILDING AND INVESTMENT SOCIETY.

Benefit building society—10 Geo. 4, c. 56, s. 27—6 & 7 Will. 4, c. 32—*Withdrawing investment*—*Bill by member against directors and trustees of society*—*Jurisdiction*—*Demurrer*.

The clause in the above Acts providing for the reference to arbitrators or justices of the peace of internal disputes between benefit building societies and their members are not merely permissive, but are imperative, and oust the jurisdiction of the court.

THIS was a demurrer to a bill filed by a member of the Planet Benefit Building Society against the society and the trustees who were the parties authorised by statute to sue and be sued for the society, and the directors of the society.

The bill stated that the society was duly enrolled pursuant to the provisions of the 6 & 7 Will. 4, c. 32, and that the rules of the society were duly certified by the barrister appointed for that purpose. The shares of the society were divided into paid up-shares of 50l. each, part paid-up shares and subscription shares, and by the rules it was provided that if several members were desirous of withdrawing, and should give notice thereof at one time, they should be paid in rotation according to the priority of notice, provided always that the widows and children of deceased members should have precedence, and after them the holders of paid-up shares.

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The plaintiff was the holder of certain part paid-up and subscription shares, which were transferred to him by a Mr. John Selby, who had, in Sept. 1871, previously to the transfer, given notice of his intention to withdraw his investment, the benefit of which notice the plaintiff now sought to avail himself of. In May 1872, certain rules, without the knowledge of the plaintiff, were passed relative to the withdrawing of investments, but the plaintiff contended that in consequence of the notice of withdrawal he was not bound by such new rules.

The bill stated that the directors had, contrary to the rules of the society, paid to members whose notices of withdrawal were subsequent to that of the plaintiff, their investments in priority to the plaintiff, and the plaintiff charged that the directors were personally liable to repay any sum so paid by them which might be necessary for satisfying his claims. The bill further stated that the society had, contrary to the terms of its constitution, carried on through the directors and trustees the business of a bank of deposit, by receiving money from the public on deposit, at interest above the bank-rate, and that allowed by joint stock banks, and by investing the moneys so received on securities of a hazardous or speculative character in order to make a profit on the money so received. The bill further stated that the defendants alleged that the dispute ought to be referred to arbitration; but the plaintiff charged that, having regard to the relief thereby prayed, he was not bound to refer such dispute to arbitration.

The plaintiff then prayed for declarations that he was not bound by the rules of May 1872, that he was entitled to the benefit of the notice of withdrawal of Sept. 1871, and to immediate payment out of the funds of the society of the amount of his shares with interest, that the directors were personally liable to make good and repay any sum paid by them to members whose notices of withdrawal were subsequent to his, so far as was necessary for the purpose of satisfying his claim; that the directors might be decreed to raise out of the funds of the society the amount due to him, and in the mean time might be restrained from paying any member whose notice of withdrawal was subsequent to his.

The defendants demurred to the jurisdiction, and also for want of parties.

Kay, Q.C. and W. W. Cooper, for the trustees, in support of the demurrers. The society was established under the 6 & 7 Will. 4, c. 32, in which is incorporated 10 Geo. 4, c. 56, by sect. 27 of which Act provision is made for the determination of disputes as to the rights of members, either by arbitrators or by reference to justices of the peace. This provision is imperative, and not merely permissive, and ousts the jurisdiction of the ordinary tribunals.

Crisp v. Bunbury, 8 Bing. 394;

Rea v. Mildenhall Savings Bank, 6 A. & E. 952;

Wright v. Deley, 4 Hurl. & Colt. 209;

Armistage v. Walker, 2 K. & J. 211; 26 L. T. Rep. O. S. 182;

Trott v. Hughes, 16 L. T. Rep. O. S. 280;

Cooke v. Lord Courtown, 6 Ir. Eq. Rep. 266.

In *Fleming v. Self* (3 De G. Mac. & G. 997; 24 L. T. Rep. O. S. 101), it was held that the court had jurisdiction, but there the question depended partly on the construction of the rules and partly on the meaning of the mortgage deed,

and the mode of giving effect to it. Also in *Smith v. Lloyd* (26 Beav. 507), the Master of the Rolls held that the jurisdiction of the court was not ousted, but it would appear that that decision was given under the impression that the 10 Geo. 4, c. 56, had been repealed, whereas, so far as it concerns benefit building societies, its provisions have been incorporated in the latter Acts. As to want of parties they referred to *Harmer v. Gooding* (3 De G. & Sm. 407).

Amphlett, Q.C. and *Ingle Joyce* for the directors. —The directors have not done anything contrary to their duty, and there is not even any allegation of fraud or misconduct against them; there is, therefore, nothing to make them personally liable. This is a suit to settle a dispute between a member and the society which the court will not allow. The suit is also defective for want of parties.

Swanston, Q.C. and *Graham Hastings* for the plaintiff. —The present case is on all fours with *Smith v. Lloyd* (26 Beav. 507) and the case of *Doubleday v. Hosking* (which is unreported) decided by the Master of the Rolls on 8th Nov. 1869. In all the cases cited, the rule referring disputes to arbitration was set out; in this case the rule is not before the court, and therefore the demurrer is technically wrong, but, assuming that the rule is before the court, the jurisdiction of the court is not ousted, for the bill charges the society with carrying on the business of a deposit bank contrary to the rules, and therefore the society has forfeited the benefit of the 6 & 7 Will. 4, c. 32: (*Grimes v. Harrison*, 26 Beav. 435.) The provisions, too, with reference to arbitration are merely permissive:—

Cutbill v. Kingdom, 1 Ex. Rep. 404, 504;

Mullock v. Jenkins, 14 Beav. 628; 18 L. T. Rep. O. S. 203.

As to want of parties the directors are trustees for all the members of the society, and sufficiently represent them:—

Henry v. The Great Northern Railway Company, 4 K. & J. 1; 1 De G. & J. 606; 30 L. T. Rep. O. S. 10, 141;

Doubleday v. Hosking.

Kay, Q.C. replied.

The VICE-CHANCELLOR said:—In my opinion no case more important than this has occupied the attention of the court. Benefit building societies are scattered over the whole of this empire. There is hardly a town of any importance, or even of small importance, which has not one or more of such societies. If I were to decide in favour of this bill, and against the demurrers, I should open the flood gates of litigation, and ruin many and distress many more of the existing societies, and I should do it, according to my view of the case, directly against the words of the statutes, and against the policy of the law as it is expressed in those words. It is quite clear that the statutes, which I need not read (notwithstanding the comment upon them that they are intended for poor people), were intended to encourage, and at the same time to protect, benefit building societies, and a new law and new machinery is created by the statute for the purpose of carrying that object into effect. One very plain feature is that assuming that the members of these societies will be numerous and many of them, perhaps all of them, will be poor, the object of the Legislature seems to have been carefully to guard against the possibility of any internal dispute (to use

an expression, I think of Lord Hatherley's in one of the cases) being dragged into courts of law or equity. Now in the clauses which have been referred to, the words of the statute do, in the most express manner, carry that object into effect. The decisions at common law have adopted that policy, and given effect to those words. The decisions in equity, with the exception of those to which my attention has been called, which create in my mind the only difficulty in the case, have all done the same thing, and although in the mortgage case the suit was entertained because it related to a subject entirely beyond, and not affected by the operation of the Benefit Building Society Act, *quid* Act, in all the other cases, without any exception, the principle is plainly recognized, that if the dispute between the parties is an internal dispute only it must be regulated by that provision which makes the arbitrators the conclusive judges and determiners of the dispute, whatever that may be. With that abundance of authority, and with that plain indication, contained in the statute, in any case in which there is merely an internal dispute between the members of the society and the society itself, or any of the persons holding office in the society and the society itself, I should be bound to hold that I cannot open the doors of this court to a dispute which the Legislature has said shall be settled elsewhere. I am greatly pressed by the two decisions which have been referred to, pronounced by the Master of the Rolls. I need not say that I entertain the most sincere respect for any decision of the Master of the Rolls, and that I would not willingly go against anything which I found he had decided. But when I find that his decisions which are here invoked, plain as they are in one instance, and plainly against the demurrers which have been argued, are directly opposed to the decisions at common law, and the other decisions in this court, I am not at liberty to hesitate in saying that I am bound by and must follow the other decisions, and must give force to the Act of Parliament as I read it, and as I conceive everybody else must read it. Now the cases which have been referred to principally are, first, the case of *Grimes v. Harrison* (26 Beav. 435), which has no very direct application to the case before me. In *Grimes v. Harrison* I find the Master of the Rolls, having pointed out the distinction between a benefit building society and freehold land society, says: "But this is quite clear, that in both cases the members must be bound by the rules constituting the society to which they have become parties, and upon which they have acted; and I am of opinion that it does not lie in the mouth of any member of the society to say that the book of rules, certified by the barrister, does not contain the rules by which they are to be bound." The decision there goes upon a totally different point; something had been done there which was not consistent with the rules, or with the scope and intention of the society established by the statute, but the decision turned entirely upon that. Having first decided that they were at liberty to sell freeholds, he decided ultimately that the directors had committed a breach of trust in having contracted a purchase for 2000*l.*, which they had not the money to meet; that having given a cheque for 800*l.* when they had only 600*l.* in hand, they were liable to replace the 800*l.*, and that the vendor

was under no liability. But the other case, namely, the case of *Smith v. Lloyd* (25 Beav. 507), is very much more to the purpose, and creates a very much greater difficulty, because there the bill was by a retiring member of a benefit building society against the trustees to recover the plaintiff's share. It was supported, and inquiries and accounts were directed; and it was held there that the rule to refer to arbitration did not oust the jurisdiction of this court in such a case. In the argument of that case reference was made by the defendant's counsel to the case of *Trott v. Hughes* (16 L. T. Rep. O. S. 260); in that case the arguments state that a shareholder had given notice to withdraw, and the court refused to restrain the directors by injunction from parting with the fund in their hands on the ground of the plaintiff having a primary lien upon them for the return of his subscriptions or an apprehended mismanagement of the fund. Lord Cranworth there used the words which I am quoting: "The Legislature, for the convenience of institutions of this kind, had provided a particular mode for the settlement of disputes of this sort." Then he refers to the 33rd Regulation of the society, made in compliance with the directions of the Legislature, by which the directors were able to decide disputes between the society and any of its members. If that decision were not satisfactory to them, then arbitrators were to be appointed. His Lordship added: "The case was one of a benefit society regulated by rules made in pursuance of certain Acts of Parliament. By one of these it had been provided that disputes as to the construction of the rules, or any other matter relating to the society, should be referred to arbitration. The Legislature had thus concluded the question by the appointment of a tribunal—a less expensive and more appropriate one." His Lordship said he thought in doing that, they proceeded upon an erroneous principle. That statutory enactment, which is so referred to in the argument, I do not find alluded to in the judgment. I do not find that the judgment in the case of *Trott v. Hughes* provokes a single observation from the Master of the Rolls. I cannot impute to his Lordship the intention of overruling *Trott v. Hughes*. And if he differed in opinion from Lord Cranworth, I cannot impute to him that he would not have said so, and have furnished the parties in the suit with a suggestion of some of the reasons why he differed; but I find that which I cannot help thinking (although it is a mere suspicion) must have had some influence upon the Master of the Rolls' mind, and an influence to the extent of making him think it was unnecessary for him to consider Lord Cranworth's decision, because the Act of Parliament on which it was founded had been repealed. I find it reported that Mr. Villiers in reply said that the 10 Geo. 4, c. 56, has been repealed by the 13 & 14 Vict. c. 115; and a cursory inspection of the latter statute might possibly have led to that notion; but a closer examination shows that it has no such effect, but that the provisions of the 10 Geo. 4 remain still in all their original force. In the judgment of the Master of the Rolls, all that he says upon the subject is, "On looking into this case I see nothing to oust the jurisdiction of the court in these matters." Lord Cranworth had decided in the most express terms that the jurisdiction of the court was ousted. No single

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observation is reported to have been made by the Master of the Rolls upon Lord Cranworth's judgment. The judgment proceeds, "I am of opinion that the court has jurisdiction, but whether the plaintiff will ultimately succeed must depend on the result of the inquiries." Then the rest of the judgment only says that his Lordship thought he must direct the inquiries: can I accept that to the extent to which it was tendered to me, and urged very properly by Mr. Swanston? I have no power, and as little inclination to overrule any decision of the Master of the Rolls, but I cannot understand it. I read that an authority is quoted to the Master of the Rolls, I read that it is said that that authority (I don't mean that it is actually stated in such words) is of no binding power, because the Act of Parliament on which it is founded is repealed, and I find what I cannot but consider a ready adoption by the Master of the Rolls of that last statement, and from that statement, he found himself relieved from considering anything about *Trott v. Hughes*, because the Act of Parliament was repealed. For this reason, I do not feel myself so much bound by the case of *Smith v. Lloyd* as I otherwise should have been. But then the other case which has been referred to by Mr. Graham Hastings, and which is a much more recent case, contained the two points, the objection for want of parties, and the effect of what is an explicit plain rule providing for a reference to arbitration. That is set out, as I understood Mr. Graham Hastings to tell me, in the answer. What arguments were addressed to the court, and in what terms his Lordship expressed his judgment I have no means of ascertaining, but the decree as Mr. Graham Hastings read it to me, is a plain decree overruling both the objections, and in its effect directing the inquiries which are mentioned in the decree which ought not to have been made if the objection as to arbitration prevailed, and disregarding utterly the objection for want of parties. Then I am in this position; I have to deal with a case in which I find an abundance of authority one way, and on which side also my own judgment leans, and that is opposed only by one case, for although I have mentioned two for the reasons I have given, I do not think *Smith v. Lloyd* can in justice to the Master of the Rolls be fairly and properly considered as a decision on the point. It is said that I must adopt that case in opposition to all the others. I cannot do that; I have only to consider whether upon this record a case is stated which comes within the principle of the decisions and the words of the Act of Parliament. I find that it states this, and this only, there is a dispute between a member of the society and the executive body of that society. That is the very case which the law meant should be submitted to arbitration, and meant that it should be disposed of as speedily, and with as little expense as possible, because it will be recollected that the amount of the expense is limited by the Act of Parliament. The allegation in the bill is this: that the society was established in July 1848, and was duly enrolled pursuant to the Act of Parliament of the 6 & 7 Will. 4, and that the rules of the Society were duly certified by the barrister appointed for that purpose on July 7, 1848, which is the very day on which the society was enrolled. It has been truly said that the statute leaves no option to the parties as to

the rules, and that it imperatively requires that there shall be this rule about arbitration. As a matter of pleading, therefore, am I at liberty to doubt that this record is to be read as if the rule upon the subject for arbitration were set out? It has been urged by Mr. Swanston with great force, and that is entitled to great consideration, that in the Common Law Cases, and in some of the other cases, the rules were set out at length, so that the court had an opportunity of considering them, and that that is wanting in this case. I should be very slow indeed, under these circumstances, to furnish such a recipe for filing bills against benefit building societies as would be furnished if I held that the allegation that the rules, which were duly certified, did not contain that rule which the statute says shall be an indispensable rule among them, was sufficient to maintain the bill. It is not necessary to pursue that very much further, because in a letter which has been read in the course of the argument I find upon the part of the directors this sentence: "If you should be dissatisfied with their decision, the directors are ready and willing, and hereby offer, to refer all matters in dispute between your client and themselves to arbitration under the rules." The only other reference which is made to that subject is in the 28th paragraph of the bill. "The defendants sometimes allege that the dispute between the plaintiff and the defendants ought to be referred to arbitration, but the plaintiff charges that, having regard to the relief hereinafter prayed, he, the plaintiff, is not bound to refer such dispute to arbitration." That makes it necessary for the purpose of understanding the plaintiff's contention to refer to the relief that he asks, which is simply that he may be paid the money that he says, according to the rules, is due to him. There has been an attempt made to say that there is a charge in this bill which would sustain it, I mean the 27th paragraph, because the effect of that is to show that the benefit building society has so enlarged its borders as that it has become a society of a different kind, namely, a bank of deposit. If any relief had been prayed upon that, that would have had to be considered, but as it is I read it as the most harmless and immaterial allegation that can be conceived. It has no more to do with it than if they had alleged anything else on the part of the directors. First he says that, "He is apprehensive that such a sum or the greater part thereof may be lost in consequence of the payment by the defendants, the directors, to members (who are subsequent to the plaintiff) of their investments" and his apprehension of course does not give him a right to sustain this bill. Then he says: "The said society has contrary to the terms of its constitution carried on through its trustees and directors the business of a bank of deposit by receiving money from the public on deposit at interest above the bank rate, and above the rate allowed by the joint stock banks, and by investing the money so received on securities of a hazardous or speculative character in order to make a profit on the money so received." This society was established in the year 1848. What is there alleged may have been done long before Mr. Selley or the plaintiff became members of the society. I am not going to speculate whether it was or not, or whether it has been discontinued, but I say, that I cannot even read that as an allegation that the directors are now doing the thing

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at which that complaint is pointed. When to that is added that there is no prayer for relief founded upon it, I consider that a wholly immaterial allegation. Then what remains, if the bill be read through, it says simply this, "I became in October, 1872, the owner of certain shares." They had been transferred to him, he was the equitable owner the year before, he could only have them according to the rules, he could claim nothing besides or beyond, or in contradiction to the rules, he says, "I became the owner in 1872. I claim the benefit of the previous notice of withdrawal which had been given. I say that the payments which had been made were in contravention of my right." If the 26th paragraph is read, it will be found that that is an insufficient allegation, for, according to the rules quoted, paid-up members have the first right to be paid, and next to them the widows and children of deceased members; and the allegation that some of the members whose notices of withdrawal are dated after 19th Sept., 1871, have been paid in priority to the plaintiff, points out no kind of delinquency on the part of the directors, nor even suggests a cause which he would have a right to complain of before the arbitrator, if the matter were referred to arbitration. In my opinion, the proceeding has been altogether erroneous. I think that, taking at the most the complaint which this gentleman makes, and giving to it its full weight, and adopting every word that he uses in the way of complaint, that this is a case, which, according to the statute, the policy of the law and the decided cases, he ought to have insisted upon being decided by the arbitrators, who had power to decide. The law having given them power to enforce their award, there was no necessity in this case for filing any such bill, and I should be greatly alarmed if I entertained a cause of this kind, because I am certain I should be doing incalculable mischief, and plunging the affairs of benefit building societies into danger and difficulty, which it is the plain and express object of the Legislature to protect them against. I think, therefore, that the demurrers must be allowed.

Solicitors for plaintiff, *Harper, Broad and Battcock*.

Solicitors for the defendants, *Ingle, Cooper, and Holmes*.

V.C. WICKENS' COURT.

Reported by EDWARD WINSLOW and HENRY GODEFROI, Esqrs.
Barristers-at-Law.

May 6 and 9, 1873.

SHOESMITH v. BYERLEY.

*Injunction—Right of way—Cul-de-sac—Obstruction
Mutual rights.*

Where the plaintiff established by evidence a right of using a cul-de-sac for the purpose of his property which was at the head of a road, and farthest from its outlet, but did not prove any grant of a right, a decree was made declaring that it was the duty of the defendant, who had premises lower down the road, so to arrange the use of the road by him as best to facilitate the reciprocal rights to the use of it by other persons entitled to use it, not to leave stationary obstructions in the road when others required to use it, and in such case to remove any such obstruction immediately, with an injunction to

restrain the use of the road by the defendant in any other manner.

THE plaintiff in this case was the proprietor of certain premises known as "Mr. Shoesmith's Hay and Corn Stores," in West-street, Brighton, and the only approach to them was by a private road of the width of about 9ft. 9in., with a footpath at the side of the width of 5ft. The road is bounded on one side by a chapel and a courtyard belonging to it, and by a dwelling-house and on the other side by the premises of the plaintiff and by certain corn stores recently erected by the defendant on a garden which belonged to a house in the street and adjoining the plaintiff's property. The road had been made by the lord of the manor and had been used by the plaintiff almost exclusively, and ever since 1849 he had kept it in repair at his own expense.

Several years ago the occupier of the house and garden to which the defendant had added his stores, was permitted to open a doorway from the garden into the road, and also to make a small opening in the road near the garden wall for a coal-shoot, but the bill alleged that only foot-passengers were allowed to use the door as a means of access to the road.

The defendant became the occupier of his premises in 1871, and in July of the same year built his corn stores.

The bill then stated that the defendant had taken down part of the former garden wall and placed carriage-gates there opening on to the road, and had used the road for carrying hay and corn in carts to and from his stores, and had seriously obstructed the plaintiff in the use of the road to which the plaintiff claimed an exclusive right; that the road was so narrow that when the defendant's carts were loading or unloading at the new gateway the plaintiff was unable to use the road at all, sometimes for periods of an hour at a time.

In November 1871 the plaintiff brought an action in the County Court against the defendant for disturbing the plaintiff's use of the road, but a verdict was taken by consent for forty shillings.

The bill then prayed for an injunction accordingly, and a declaration that the defendant was not entitled to use the road so as to obstruct the plaintiff's use of it, or to use the new gateway for any purpose whatever.

The defendant by his answer denied that the road was a private road, though he admitted that he had no reason to doubt that the plaintiff had never before been obstructed in his use of it, but he stated his belief that the former tenant of his premises had had access to the road for carts as well as for foot-passengers; he further insisted that if it was not strictly a public road for all purposes, it was at least subject to the use and enjoyment of all the owners and occupiers of the premises abutting upon it. He alleged that the plaintiff had stood by when he was making the new gateway; and he admitted that he had obstructed the passage of the plaintiff's carts, but not for such long periods as alleged by the bill; but that it was easy for a cart to pass another cart by going over the footpath at the side of the road. He then claimed a right to use the road as an occupier of an adjoining messuage; and contended that the injury complained of was only temporary and slight.

Evidence was given by the plaintiff's witnesses

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as to the obstructions; and his time-books were produced. The evidence as to the former mode of user of the road was very conflicting. The case now came on to be heard upon motion for decree.

Lindley, Q.C., and *Speed* appeared for the plaintiff.—The defendant, or his predecessors in title, had only a right to use the old door occasionally, and he had no right to increase the servitude by turning the place into business premises. It does not appear from the pleadings who is the owner of the road. We do not deny that a cul-de-sac may be a public road, but the defendant must prove that it is so if he alleges it (*Woodyer v. Hadden*, 5 Taunt. 124). Whether a cul-de-sac is a highway or not is a question for a jury: (*Reg. v. Lloyd*, 1 Camp. N. P. 262.) [The VICE-CHANCELLOR.—There may be a partial dedication to the public; nothing is more common.] There is no evidence of dedication here, and that cannot be inferred. The defendant has not shown any grant of a right of way, and he is therefore a trespasser: (*Cooling v. Higginson*, 4 M. & W. 245.)

Kekewich (Dickinson, Q.C. with him).—We say that we do not obstruct the plaintiff in an unreasonable manner, not wilfully or otherwise than we are entitled to do, within the principle laid down in *Attorney-General v. Sheffield Gas Consumers' Co.* (3 De G. M. & G. 339). He also cited *Gaunt v. Fynney* (L. Rep. 8 Ch. 8). [The VICE-CHANCELLOR referred to *Thorpe v. Morrell* (a), in which an injunction was asked to restrain the plaintiff's right to unload waggons in an innyard, the defendants claiming a similar right.]

May 9.—The VICE-CHANCELLOR.—It seems that out of West-street, Brighton, there is an impervious alley or cul-de-sac with houses on both sides—a pavement on one side, and a carriage-way so narrow that carriages cannot pass one another. The houses are numbered as in West-street, but there is no reasonable doubt that the road is private. At the upper end of this, that is, the end furthest from West-street, the plaintiff has hay and corn stores. The defendant has recently established similar stores at the lower end, and the plaintiff's complaint is in substance that the defendant's carts, while they wait to be loaded, cut off communication by cart between the plaintiff's stores and West-street, or in other words between the plaintiff's stores and the world outside. The whole property belonged some time ago to a Mr. Field, who is no party to the present controversy; and there is a good deal of evidence as to user, but no evidence on either side of a formal grant of right of way. Weighing the evidence and probabilities as well as I can, and drawing what seems to me the true legal inference, I think that the plaintiff must be taken to have the right of using the road for the purposes of his own property and concurrently with the other owners of property on both sides of it. The practical result of this view in the present case would seem to be that the plaintiff and the defendant have rights which are reciprocal and neither of which is paramount over the other, to use the roadway for their several trades. Each must be bound to use his right so as to injure the other as little as possible; what would constitute

abuse would be in nearly all cases undefinable. So thinking, I felt during the argument great difficulty as to defining the rights in any way which would warrant the granting of an injunction. The difficulty now seems to be removed in the case of *Thorpe v. Morrell*. That precise state of things which I infer to have existed here was inferred by the Master of the Rolls to exist in that case. My impression was that the case of *Thorpe* stood higher, and I rather infer that the Lords Justices thought so. But the Master of the Rolls, treating it as a question of equal and reciprocal rights, drew from that a particular inference in the plaintiff's favour, which the defendants on the appeal did not quarrel with; and as the Lords Justices certainly did not overrule the view of the Master of the Rolls, and I should clearly have followed his decision if unappealed from, I follow it now. Therefore I propose to make in this case similar declarations to what the Master of the Rolls made in that case and to grant an injunction founded on them. But as the plaintiff has, in my opinion, mistaken the true nature of his case, and has asked for much more than he can claim, the decree will be without costs. The following was the decree made:—"Declaration to the effect that it is the duty of the defendant so to arrange the use of the road as best to facilitate the use of it by the other persons entitled to use it; that he is not entitled to leave any stationary obstruction in the road except when the use of it is not required by any other person entitled to use it; and that if when the road is occupied by the defendant the use of it is required by any other person entitled to use it, the defendant is bound to remove the obstruction immediately. Injunction to issue to prevent the defendant, his workmen, &c. from using the road in any manner other as described in the preceding declaration. No costs."

Solicitors for the plaintiff, *Nash, Field, and Layton* for *Starkey*, Brighton.

Solicitors for the defendant, *Gregory and Co.* for *S. S. Long*, Portsea.

COURT OF QUEEN'S BENCH.

Reported by J. SKEOTT and M. W. MCKELLAR, Esqrs.,
Barristers-at-Law.

Wednesday, April 30, 1873.

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Pedlars' Act 1871—Missionary basket—Trade of a pedlar.

The respondent was one of several ladies who purchased materials and made them into articles of wearing apparel and of domestic use; they carried these articles about in a missionary basket from house to house for sale. The materials were paid for out of the money made by the sale, and the profits were devoted to educational and religious purposes. The respondent was not licensed under *The Pedlars' Act 1871*, but justices dismissed an information against her for breach of that Act.

Held that the respondent could not be said to travel and trade within the definition of a pedlar given by the third section; and that the justices were right in dismissing the information.

THIS was a case stated by justices for the Parts of Lindsay, in the county of Lincoln, under the Statute 20 & 21 Vict. c. 43, for the purpose of

(a) Not yet reported. This case stood over in order to obtain a note of the judgment of the Lords Justices in that case.

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obtaining the opinion of the court on a question of law which arose before them as hereinafter stated.

At a petty sessions holden at Great Grimsby, in and for the Hundred of Bradley Haverstoe, in the said parts and county on the 1st Oct. 1872, an information preferred by Wm. Gregg, of Great Grimsby, superintendent of police (hereinafter called the appellant), against Susannah, the wife of Charles Smith, of Laceby, shoemaker (hereinafter called the respondent), under sect. 4 of the Pedlars' Act 1871, charging for that she, the said Susannah Smith, on the 26th August 1872, at the parish of Laceby, in the said parts and county, unlawfully did act as a pedlar without having obtained a certificate under the Pedlars' Act 1871, authorising her so to act, contrary to the form of the statute in such case made and provided, was heard and determined by the said justices, the said parties respectively being then present with their respective attorneys, and upon such hearing the justices dismissed the said information without ordering the payment of costs by the appellant;

And whereas the appellant being dissatisfied with the determination upon the hearing of the said information as being erroneous in point of law, hath, pursuant to sect. 2 of the said statute, 20 & 21 Vict. c. 43, duly applied to the justices in writing to state and sign a case setting forth the facts and the grounds of their determination as aforesaid for the opinion of this court, and hath duly entered into a recognisance as required by the said statute in that behalf;

Therefore the said justices, in compliance with the said application, and the provisions of the said statute, stated and signed the following case:

Upon the hearing of the information it was proved and admitted on the part of the said appellant and respondent, and found as a fact, that twelve ladies, of whom the respondent was one, purchased materials and made them into aprons, handkerchiefs, chemises, shoes, and other articles of wearing apparel, and also wool mats and other articles of domestic use. These articles were carried about in a basket, called a Missionary Basket, from house to house for sale by the twelve ladies, each having the basket one month.

The respondent on the day mentioned in the information went "on foot to other men's houses" with the basket, and exposed for sale and sold some of the articles named above; and had no certificate (authorising her to act as a pedlar) under the Pedlars' Act 1871.

The twelve ladies do not find the money for the materials out of which to make the articles, but the money derived from the sales is applied towards the purchase of them. The profits of the baskets are devoted to a school in the village of Laceby, and religious purposes, but 10l. of the profits was once given towards furnishing a minister's house.

It is also an admitted fact that under the Pedlars' Act of 1870 each of the twelve ladies took out a pedlar's certificate, the fee for which was 6d.; but now they do not, as under the Pedlars' Act 1871 the fee for the certificate is 5s.

It was contended on the part of the respondent that the respondent did not come within the meaning of the term "Pedlar," mentioned in the first clause of the third section of the Pedlars' Act 1871, as she did not go about as a trader to sell for her own personal gain or profit, or as a means of livelihood, but simply for a charitable and religious

purpose, which was not within the spirit or contemplation of the Act.

On the part of the appellant it was contended that the respondent was a pedlar within the meaning of the Act, and that she was not one of those persons defined by the 23rd section who do not require certificates; and that if the Legislature had intended to exempt such cases as the going about from house to house and selling for charitable or religious purposes it would have defined them in the 23rd section.

No objection was made by the appellant or respondent that the said proceedings were illegal or irregular.

The justices, however, having considerable doubt whether the respondent was a pedlar within the interpretation of the term "pedlar" mentioned in the 3rd section of the Act, so as to bring her within the operation of the 4th section, gave her the benefit of such doubt, and dismissed the information.

The question of law upon which this case is stated for the opinion of the court, therefore, is whether upon the facts admitted and proved the respondent was a "pedlar" within the meaning of the Act, and liable to the penalties under the 4th section.

And the court was humbly solicited, according to the power vested in the court by the said statute, 20 & 21 Vict. c. 43, to remit the case to them, the said justices, with the opinion of the court thereon, or to make such other order as to the court might seem fit.

Cave argued for the appellant, the informant:—The definition in sect. 3 of the Pedlars' Act 1871, (34 & 35 Vict. c. 96) is, "The term 'pedlar' means any hawker, pedlar, petty chapman, tinker, caster of metals, mender of chairs, or other person who, without any horse or other beast bearing or drawing burden, travels and trades on foot, and goes from town to town, or to other men's houses, carrying to sell or exposing for sale any goods, wares, or merchandise, or procuring orders for goods, wares, or merchandise, immediately to be delivered, or selling or offering for sale his skill in handicraft." The object of all the Hawkers' and Pedlars' Acts appears from the judgment of Bayley, J., in *Rez. v. Gill* (2 B. & C. 142), 147, "to have been to protect domiciled tradesmen;" and to such persons these ladies would probably do as much injury as licensed persons carrying on the trade of pedlars. [BLACKBURN, J.—I do not believe these Pedlars' Acts were passed to protect tradesmen. They seem to be merely Police Acts.] In *The Attorney-General v. Tongue* (12 Price 51) Graham, B., referring to one of the Hawkers' Acts (50 Geo. 3, c. 41), said, p. 60, "The object of the Legislature in passing the Act upon which this information is founded was to protect on the one hand fair traders, particularly established shopkeepers, resident permanently in towns or other places, and paying rent and taxes there for local privileges, from the mischiefs of being undersold by itinerant persons to their injury; and, on the other, to guard the public from the impositions practised by such persons in the course of their dealings." This would include the respondent in the object of the Legislature. [BLACKBURN, J.—The question is rather whether the respondent was trading as a pedlar.] Here the purpose of the respondent was to make profit by the sale of these goods, just as a trader's purpose

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would be; the only difference between them is the destination of their profits. [BLACKBURN, J.—Amongst the regulations with respect to the grant of pedlars' certificates in sect 5, it is enacted that "a pedlar's certificate shall be granted to any person by the chief officer of the police of the police district in which the person applying for a certificate has, during one month previous to such application, resided on such officer being satisfied that the applicant is above seventeen years of age, is a person of good character, and in good faith intends to carry on the trade of a pedlar." And in the form given in schedule 2 of the Act, the applicant is required to state his trade and occupation. How can these provisions apply to the respondent P]

Waddy, contra, was not heard.

BLACKBURN, J.—I think there is no doubt about this case; the information was properly dismissed. The definition of pedlar relates only to a person who travels and trades on foot; and the police must be satisfied that an applicant for a licence in good faith intends to carry on the trade of a pedlar. Whether a person employed as the respondent was could be included in these provisions must be a question of fact, more or less, for the justices. I cannot say these ladies were trading, and I incline to think the justices have properly said they were not.

QUAIN, J.—I am entirely of the same opinion. In Lee on Bankruptcy, p. 488, a trader is thus defined: "The rule as to occasional acts of trading is, that where it is a man's common or ordinary mode of dealing, or where if any stranger who applies may be supplied with the commodity in which the other professes to deal, and it is not sold as a favour to any particular person, there the person so selling is subject to the bankrupt laws as a trader." And further on, "Whether or not a person is a trader does not depend upon his occasionally doing acts of trading, but upon the intention generally so as to get his living." According to this test of trading these ladies certainly cannot come within the Pedlars' Act.

ARCHIBALD, J.—I am of the same opinion.

Judgment for the respondent.

Attorneys for appellant, Swann and Co.

Attorneys for respondent, Grange and Winttingham, Great Grimsby.

Wednesday, May 7, 1873.

REG. v. THE MAYOR, &C., OF RYDE.

Town council—Motion of alderman—Rescission of resolution—Restoration by mandamus.

A town council, upon insufficient grounds, and by an illegal mode, passed a resolution removing an alderman, and declaring his office void. At the next meeting the council formally rescinded their previous resolution. The alderman obtained a rule for a mandamus to the corporation to restore him, on the ground that he might be liable to proceedings, if he continued to act merely upon the rescission of the resolution:

Held, that the corporation had done all they could do, and that there was no wrong which the mandamus could remedy.

On the 30th Jan. last, Sir J. B. Karslake, Q.C., on behalf of George Fellows Harrington, formerly alderman of the borough of Ryde, in the Isle of

Wight, and county of Southampton, obtained a rule nisi, calling upon the mayor, aldermen, and burgesses of the said borough of Ryde to show cause why a writ of *mandamus* should not issue, directed to them, commanding them to restore the said G. F. Harrington to his office of alderman of the said borough, from which he was removed by the town council of the said borough, on the 17th Dec. 1872.

The town of Ryde was incorporated by royal charter in the year 1868, and is locally governed by twenty-four councillors, from whom are chosen the mayor and six aldermen. The said G. F. Harrington was chosen an alderman at the first election in 1868. In 1871 he was re-elected alderman with six years' tenure of office.

On the 17th Dec. 1872, a meeting of the Ryde Town Council, adjourned from the previous day, was held in the absence of the said G. F. Harrington, and without any notice having been sent him of the object for which the adjourned meeting was to be held. The following resolution was passed:

That having regard to the various occasions specified in the paper marked A now read, a copy of which was forwarded to Mr. Harrington on the 16th Dec. 1872, in which the said G. F. Harrington acted, or voted, or took part in the discussion of questions or matters in which the Ryde Pier Company, or in which the Ryde Gas Company respectively were interested, or in which the said G. F. Harrington, as a shareholder or proprietor in the said companies, or one of them, was directly or indirectly interested, this meeting doth declare that the said G. F. Harrington became and is disqualified to act as an alderman of this borough; and that his said office has become and is now vacant, and this meeting doth hereby resolve that the said G. F. Harrington shall be, and that he is hereby removed from his said office of alderman, and this meeting doth hereby order and direct that the common seal of this corporation be affixed to the aforesaid order and resolution.

A. COLLINGWOOD J. DICKSON, (Seal.)
Chairman.

At an adjourned meeting of the council, held at the Town Hall, on Tuesday, the 17th Dec. 1872, the seal was affixed in the presence of

EDWIN HOGGOOD, Town Clerk.

A copy of this resolution was forwarded to the said G. F. Harrington by the town clerk on the following day.

The various occasions specified in the paper marked A, mentioned in this resolution, were all of them previous to the 9th Nov. 1871, when the said G. F. Harrington was re-elected to the office of alderman; and at none of these occasions did the said G. F. Harrington, even when he was present, vote for or against any resolution concerning either the Ryde Pier Company or the Ryde Gas Company. He held shares in both these companies, but was in no other way interested in them or their contracts.

On the 9th Jan. 1873, the Ryde Town Council, having received notice from the said G. F. Harrington of his intention to apply for a *mandamus* to compel them to restore him to his office of alderman, formally, at a general meeting, passed a resolution, rescinding the said resolution of the 17th Dec.

The town clerk stated in his affidavit that there was no meeting of the council between the said meetings of the 17th Dec. 1872, and the 9th Jan. 1873, and no attempt was made to elect or put any other alderman in the room or place of the said G. F. Harrington; also that since the 9th Jan. 1873, all notices and copies of agenda papers have been regularly sent to the said G. F. Harrington,

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as to the other aldermen of the borough, and no objection would have been made if he had chosen to attend the meetings of the town council.

The said G. F. Harrington stated that he had been threatened with proceedings for penalties and with an indictment if he exercised the rights and franchises of the office of alderman, and he was apprehensive that he might be harassed by proceedings against him unless he were restored and confirmed in his office by judicial decision.

Manisty, Q.C. (with him *J.O. Griffiths*), showed cause.—The resolution of amotion having been rescinded, the object of this rule was obtained before it was granted. The corporation admit that the amotion was invalid, and they can do no more than they have done. [*BLACKBURN, J.*—The rule was granted on the ground that the amotion was of so much effect that it required a judicial decision to rescind it.] The council acted upon sect. 2 of 5 & 6 Vict. c. 104, which provides "that it shall not be lawful for any member of the council of any borough to vote or take part in the discussion of any matter before the council in which such member shall directly or indirectly, by himself or his partner or partners, have any pecuniary interest;" but no power is given to a town council to turn a member out on this ground, and probably the mere holding of shares was not such a pecuniary interest as this section provides for (5 & 6 Will. 4, c. 76, s. 28); besides, this is not an offence for which a corporator may be disfranchised or a corporate officer removed, by the power of amotion incident to every corporation (*Rawlinson's Municipal Corporations Acts*, p. 80); nor is it within sect. 52 of 5 & 6 Will. 4, c. 76; at all events, the resolution was illegal, and may be taken to have been of no more effect than waste paper. *Bagg's case* (11 Co. Rep. 93 b.), shows that this resolution was altogether void, for more reasons than one. And Mr. Harrington's apprehensions are unfounded, because it was held in *Rea v. Heaven* (2 T. R. 772), that this court will not grant an information in nature of a *quo warranto* against a corporator for non-residence, until he has been removed by the corporation.

Sir J. B. Karlake, Q.O. and *Philbrick*, supported the rule.—In *Rea v. Taylor* (3 Salk. 231), which was a *mandamus* to restore an alderman, the corporation of Gloucester made a return, which was bad in form, although the cause of amotion was sufficient. "But the return being ill, for the reason before mentioned, a writ of restitution was granted, and the corporation might proceed *de novo*. A writ of restitution is what Mr. Harrington asks for here, after the corporation has made a return to the *mandamus*. If the resolution of amotion, although bad, had any legal effect, a mere rescission of the resolution cannot restore to an elective office. [*BLACKBURN, J.*—What possible risk can Mr. Harrington incur by continuing to act as an alderman?] He says proceedings might be taken against him.

BLACKBURN, J.—I think we must discharge this rule. First, the writ is discretionary, and we should not grant a rule unless to remedy a substantial wrong. I am, however, unable to perceive anything whatever of wrong to the prosecutor. He was improperly sentenced to removal by the council, but they have rescinded their resolution and revoked their sentence. The first proceeding was of itself invalid; and, if not, the rescission would have rendered it of no effect. *Sir J. Karlake*, although invited, showed no reason for Mr. Harrington's

apprehension of risk by continuing to act. If a writ of *quo warranto* were asked for against him, it would certainly be refused, and I know of no penalties to which he could be liable. This rule must be discharged with costs.

QUAIN, J.—I am of the same opinion. The corporation have done all they can do to counteract their mistaken resolution.

ARCHIBALD, J.—I am of the same opinion.

Rule discharged.

Attorney for prosecutor, *C. T. Foster*.

Attorneys for defendants, *Davies, Campbell, Reeves, and Hooper*.

Wednesday, June 4, 1873.

FITZPATRICK v. KELLY.

Adulteration of food—Representation by seller—Knowledge of adulteration—Proof—35 & 36 Vict. c. 74.

Respondent was charged before a police magistrate, under the Adulteration of Food, &c., Act 1872 (35 & 36 Vict. c. 74), s. 2, with having sold, as unadulterated, butter which was adulterated. The appellant, the inspector of nuisances, had asked in respondent's shop for a pound of butter, and received what upon analysis was found to be a mixture of various ingredients not injurious to health with some butter. No proof was given of any express representation by the seller that the article sold was unadulterated butter, nor that the respondent had any knowledge of the adulteration, and the magistrate dismissed the information:

Held, upon a case stated, that these facts constituted an implied representation, which was sufficient to satisfy the statute; that no proof of knowledge was required in the offence of selling articles adulterated with ingredients not injurious to health; and that the case must be remitted, in order that the charge should be tried on the merits.

This case was stated by the police magistrate of the borough of Liverpool, under 20 & 21 Vict. c. 43.

On the 9th Dec. 1872, the appellant Henry Fitzpatrick laid information, in due form of law, before one of Her Majesty's justices of the peace in and for the said borough, against the respondent George Kelly, for that he the said George Kelly did, on the 28th Nov. 1872, at the borough aforesaid, sell as unadulterated an article of food, to wit, butter, which was adulterated, contrary to an Act made and passed in the last session of Parliament, intituled, "An Act to Amend the Law for the Prevention of Adulteration of Food and Drink, and of Drugs."

On the 18th Dec. 1872, this information came to be heard before the said police magistrate at Liverpool aforesaid, when both parties appeared. The charge against the said respondent arises under the said statute 35 & 36 Vict. c. 74, intituled, An Act to Amend the Law for the Prevention of Adulteration of Food and Drink, and of Drugs. The 2nd section of this statute enacts, amongst other things, that "every person who shall sell any article of food or drink, with which, to the knowledge of such person, any ingredient or material injurious to the health of persons eating or drinking such article, has been mixed, and every person who shall sell as unadulterated any article of food or drink, or any drug, which is adulterated, shall, for every such offence on a sum-

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mary conviction, forfeit and pay a penalty not exceeding 20l."

The 3rd section provides that "any person who shall sell any article of food or drink, or any drug, knowing the same to have been mixed with any other substance, with intent fraudulently to increase its weight or bulk, and who shall not declare such admixture to any purchaser thereof before delivering the same and no other, shall be deemed to have sold an adulterated article of food or drink, or drug, as the case may be, under this Act."

The 4th section incorporates the Pharmacy Act 1868 (31 & 32 Vict. c. 121), and the stat. 23 & 24 Vict. c. 84. The 6th section of the 35 & 36 Vict. c. 74, authorises the inspector of nuisances to procure and submit samples of articles of food or drink, or drugs, suspected to be adulterated, to be analysed by the analyst appointed under the Act, and requires the inspector, on receipt of a certificate from such analyst, stating that the articles of food, drink, or drugs, are adulterated, to cause a complaint of an offence against the Act to be made.

Upon the hearing of the said information, it was proved that George Ison Robinson, an inspector of nuisances, authorised in that behalf, went to the shop of the said respondent, who is a provision and butter dealer, and said to an assistant in the shop, "A pound of butter at 7d." The assistant then handed to the inspector a pound of butter in a saucer.

The respondent was present at the time, and it was proved that the inspector, after he had received and paid for the butter, gave him notice of his (the inspector's) intention to have the article analysed, and that a reasonable opportunity was afforded to the respondent to accompany the inspector to the analyst, as required by the 3rd section of the statute 23 & 24 Vict. c. 84. It was proved to the magistrate's satisfaction, as required by the 8th section of 35 & 36 Vict. c. 74, that the article was delivered to the analyst in the same condition, as regarded its purity or impurity, as it was when received from the seller, and that a sample of the butter was taken and sealed in the presence of the analyst by the inspector, as required by the 10th section of the last-named Act.

It was proved that the analyst delivered to the appellant a certificate, of which the following is a copy:—

"Liverpool, Dec. 7, 1872.

Sample No. 56.—Butter.

Marked Inspector of Nuisances, No. 56.

Result of analysis:—This contains a quantity of stearin and palmitin, it is therefore largely adulterated by the admixtures of fats containing these substances (the most common of these are lard, tallow, dripping, palm oil, and the fat from certain seeds). This adulteration is not necessarily injurious to health.

(Signed) J. CAMPBELL BROWN, D.Sc.
Public Analyst."

It was proved that the sample of butter referred to in the certificate was a portion of the butter purchased by the inspector at the respondent's shop. The analyst was called on the part of the appellant, and gave evidence that in his opinion the butter was adulterated in the manner set out in the certificate.

The counsel for the respondent, before entering upon the case on its merits, contended that in order to convict the respondent, it was necessary to prove that it had been represented at the time of the sale that the butter was unadulterated; and

that it was also necessary, under the 3rd section, that it should be proved that the butter was sold by some person knowing the same to have been mixed with some other substance, with intent fraudulently to increase its weight or bulk. No evidence on this point was tendered. The appellant's attorney contended that it was sufficient to prove that the inspector asked for butter, that an article was handed to him, for which he paid the price named, and that the article was mixed with some foreign substance, i.e., adulterated in the ordinary sense of the word, in order to throw upon the respondent, he being a dealer in the article, the burden of proving that he did not sell the article "as unadulterated;" and that "he did not know the same to have been mixed with any other substance, with intent fraudulently to increase its weight or bulk."

The police magistrate was of opinion that in law it was necessary on the part of the appellant to prove that the butter when sold was represented as unadulterated, and that it was also necessary for the appellant to prove that the respondent knew that the butter had been mixed with some other substance, with intent fraudulently to increase its weight or bulk. He therefore, without calling upon the respondent for his defence, dismissed the summons.

Whereupon the said appellant did, pursuant to the first-mentioned statute, within three days after the said determination, that is to say, on the 19th Dec. 1872, duly apply in writing to the said police magistrate, to state and sign a case, setting forth the facts and the grounds of his determination, for the opinion thereon of this court: and he having duly entered into a recognizance to prosecute such appeal without delay, and to submit to the judgment of this court, and to pay such costs as may be awarded, as required by the said statute in that behalf, the magistrate, in pursuance of the said statute, stated and signed this case accordingly.

And it appeared to him, and he further submitted to this court, that the questions of law arising in this case were:—First, whether it was necessary for the appellant to prove that when the butter was bought it was represented to be sold as unadulterated; secondly, whether it was necessary for the appellant to prove that the respondent knew that the butter had been mixed with some other substance, with intent fraudulently to increase its weight or bulk; and he further submitted, that if the opinion of the court were in the affirmative upon either of the said questions, the said dismissal should stand affirmed; if otherwise, that the case should be remitted to him to be reheard.

Milward Q.C. (with him *Bigham*), argued for the appellant, the prosecutor. The object of this Act is to be found from the preamble, and from a comparison with the previous Act, 23 & 24 Vict. c. 84, which it repealed. The first section of the last Act is new and relates to the actual mixture of adulterated articles. The second repeats verbatim the first section of the Act of 1860, with the exception of omitting the word pure which in the old act is coupled with adulterated, and also with the exception of increasing the limit of the penalty from 5l. to 20l. The third section of the Act of last year creates an entirely new offence, and certainly does not limit the seller's liability in face of the expressed object of the Act, which is the protection of the ignorant

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buyer, and not the assistance of the dishonest tradesman. Here the buyer asked for butter; and the seller, by handing him an article in answer, impliedly represented that what he sold was unadulterated butter. No person is likely to ask for unadulterated butter; therefore, if this is not sufficient to constitute the offence, the section, so far as it relates to adulteration with non-injurious ingredients, is a dead letter. As to the second point, no proof of knowledge is required by the Act, and sect. 6 is strong confirmation that no such knowledge is necessary for a conviction. That section gives inspectors and analysts power to test samples of the articles sold by tradesmen, and to prosecute sellers and adulterators. Not one word is there said of guilty knowledge, and the proof of it required for the offence created by sect. 3 implies that no such proof need be given when not expressly made part of an offence.

Segar (with him *Russell*, Q.C.) for respondent.—The words of the second section, “who shall sell as unadulterated” show that a representation is an ingredient of the second offence mentioned. The first offence is complete even if the seller gives notice of the injurious mixture he sells, but the second requires a warranty of the absence of adulteration. Although the Act professes to make the law more severe than before against adulterators and fraudulent sellers, and for that purpose increases the penalties; yet, throughout, it protects innocent tradesmen more carefully than the previous law. The 3rd section defines every offence under the Act, and requires for a conviction proof of knowledge and fraud; this section must be read with the first and second in deciding upon what constitutes an offence. Sect. 6 uses the words “adulterate,” which also must be interpreted by sect. 3.

BLACKBURN, J.—I think in this case that on both points the magistrate has gone wrong and made a mistake. It appears that the inspector asked for a pound of butter at the respondent's shop, and in the respondent's presence he was given what has been found to have been adulterated. The magistrate, however, stopped the case against the respondent on two grounds: he was of opinion that the case was not within the Act, unless it was shown that the person selling the adulterated article stated to the purchaser that it was unadulterated; and he was further of opinion that proof of the respondent's knowledge of the adulteration was a necessary part of the appellant's case in order to obtain a conviction. The Act of 1872, the object of which is to prevent adulteration, recites that the health and lives of Her Majesty's subjects require adulteration to be repressed by more effectual laws than those which are now in force for that purpose. By the first section a penalty is imposed upon persons wilfully admixing with food, drink, or drug, any injurious or poisonous ingredient or material to adulterate the same for sale; the penalty not to exceed 50*l*. The second section goes on to impose a penalty not exceeding 20*l*. upon a person doing either of two things; the first is, if he sell any article with which to his knowledge has been mixed an ingredient or material injurious to health; the second is, if he sell as unadulterated any article which is adulterated. Here the knowledge of the seller is not expressly required, and the adulteration is sufficient if by the mixture of ingredients not injurious to health. The first is an offence, even if the seller avows that the articles he sells

are mixed with injurious ingredients; but the second requires that he should either expressly or by implication lead buyers to suppose that the articles he sells are unadulterated. I think that the Legislature, by making it part of this offence that a person must sell as unadulterated the article adulterated, has left tradesmen safe, so far as this Act goes, in selling adulterated articles if they describe them as mixed or adulterated, and provided that they are not mixed with ingredients injurious to health. But I do not think that before conviction proof should be required of any statement or representation by the seller that the article sold is unadulterated; it is sufficient if the article be sold for what it is called without explanation by the seller, who would then sell the article as unadulterated. Persons who buy have a right to obtain the article they ask for, and if they obtain an adulterated article without explanation, the tradesman may be said to sell the article as unadulterated. Nor do I think that any proof of a tradesman's knowledge of the adulteration of articles he sells is necessary for a conviction; it is not required in the Act, and no hardship is imposed by making a tradesman take the trouble to analyse samples of the goods he sells. The third section is so drawn as to be very difficult to understand, but I think it was clearly not intended to relax the law in behalf of the seller: it relates to the mixture of articles not adulterated, and makes it an offence if done with a fraudulent intent, and sold knowingly without a declaration of the mixture. A person doing so shall be deemed to have sold an adulterated article under the Act; this is a clumsy way of expressing what I think is intended to be a different offence from those mentioned in the previous sections. I think it does not apply to nor in any way qualify the preceding offences; and it is so far from being in favour of the seller that it increases and extends his liability by the creation of a further and different offence. I think the magistrate has gone completely wrong, and the case must be remitted to be tried upon its merits by our interpretation of the Act.

QUAIN, J.—I am of the same opinion. I think that when a man asks for butter, and is sold an article which seems to be butter, the representation by the seller is that the article sold is unadulterated butter. It is further contended that sect. 3 must be taken to be the definition to be applied to every offence under sect. 2, but I do not think this can be so, and in my opinion the magistrate is wrong on both his points.

ARCHIBALD, J.—I agree on both points. The construction contended for by the respondent would materially lessen the usefulness of the Act; and it would be impossible to hold consistently with the rest of the Act either that the representation as unadulterated should be express on the seller's part, or that his knowledge of the adulteration should be proved before a conviction could take place. No doubt here in this case was an implied representation that the butter sold was unadulterated; and that I think was quite sufficient. An offence under the first part of the section would be complete even if the tradesman give notice to the buyer that injurious ingredients are mixed with the article sold; he would be liable whether he represented them truly or not. I agree that this is not the case under the second clause of the section; a seller is safe if he declares

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his goods to be mixed with other ingredients and those ingredients are not injurious to health. This construction is confirmed by sect. 6 of the Act. I think the suggestion that sect. 3 was meant to cut down the law as it bore against the seller is untenable; it was meant to include the further offence of fraudulently mixing unadulterated articles amongst the offences previously provided for.]

Judgment for appellant. Case remitted. Costs of this court to abide the event.

Attorneys for appellant, *F. Venn and Son*, for *J. Bayner*, Town Clerk, Liverpool.

Attorneys for respondent, *Vizard, Crowder, and Co.*, for *Yates and Martin*, Liverpool.

COURT OF COMMON PLEAS.

Reported by H. F. POOLEY and JOHN ROSE, Esqrs.,
Barristers-at-Law.

Friday, April 25, 1873.

GOURLEY v. PLIMSOLL.

Libel—General plea of justification—Criminal charges.

As a general rule in actions for defamation the ordinary plea that the matters complained of by the declaration are true in substance and in fact is sufficient and will be allowed.

Therefore, where the plaintiff charged as a libel and set out in his long declaration passages from a book written by the defendant imputing to the former, that he, being a shipowner, sent vessels to sea overloaded and unseaworthy, and over insured, with a wilful and reckless disregard of the lives on board, and with the object of losing the ships, and a general plea of justification was pleaded, the court allowed the plea, on the ground that particulars thereof might be obtained, and that such a plea with particulars is in practice preferable to a special plea.

MOTION for a rule calling upon the defendant to show cause why an order of Cleasby, B. should not be varied in so far as it permitted the defendant to plead two pleas to the following declaration: For that before &c., the plaintiff was Member of Parliament for the borough of Sunderland, in the county of Durham, and was also engaged very extensively in the business of a shipowner and merchant, and as such was possessed of many ships which traded between the ports of the United Kingdom and also between those ports and divers ports and places in foreign countries, and as well in the coal trade as in other and general merchant trades and mercantile marine business, and the defendant was Member of Parliament for the borough of Derby, in the county of Derby, and thereupon the defendant falsely and maliciously printed and published and caused and procured to be printed, published, and circulated of and concerning the plaintiff, and of and concerning him in relation to his aforesaid business, in a certain printed book, entitled "Our Seamen; an Appeal, by Samuel Plimsoll, M.P.," the false, scandalous, malicious, and defamatory words and matters following, that is to say:—

[The alleged defamatory matter was then set out, and the innuendoes followed thus:—]

The defendant thereby meaning that the plaintiff as a shipowner needed the restraint and prohibition of the law, and without being made subject to the penalties of the law would have no hesitation in exposing others to the risk of losing

their lives if by so doing he would augment his own profits, and that the plaintiff was a greedy and unscrupulous man, and would not scruple to ship too large a load in a vessel for the same to carry with safety to the ship and crew if thereby he could enhance his own profits and habitually and wantonly ran the risk of causing the loss of his said ships and the deaths of the crews of the same, for the purpose that in so doing he could augment his profits on such ships, and that the plaintiff was one of the shipowners who, by such overloading, wantonly and needlessly imperilled ships and men's lives, and caused nearly all the losses of ships and lives on the English coast, and that by over insurance the plaintiff habitually made himself secure from loss in such a course of conduct. And, further, that the plaintiff by such practices, had acquired an evil reputation in his said business, and was generally known as one who habitually overloaded his ships, and that he was also of evil reputation for terribly frequent and disastrous losses of ships and lives, occasioned by his aforesaid practices or his cynical disregard of human life in order to increase his pecuniary gains, and that by reason of the premises the plaintiff's name in the said business had become so black with infamy that the insurance brokers in London dared not offer risks for insurance unless they warranted that the cargoes were not to be carried in (amongst others) the plaintiff's ships, and that plaintiff, though he held his head very high, was in the trade, and among those who knew his business affairs and reputation, and his aforesaid practices, of evil character and repute, and was in truth guilty of practices which justly rendered him infamous. Whereby the plaintiff was greatly injured in his name, character, and reputation, and in his said business, and was held up and exposed to public ignominy and disgrace, and was otherwise greatly damaged.

Second count alleged the writing, composing, and publishing of the aforesaid defamatory words by the plaintiff of the defendant, and of him in relation to his business, with the innuendoes as in first count.

Third count, repeating all the prefatory averments in the first count, alleged that defendant falsely and maliciously printed and published and circulated of and concerning the plaintiff, and of and concerning him in relation to his said business in the said book, the false, scandalous, and malicious and defamatory words and matters following, viz.:—

[Here followed the alleged defamatory matter.]

The defendant thereby meaning that the plaintiff was notorious as a shipowner for the practice of overloading his ships and for a systematic and reckless disregard of the lives of the crews of his said ships, and that by such overloading he had recklessly and wickedly sacrificed at least 105 lives out of the crews of his said ships, and more the particulars of which were not known, and that it was awful to contemplate the loss of human life from the operations of the plaintiff alone in his said business, and that the plaintiff on being threatened with exposure in the House of Commons turned craven and coward and was conscience struck at his own guilt, whereby the plaintiff suffered such damage as in the said first count is alleged.

Fourth count alleged the composing, writing, and publishing of the same.

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Fifth. And also repeating all the prefatory averments in the first count mentioned, that the defendant falsely and maliciously printed and published and circulated in the aforesaid book of and concerning the plaintiff, and of and concerning his relation to his said business the false, scandalous, malicious, and defamatory words and matters following, that is to say:—

[Setting out other defamatory matter.]

The defendant thereby meaning that the plaintiff was one of a small minority of bad men, who were, and that the plaintiff in fact personally was, guilty of evil practices in his said business, and of recklessly overloading his said ships for his private profit, and thereby of wrongfully, heartlessly, and wickedly endangering the lives of "the crews of the said ships, and that the plaintiff was one of three out of the said minority of bad men who had obtained a seat in Parliament, and that he was a man of evil character and repute, and properly classed with one John Sadleir, deceased, who having been a Member of Parliament was yet notorious as a forger and swindler, and with one William Roupell, who having also been a Member of Parliament was yet notorious for forgery, perjury, and fraud, and that the plaintiff was one of the two or three called in the north, "the greatest sinners in the trade," and that the plaintiff was in fact one of the greatest sinners in his said business, and that he recklessly, wilfully, and purposely overloaded his said ships, after having caused them to be over insured, thereby wrongfully and wickedly endangering the lives of the crews of his said ships in order that he the plaintiff might augment his gains and reap a profit from fraudulent over insurance, being utterly callous as to the loss of human life, and that there was by the plaintiff's procurement a systematic overloading of his said ships, so that whether they came safe to land or were lost he might receive in the one case more than the full and fair profit of a voyage, or in the other, more than the full value of the said ships from the underwriters, and that the plaintiff was notorious for habitual and excessive overloading his said ships to an extent endangering their safety and that of their crews, and also for his reckless disregard of the lives of the crews of the same, and that by such overloading and disregard the plaintiff had caused the loss of seven of his said ships, and had caused the deaths by drowning of over one hundred men of the crews of the said ships in less than two years, and that by reason of the premises the plaintiff was one of the men in whose ships the insurance brokers at Lloyd's had to warrant the underwriters that the cargoes they offered for insurance should not be shipped in the plaintiffs' vessels before they would underwrite the policies, whereby the plaintiff suffered such damage as in the said first count is alleged.

Sixth count, alleged the composing, writing, and publishing of the same with the innuendoes.

Pleas:—First, not guilty; secondly, "that the said several words and matters concerning the plaintiff whether charged as the words of the defendant, or as the words of another person or other persons respectively, are true in substance and in fact;" thirdly, the defendant, as to so much of the declaration as relates to the printing and publishing, and causing and procuring to be printed and published, and to the writing, composing, and publish-

ing by the defendant of the said alleged words and matters respectively without the alleged respective meanings, says that the said several words and matters concerning the plaintiff, whether charged as the words of the defendant or as the words of another person or other persons respectively, are true in substance and in fact.

Philbrick in support of his motion.—These pleas in this general form ought not to have been allowed. [BOVILL, C.J.—It is the common form at the present day]. The older authorities uniformly show that the plea of justification in such a case must contain specific allegations. [BOVILL, C.J.—And so specific as not to be open to special demurrer]. Nowadays there are cases where a general plea is allowed *with particulars*, yet never where the libel imputes a *criminal charge*. In *Behrens v. Allen* (8 Jur. N.S. 118) Willes J. said (p.121) "*F. Anson v. Stuart* makes it clear that before the Common Law Procedure Act 1852, a general plea of justification in these circumstances was not allowed, with the exception, possibly, of a case of a specific charge in the declaration, and a plea alleging the charge to be true." And in the notes to *F. Anson v. Stuart* (1 Sm. L. O. 8th edit., p. 67), it is stated that "A plea of justification, therefore, to declaration in slander or libel must contain a specific charge set forth with certainty and particularity. . . . Since the Common Law Procedure Act, 1852, a practice has prevailed of pleading in general terms that the matters in the declaration complained of are true in substance and in fact. . . . This mode of pleading is clearly insufficient where the libel or slander complained of does not consist of a distinct statement that particular facts have occurred, which statement may be deemed to be incorporated in the plea which asserts in general terms the truth of the libel." During the argument in *Behrens v. Allen* (*sup.*) Willes J. said, "*F. Anson v. Stuart* (1 T. R. 750) adverts to the distinction between the case where the plea states in justification an indictable matter and where it states what is not of that character. In the latter case I have always at chambers allowed the plea, the defendant furnishing particulars." [DENMAN J.—"In *Behrens v. Allen* (8 Jur. N.S. 118), where a declaration in libel complained of charges, made by the defendant against the plaintiff's honesty, which were mostly of a specific nature, the court allowed a general plea of justification the defendant giving particulars of the charges intended to be justified; and this course has been conveniently pursued in many cases." (See note to *F. Anson v. Stuart*, *sup.*) BOVILL, C.J.—Ever since I have been on the Bench I do not remember any instance where a plea of justification has not been merely "true in substance and fact," whether the charge in the declaration was specific or not. The only effect of requiring the defendant to plead specially is that he raises an argument and discussion not on the real facts of the case, but on the facts which some ingenious pleader may put on the record, and I find that a general plea, with particulars, leads to no inconvenience]. In *Jones v. Benwick* (L. Rep. 5 C. P. 32) the defendant, in an action for libel, pleaded that the defamatory matter in the declaration complained of, was and is, true in substance and in fact. The court ordered him to give particulars of the facts and matters he relied on to justify the libel, or in default that the plea should

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bestruck out. [BOVILL, C.J.—That case will illustrate the convenience of the modern system of particulars as compared with a special plea; the defendant had written of the plaintiff as "Old Perjury Jones," and the consequence was, that he might have proved perjury committed in any one year during the whole lifetime of the plaintiff. So, we ordered particulars, as the charge was too general, and then when they were given what was the use of a special plea? GROVE, J.—What distinction do you make between the charge of an indictable offence and any other defamation?] When a charge of an indictable offence is complained of in the declaration the plaintiff has a right to have the full statement of the matters on the record, so that it remains for a testimony of his character having been cleared. [BOVILL, C.J.—The same effect would follow from a verdict for the plaintiff on the plea of Not Guilty only. The object here is to hamper the defendant in pleading to your innuendoes, whereas if the facts were in particulars only the whole matter would go to the jury. GROVE, J.—A constant cause of new trials in such actions used to be that some trifling allegation in a special plea was not justified, and an immense expense and inconvenience followed]. The statements in particulars are made with much more looseness than in a special plea in which nothing more is put than the defendant may be able to prove. In *Jones v. Bewicke* (sup.) Keating, J. said, "I doubt whether such a plea should be allowed at all." Here the charge is of a most serious kind. [BOVILL, C.J.—In the recent case of *Odger v. Waterlow* (unreported) the charge amounted to one of treason]. And here in effect to murder, viz., that the plaintiff sent ships to sea with the avowed object of sinking them. In Bullen and Leake's *Precedents of Pleading* a note to the form of plea of justification says (p. 613), "When the charges contained in the libel or slander, instead of being specific are general, and particularly when they impute indictable matter, a general form of plea ought not to be used. It is contrary to the essential objects of pleading, namely, that the other side should be informed of what facts are to be heard, and that the court should be able to judge whether the facts relied on are, if true, sufficient in law. The former object may no doubt be attained by the delivery of particulars, but there is no sufficient reason why the proper office of pleading should be superseded by this more complicated and expensive substitute. In practice, too, it is a matter of frequent experience that imputations are sought to be justified in a general form which no one could attempt to justify specifically; and thus the test which pleading affords, even to the pleader himself, of the validity of a defence, is lost. The other object, that of enabling the court to judge of the sufficiency in law of the justification, is unavoidably sacrificed by a general plea, the plaintiff is in effect precluded from obtaining the opinion of the court (and of a court of error) on the question whether the facts justify the imputation, and the matter has to be left in the hands of the jury in cases most peculiarly open to feeling and prejudice. And, after all, there remains no record of the distinct determination of any particular facts which can be afterwards binding on the parties." [He referred to passages of the libel charged in the declaration]. If the pleas were allowed at all it should have been made a condition that particulars should be given.

BOVILL, C.J.—I am of opinion that the most convenient course in actions for libel, as a general rule, although there may be exceptions, is that a plea of justification should be allowed in a general form. The old system of pleading a special justification led to all kinds of inconveniences and difficulties according to my experience. A defendant who desired to plead something which might or might not be a justification framed his plea in such form that he might possibly obtain judgment on the verdict of the jury on one interpretation of the plea when the interpretation put on it by the court might be another, and so, contrary to the merits of the case, the defendant might succeed. On the other hand, in many cases, parties were disposed to insert allegations without foundation to make the plea good on the face of it; that occupied the court constantly in determining a state of facts in the plea other than the real facts of the case which might fall far short of a justification. Although the object of pleading specially was in order that the plaintiff might have notice of what was intended to be charged against him, it seems to me that a special plea is very unlikely to inform him of that, and that the very object of giving information to the plaintiff, and to prevent the defendant going into a general statement, is obtained by a liberal allowance of particulars, so that the plaintiff may not be taken by surprise, and the trial and judgment of the court may proceed on the real facts. As to an instance given by Mr. Philbrick of a plea as to part, and not as to the residue of the declaration, so far as the plaintiff is concerned, that is an advantage to him, for if the imputations thrown out are well founded the defendant obtains the verdict, if not the plaintiff will recover. I see no inconvenience in this course, and after an experience of some years I have come clearly to the conclusion that the most satisfactory course is to allow a general plea and order particulars thereof, if required afterwards, and particulars of such kind that the parties may not be misled on one side or the other. Therefore I think the order of my brother Cleasby ought to be upheld, and the rule refused.

GROVE, J.—I am of the same opinion. I can recollect a great many cases in which I have been counsel either for the plaintiff or for the defendant, where there were special pleas of justification, that much more time of counsel was occupied in ascertaining how much must be proved, and how much might be material than in actually finding out the merits to be tried. This gave rise to great technicality and many new trials, and I think the modern way of pleading is of benefit in elucidating the merits of the case. Mr. Philbrick says all that he wishes is that the real substantial question should be tried. Now, it is best that that should be in the issue which goes to the real merits of the case, and to prevent the plaintiff being taken by surprise particulars may be given which would afford all information required. Thus the whole matter will be fairly laid before the jury.

DENMAN, J.—I also think this rule ought to be refused. The defendant is charged with publishing a book which contains libellous matters, and the plaintiff has had an opportunity of selecting a large quantity of passages which he says reflect libellously on him. Then the defendant pleads

a general plea saying the allegations are true in substance and in fact. The question raised is whether such general plea should be allowed where the charges are of so serious a character. Now in my judgment the fairest mode of proceeding is to allow a general plea in such cases as this, with the power in the plaintiff to obtain particulars of the occasion on which, and circumstances under which certain parts of the statement were made in this publication of which the plaintiff complains. The court has always been liberal in allowing such particulars, and we cannot assume that they would not be allowed. Mr. Philbrick relied on certain expressions of my brothers Keating and Smith in *Jones v. Bewicke*, but those observations must be taken as applicable to the particular case in which they were used, and the mere fact that in *Jones v. Bewicke*, Keating, J. doubted whether the plea should be allowed, amounts only to a doubt as to whether it should be allowed in that particular case, because the practice of the Court for a considerable time has been to allow such plea, and to grant particulars. I agree with my Lord that there may be cases in which such rule ought not to be adopted, although I do not think this is such a case, and therefore I am of opinion that this rule should be refused.

Rule refused.

Attorneys for the plaintiff, *Lowless, Nelson, and Co.*

Tuesday, April 29, 1873.

MARSHALL (app.) v. SMITH (resp.)

Public Health and Local Government Acts (11 & 12 Vict. c. 63, sect. 115; 21 & 22 Vict. c. 98, sect. 34)

—*Building of party-wall contrary to bye-law—“Continuing offence.”*

The term “continuing offence” in sect. 115 of the Public Health Act 1848 means only an offence which is from its nature susceptible of continuance.

By sect. 115 of the Public Health Act 1848, local boards may make bye-laws, may impose a penalty not exceeding 5l. a day for each offence against them, and “in the case of a continuing offence” a further penalty not exceeding forty shillings a day. By sect. 34 of the Local Government Act 1858, such bye-laws may be made in respect of (inter alia) “the structure of walls of new buildings for securing stability and the prevention of fires.” The local board of S. made a bye-law that party-walls within the district should not be less than nine inches thick; the appellant was duly summoned, and convicted for an offence against that bye-law. He was afterwards again convicted in respect of the same wall for an offence against another bye-law, made in pursuance of that part of sect. 115 of the Public Health Act 1848 which relates to continuing offences, and adjudged to pay a continuing penalty of 5s. a day. Upon a case stated by the convicting justices under 20 & 21 Vict. c. 43:

Held by Keating and Honyman JJ. that the conviction for a continuing offence could not be sustained, because the improper building of a wall was not a continuing offence within the meaning of the Act or bye-law.

THIS was a case stated under 20 & 21 Vict. c. 43 by two justices of the peace acting for the borough of Sunderland in the county of Durham.

The appellant had been convicted on an information charging him “for that” at Bishopwearmouth, in the borough of Sunderland, “he did build a certain party-wall at the west end of a certain house less than nine inches thick, as required by bye-law No. 12 of the said borough, made under the Local Government Act 1858, to wit, 4½ inches thick, and for that, although he had been convicted and a penalty imposed for the said offence, yet the offence still continued contrary to bye-law No. 42 of the said borough and contrary to the statute,” &c.; and had been adjudged to pay a continuing penalty of five shillings a day for seven days previous to the issuing of the summons.

Bye-law 12 was in the following terms:—

“*Structure of Walls of New Buildings.*—The external walls of any new buildings, other than out-offices, shall be of the following thickness, namely: All party-walls shall be nine inches at least in thickness. Any person offending against this bye-law shall be liable to a penalty not exceeding forty shillings.”

Bye-law 42 was in the following terms:—

“*Continuing Penalties.*—In case any offence under any of the foregoing bye-laws shall continue, the person offending shall be liable to a further penalty of not exceeding forty shillings for each day during which such offence shall continue after written notice of the offence has been given by the local board to the offender.”

These bye-laws had been duly made and published under sect. 115 of 11 & 12 Vict. c. 63, and sect. 34 of 21 & 22 Vict. c. 98(a). Due notice had been given to the appellant of the alleged continuing offence, but it appeared in evidence that he was at the time of the hearing of the information no longer owner of the house, having sold it not long after his first conviction, whether before the issuing of the summons or not did not distinctly appear. The case stated that the points urged before the justices for the appellant were these:—

That as the wall was proved to be in the same state at the time of the hearing as it was more than six months before it, and as the appellant had done nothing to it in the meantime, the magistrates had under 11 & 12 Vict. c. 43, s. 11, no jurisdiction to adjudicate.

That bye-laws 12 and 42 were invalid, because

(a) The material part of these sections is as follows:—11 & 12 Vict. c. 63, s. 115, “All bye-laws made by the local board of health shall be in writing under their seal. And the said local board may by any such bye-laws impose upon offenders against the same such reasonable penalties as they shall think fit, not exceeding the sum of five pounds for each offence, and in the case of a continuing offence a further penalty not exceeding the sum of forty shillings for each day after written notice of the offence from the said local board, . . . provided that no such bye-laws shall be repugnant to the laws of England, . . . 21 & 22 Vict. c. 98, s. 34. Every local board may make bye-laws with respect to the following matters, that is to say, . . . with respect to the level, width, and construction of new streets, and the provisions for the sewerage thereof; with respect to the structure of walls of new buildings for securing stability and the prevention of fires; with respect to the sufficiency of the space about buildings to secure a free circulation of air; . . . with respect to the drainage of buildings, to waterclosets, privies, ashpits and cesspools in connection with buildings, and they may further provide for the observation of the same by enacting therein such provisions as they may think necessary . . . “as to the power of the local board to remove, alter, or pull down any work begun or done in contravention of such bye-laws.”

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the Local Government Act 1858 did not authorise the local board to enforce compliance by any penalty, much less by a continuing penalty, and that if a penalty could be inflicted, the defendant might be punished twice for the same offence;

That the local board had no power to make two separate bye-laws with separate and distinct penalties for one and the same offence;

That bye-law 42 was invalid because it did not specify any offence except by reference to other bye laws, all specifying their own penalties;

That bye-law 42 was invalid because the penalty imposed thereby was not restricted in its application to such time as the appellant remained owner of the property, whereas at the time when the offence was alleged to have been committed he had ceased to be owner;

That as the offence (if any) was the original building of the said wall, and as nothing whatever had been done by the defendant since that time, no continuing offence within the meaning of bye-law 42 had been committed;

That if any offence had been originally committed by the appellant, it had been purged when he paid the fine that was inflicted on the former summons.

It was contended on the part of the informant that the local board are expressly authorised by s. 115 of 11 & 12 Vict. c. 63 (incorporated in 21 & 22 Vict. c. 98, by s. 4 of that Act) to enforce by bye-laws continuing penalties for continuing offences.

The justices being of opinion that what had been done by the appellant came within the meaning of bye-law 42, and that such bye-law was valid, and that the appellant was not absolved from liability by having paid the fine under the former conviction, and that the offence (if any) was a continuing offence, gave judgment against the appellant, and adjudged him to pay a continuing penalty of five shillings a day for seven days previous to the issuing of the summons.

Whereupon the judgment of this court was required as to whether the justices were correct in point of law in such determination.

Gully for the appellant.—Although the offensive thing which the Act was intended to prevent may continue, there is still no continuing offence on the part of the appellant. "Structure" in sect. 34 of 21 & 22 Vict. c. 98 means original construction, not the keeping constructed any number of years after. The remedy which ought to have been taken in this case was that given by a subsequent part of the section by which the board is empowered to make provisions for removing, altering, or pulling down any work begun or done in contravention of the bye-laws. Taken together, the two enactments mean that bye-laws may be made for regulating buildings, so that if work be doing improperly, a preventive penalty may be inflicted, and if it be actually done improperly, it may be pulled down. If it were not so, a builder might be liable to a continuing penalty all his life, whereas it might be quite out of his power to abate the offence without committing a trespass. This is in fact the present case, the appellant having sold the house. If the bye-law can bear such a construction as to make a man liable for ever without his own fault, it is unreasonable and bad.

Crompton for the respondent.—By sect. 4 of 21 & 22 Vict. c. 98, that Act, and 11 & 12 Vict. c. 63 are to be read together, and the words "continuing offence" must be read with express reference to

the offences respecting the matters specified in sect. 34 of 21 & 22 Vict. c. 98, of which the "structure of buildings" is one. There is therefore a continuing offence here. [KEATING J.—The offence must be one capable of continuance. How do you propose to make the continuance of the wall a continuance of the offence? It struck me at first that if it were not so the intention of the Acts might be defeated, but that is met by Mr. Gully when he points out that the wall might have been pulled down.] It is submitted that the board are not confined to such a high-handed remedy when they might effect their object peaceably. If they may make a bye-law regulating the structure of buildings, surely they may make one to prevent the continuance of buildings improperly constructed. The meaning contended for is the more obvious one, and should not be narrowed. As to the suggested unreasonableness of the bye-law, and as to its pressing on the appellant, notwithstanding that he had sold the house, why should a wrong-doer be excused, because he puts it out of his own power to abate the wrong? If a man were to put a noxious thing on his neighbour's land, it would be no answer to say that he must commit a trespass in order to take it away. He then cited *Roswell v. Prior*, 12 Mod. 635, where it was held that if a lessee erect a nuisance, for which damages are recovered, and the nuisance is continued by his under lessee, an action for the continuance of the nuisance may be brought against either.

KEATING, J.—I am of opinion that this conviction cannot be supported. It appears that the Local Board of Bishopwearmouth, acting under the provisions of the Public Health and Local Government Acts, proceeded to make bye-laws under the powers given them by those Acts. Now sect. 115 of the Public Health Act of 1848 authorises the making of bye-laws in the following terms: [The learned Judge read the section.] Then sect. 34 of the Local Government Act of 1858 specifies the various matters in respect of which bye-laws under the Public Health Act of 1848 may be made; and amongst these matters is "the structure of walls of new buildings for securing stability, and the prevention of fires." This is a very wholesome provision, and should be carried out in the spirit in which it was passed by the Legislature. By the 12th bye-law it is ordered that party-walls should be at least nine inches in thickness. The defendant constructed a party-wall of only half the proper and legal width. Having so done, he exposed himself to a penalty under the bye-law, and was most properly convicted. But it was afterwards sought to make him liable in respect of the same wall for a continuing offence within the meaning of sect. 115 of the Public Health Act 1848, and the 42nd bye-law which applies that part of it which relates to continuing offences. I think that this could not be done. I think "continuing offence" must be read to mean an offence of a nature which is susceptible of continuance, and cannot mean an offence similar to that which is the subject of the present appeal. That continuing penalties can be imposed in certain cases is clear enough. Such cases are the management of "drainage, water-closets, ashpits," &c. with respect to some of which there may be continuing offences. But in this instance the offence was that the defendant built a wall. I was at first struck by the argument that unless no power were given to continue the penalty until the wall was pulled down, the Acts might be

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defeated; and if it had been impossible to carry out the intention of the Acts in any other way, I might perhaps have yielded to the force of that argument, and have held that continuing penalties might be enforced. But it appears from the latter part of sect. 34 of the Act of 1848 that the board has power to pull down walls improperly built. I think that this, and not a continuing penalty, is the appropriate remedy to meet the evil. Nobody could complain of it, the public health and safety being of paramount importance. I am far from saying that there might not be cases in which even the continuance of a wall might not render a person liable to a penalty, for instance, if having begun to build improperly, he were to go on improperly building; but this is not the present case, and I think the conviction could not stand.

HONYMAN J.—I am of the same opinion. It appears that an information was laid against the defendant, charging him with an offence against the Local Government Acts in the following terms. [The learned Judge read the information]. The bye-laws were made under the Acts of 1848 and 1858, and they were made with reference to sect. 34 of the Act of 1848, as may be seen from the heading. In bye-law 12, the offence aimed at was the offence of *building*. Then we have bye-law 42, which must not be read as if it came after bye-law 12 and aimed at any offence under bye-law 12, but must be intended to meet the case of any offence which is capable of continuance; and I agree with my brother Keating in thinking that sect. 115 of the Act of 1848 means by "continuing offence" an "offence of a nature which is susceptible of continuance." I think, therefore, that the offence in this case is not within bye-law 42, but if I were driven to the conclusion that it was, I should also be driven to the conclusion that bye-law 42 was unreasonable, for it might then follow from it that any deviation in building from the prescribed limit—no matter how small the deviation, or how excusable—might render a man liable to a penalty of 700*l.* a year for the remainder of his life.

Conviction quashed.

Attorneys for the appellant, *P. K. Wright*, for *Oliver and Botterell*, Sunderland.

Attorney for respondents, *Bell, Brodrick and Gray*.

Thursday, May 1, 1873.

TUTIL v. THE LOCAL BOARD OF HEALTH FOR WEST HAM.

Highway—Right to fill up ditches—Local board of health—Presumption.

By the 16th section of the 30 Vict. c. lvi, the local board when they think fit may cause the ditches at the sides of, or across public roads and public footpaths to be filled up, and may substitute pipe or other drains alongside or across such roads.

The plaintiff was possessed of a freehold close adjoining a public highway. By the side of the highway was a low fence about 2ft. high. Then a strip of greensward averaging 10ft. in width, with a broad ditch running parallel to the highway.

The close was separated from the strip of greensward by a paling 8ft high.

The local board under the authority of the Act of Parliament filled up the ditch and substituted drain pipes.

Held, that the ditch being fenced from the highway the presumption was that it belonged to the plaintiff, and also that as the section referred only to ditches by the side of the highway the Act of Parliament was not applicable.

SPECIAL CASE.

1. Before and at the time of the alleged trespass hereinafter mentioned the plaintiff was possessed of a close of land in the district of West Ham, in the county of Essex. The said close was and is bounded on the west by the public road called Upton-lane, in the said district.

2. The said land of the plaintiffs before and at the time of the alleged trespass was and is still enclosed by a close fence, 8ft. high. Outside this fencing, and between it and the metalled roadway of Upton-lane was a slip of land averaging 9ft. in width and separated from the said roadway by wooden posts, about 2ft. in height, with rails along the tops. In this strip of land was a ditch of the average width of 5ft. Three feet in width of the said slip was occupied by the bank of the said ditch which was on the east side of the ditch next to the said high fence, and was covered with grass, and on the west side of the ditch next to the posts and rails was the remaining one foot of the strip likewise covered with grass. The said posts and rails abutted on the said roadway. The said ditch was the only means of draining Upton-lane, there being no ditch on the other side. Before and at the time of the alleged trespass there were remains or stumps of two old posts on the slip of land, and the plaintiff claimed and still claims the whole strip, including the said ditch and posts and rails. The said strip of land was open to the said roadway, except as divided by the said posts and rails.

3. The said ditch, bank, posts, and rails had existed as above described for forty years, and during that time the plaintiff and his predecessors in title had been in possession of the said close of land, and had from time to time repaired the said posts and rails. They had also been repaired during the said period two or three times by the surveyor of highways for the said district, and once, twelve years since, by the defendants, but there was no evidence to show that the plaintiff or his predecessors in title knew of the repairs being done, either by the surveyor of highways, or by the defendants.

4. Before and at the time of the alleged trespass there were and still are standing on the south side wooden posts, about 3ft. 6in. in height, with an iron railing from one to the other fronting the land of an adjoining owner.

5. The defendants are the Local Board of Health for the district of West Ham mentioned in the Act of Parliament, passed in the 30th year of the reign of the Queen (c. 56) a copy whereof accompanies and is to be taken as part of this case, and by the 16th section of the said Act they are empowered to cause ditches at the sides of public roads in their districts to be filled up and to substitute pipe or other drains alongside such roads, and the surplus of land gained by filling up such ditches may if the local board so thinks fit and direct be thrown into such roads and be repairable as part thereof, and be under the control of the local board.

6. The defendants intending to act under the provisions of the said Act, on or about the 1st Feb. 1869, caused the said ditch to be filled up

[C. P.]

TUTIL v. THE LOCAL BOARD OF HEALTH FOR WEST HAM.

[C. P.]

and the said wooden posts and rails to be removed; and directed that the surface of the land gained by filling up the ditch should be thrown into Upton-lane. Before filling up the said ditch they caused to be laid down 9in. drain pipes in the bed of the ditch to join a then existing brick drain at or near the northern point. These pipes also communicated with other drain pipes laid across the road.

7. Afterwards the plaintiff caused to be erected other posts and rails on the site of those that had been removed, but the defendants on or about the 14th May 1869 caused these posts and rails also to be removed.

The question for the opinion of the court is whether the defendants were justified in causing the said ditch to be filled up, and the said posts and rails to be removed. If the court shall be of opinion in the affirmative, judgment shall be entered for the defendants with costs of defence. If the court shall be of opinion in the negative, judgment shall be entered for the plaintiff for the sum of 5*l.* as damages, and with costs of suit. The court is to be at liberty to draw any inferences or find any facts which in the opinion of the court a jury ought to have drawn or found.

By the 16th section of the 30 Vict. c. lvi. it was enacted that the local board when they think fit may cause the ditches at the sides of or across public roads and bye ways and public footway to be filled up, and to substitute pipe or other drains alongside or across such roads and ways, with appropriate shoots and means of conveying water from such roads and ways thereunto, and from time to time to repair and amend the same, and the surface of the land gained by filling up such ditches may, if the local board so think fit and direct, be thrown into such roads and ways and be repairable as part thereof and be under the control of the local board.

Day, Q.C. (with him *C. Lanyon*) for the plaintiff.—The point arises under the 16th section of the Act which enables the local board to fill up the ditches. The presumption is, that the railing is in the owner of the freehold of the adjoining land, and the local board must establish a dedication. In *Steel v. Prickett* (2 Stark, 463) the presumption was stated to be that waste land adjoining the road, belongs to the owner of the adjoining freehold, and not to the lord of the manor, and so also in *Grove v. West* (7 Taunt. 39) it is said *prima facie*, the presumption is that a strip of land lying between a highway and the adjoining enclosure is as well as the soil of the highway *ad medium filum viæ*, the property of the owner of the enclosure, although that presumption is capable of being either done away with or considerably narrowed by other evidence.

Prentice, Q.C. and Tindal Atkinson for the defendants.—The question is not whether the ditch and fence belongs to the plaintiff or not, but the question the court has to decide is, whether the ditch is, under the 16th section, such a ditch as the local board have power to fill up. I do not say the ditch is not the plaintiff's property, nor that it is part of the highway; if it were I should want an Act of Parliament. The intention of the Legislature was that the local board should fill up the ditch and put down drain pipes. The ditch is by the side of the highway, therefore it is of no importance whether the posts and rails are between the ditch and the road or not.

KEATING, J.—This case involves some difficulty

in consequence of the findings of the arbitrator who settled the case, not being very precise. The defendants claim to fill up the ditch under the provisions of the 16th section of the Act of Parliament, by which they may, when they think fit, cause the ditches at the sides of the public roads to be filled up. The simple question comes to this, whether the ditch in question is a ditch by the side of the road within the meaning of the statute. Now, it appears, that first there is a low fence, then a strip of ground, then the ditch in question which divides the strip nearly in half, and then the high fence. Now, the difficulty I have in finding that this is a ditch by the side of the road is that the post and rails come between the road and the strip, and I think it clear the rails had been put up for the purpose of preventing injury to persons using the highway. If this had appeared by the case I should have little difficulty in deciding the question, but it does not appear. The posts have been from time to time repaired by the owner, and the surveyors have also occasionally done repairs, but without the knowledge of the owner. The defendants have taken away the posts and rails, and therefore they claim a right of interference with the ditch, although they could not get at it without first removing the posts and rails. Such interference was never in the contemplation of the Legislature. I find, also, that the fence was carried on in a straight line beyond the point at which the ditch stopped, which strengthens the inference that it was not put up by the surveyors, but by the adjoining owner. It was argued on behalf of the defendants that the fence was put up for the protection of the public against falling into the ditch, and it may very well be the case that the fence was put up by the adjoining owner, and I think the Legislature did not intend to interfere with such cases. If it were a nuisance it could be dealt with by the previous section, and the board would have ample powers to deal with it. Upon the best consideration I can give the case I think it does not come within the 16th section, and our judgment must be for the plaintiff.

HONYMAN, J.—I quite agree with what has been said. The 16th section gives the local board power to fill up the ditches, and to substitute pipes and drains, and the surface gained by filling up the ditches may be thrown into the highway. Now, the ditch must adjoin the high road; if the strip be part of the road or part of the ditch it would equally join the road, but if the defendants do not make out that the ditch is adjoining the highway to our satisfaction (for we, sitting here as a jury, must determine the facts), they cannot complain, the onus of proof being upon them, if our conclusions are erroneous. We know that the plaintiff had been in possession of the adjoining close, and had from time to time repaired the posts and rails, so that he had exercised acts of ownership over the ground. If there had been no posts and rails I might have decided differently, but I think that under the circumstances our judgment should be for the plaintiff.

Judgment for the plaintiff.

Attorney for the plaintiff, *Mills and Lockyer.*
Attorney for the defendant, *Pontifex.*

[Ex.]

GUARDIANS OF KINGSTON UNION v. LANDED ESTATES CO.—MAW v. HINDMARSH.

[Ex.]

COURT OF EXCHEQUER.Reported by T. W. SAUNDERS and H. LEIGH, Esqrs.,
Barristers-at-Law.

Friday, June 6, 1873.

THE GUARDIANS OF THE POOR OF THE KINGSTON
UNION v. THE LANDED ESTATES COMPANY (LIMITED).*Mistrial—View by the jury—Trial in the absence
of the viewers.*

The defendants had obtained a rule for a view, which was accordingly had, but upon the trial coming on at the assizes all the viewers were empanelled and engaged in trying a cause in another court. As this, however, was the last cause on the list, the learned judge (against the consent of the defendants) determined upon trying it, and other jurors were empanelled instead of the viewers, and a verdict was returned for the plaintiffs.

Held, that this was a mistrial, and a rule for a new trial was accordingly made absolute.

THIS was a rule calling upon the plaintiffs to show cause why the verdict found for the defendants should not be set aside and a new trial had, on the ground that the cause was tried by a wrong jury after the right jury had been sworn to try the cause, and the trial had been adjourned for that purpose.

The plaintiffs were the local authority under the 23 & 24 Vict. c. 77 (Nuisances Removal), and the defendants were a limited liability company who had purchased certain houses, who had been convicted in certain penalties and costs amounting to 159l. 6s. 2d. for certain nuisances committed with respect to these premises, and to recover which penalties the present action was brought. The defendants had obtained a rule for a view by the jury, which was accordingly had, and the cause was set down for trial at the last Kingston Assizes, and was called on before the Lord Chief Justice on the 3rd April, when, in consequence of the indisposition of Mr. Montague Chambers, the leading counsel for the plaintiffs, the trial was postponed to a later period of the Assizes. Upon the 8th April the cause (which was then the last one in the list) was called on for trial before Mr. Justice Brett (the other judge in the commission), when it appeared that the jurors who had had the view were actually empanelled and trying a cause in the other court before the Lord Chief Justice. Being the last cause, his lordship decided upon taking it, although the defendants objected to that course being adopted. The jurors who had had the view were accordingly called, in accordance with sect. 24 of the 6 Geo. 4, c. 50, which enacts "That where a view shall be allowed in any case those men who shall have had the view, or such of them as shall appear upon the jury to try the issue, shall be first sworn, and so many only shall be added to the viewers who shall appear, or shall, after all defaulters and challenges allowed, make up a full jury of twelve;" and, being all engaged in the other court, none of them answered, whereupon other jurors were empanelled and the cause was tried, resulting in a verdict for the plaintiffs.

Montague Chambers, Q.C., and L. D. Powles showed cause, and contended that there was no mistrial, for that upon a correct interpretation of the 24th section of the 6 Geo. 4, c. 50, it was only necessary that the jurors who had had the view

should be called, and that upon their not appearing, other jurors might be substituted.

J. Brown, Q.C., and F. J. Smith, in support of the rule, were not called upon.

KELLY, C.B.—This rule must be made absolute, as there has unquestionably been a mistrial. The viewers ought to have been present.

MARTIN, B.—I quite concur that the rule must be made absolute, for I think that it is imperative that according to the 6 Geo. 4, c. 50, s. 24, those of the jury who have had a view must be present at the trial. There was clearly a mistrial.

POLLOCK, B., concurred.

Rule absolute.

Plaintiff's attorneys, E. C. Sherrard for R. F. Bartrop, Kingston.

Defendant's attorneys, Smith and Co.

Friday, June 13, 1873.

MAW v. HINDMARSH.

*Implied covenant—Public house—Forfeiture of
licence by misconduct of tenant.*

*Upon the letting by parol of a public-house there is
no implied agreement or covenant that the tenant
shall do no act whereby the licence shall become
forfeited.*

*A. took by parol a licensed public-house of B., but
having been three times convicted of offences con-
nected with the management of such house the
magistrates refused to renew the licence. Upon
an action by B. against A. upon his implied cov-
enant not to suffer the premises to be used in a
manner calculated to produce a forfeiture of the
licence:*

*Held, that no such covenant could be implied, and
that the action could not be maintained.*

THIS was a rule obtained by the defendant calling upon the plaintiff to show cause why the damages should not be reduced to 25l. pursuant to leave reserved on the ground that there was no warranty that the licence should not be forfeited. The two first counts were for dilapidations, and the third count was as follows: "That the defendant became and was tenant to the plaintiff of a messuage and premises of the plaintiff, that is to say a licensed public-house, upon the terms that the defendant should not permit or suffer the same to be used or use them as a brothel, or a disorderly house, or as a common gaming house, or knowingly suffer the same premises to be used in a manner calculated to produce a forfeiture of the licences for the sale of wines, spirits, and beer, granted to, or prevent the renewal thereof to, the defendant as tenant of the said public-house. Yet the defendant did permit and suffer the same to be used and did use the same as a brothel and disorderly house, and as a common gaming house, and knowingly suffer the same to be used in a manner calculated to create a forfeiture of the said licences, and prevent the renewal thereof, whereby the said licences were lost and not renewed. And the plaintiff says that by reason of the premises in the declaration mentioned the plaintiff was unable to let the said messuage and premises as a public-house, or at all, and the same became and were lessened in value, and the plaintiff was put to expense in and about certain reasonable applications to the proper magistrates in that behalf to renew the said licences." The defendant by his pleas traversed the various counts. The action was tried at the last assizes for Dur-

[X.]

REG. v. CULLUM.

[O. CAS. R.]

ham, before Pollock, B., when it appeared that the defendant took of the plaintiff a public-house situate at Bishop's Auckland, called "The Alma Hotel." The letting was by a verbal agreement only, and the defendant having been three times summarily convicted by the magistrates of offences connected with the manner in which he conducted the house they ultimately refused to renew his licence, and the licence to the house was consequently lost. This action was accordingly brought by the landlord to recover the amount of certain dilapidations, and compensation for the loss of the licence to the house; the former was estimated at 25*l.* and the latter at 50*l.* At the trial the learned judge was of opinion that the action for the damage for the loss of the licence could not be maintained. He however left the case for the jury who returned a verdict for the plaintiff for 75*l.* 50*l.* of this amount being in respect of the loss of the licence.

Trotter (Herschell, Q.C. with him) showed cause. —Although the letting of the public-house was a parol one there was an implied agreement that the tenant would do nothing to injure the premises. In consequence of the defendant's misconduct the licence to the house was lost, and so the premises were greatly deteriorated in value, equally as though they had been partially destroyed. There must be taken to be an implied undertaking on the part of the defendant that he would keep the licence alive, and was to restore the property in the same condition as he received it. [POLLOCK, B.—This is not like an actual physical damage to the house. Take the case of a carriage let out on hire to a party. If he does a physical injury to it he would be liable to make it good; but suppose he lets it out to a person who carries on an infamous trade, it may damage the carriage as regards its letting value to other persons, but that would not be an actionable damage. MARTIN, B.—I cannot see that there is any implied contract of the kind in this case. KELLY, C.B.—The tendency of modern decisions is not to imply covenants.] It surely must have been in the minds of the parties that the defendant should do nothing whereby a forfeiture of the licence should take place, such forfeiture greatly depreciating the value of the premises. [KELLY, C.B.—The impression of the court is that the action cannot be maintained, but if Mr. Holker has any authority by which to assist our opinion we shall be glad to hear it.]

Holker, Q.C. (Abbs with him).—There is no authority exactly in point in such a case, but it is well established that the court will not imply a covenant even to keep premises in repair.

KELLY, C.B.—In the absence of any authority for such an implied contract or covenant as is contended for by the plaintiff, I am undoubtedly of opinion that this rule should be made absolute.

MARTIN, B.—I quite agree with the rest of the court that there is no such implied contract. To imply such a covenant would really be to turn a court of law into a legislative body. Parties must make their own contracts.

POLLOCK, B. concurred.

Rule absolute.

Attorney for the plaintiff, *Mow*, Bishop's Auckland.

Attorney for the defendant, *J. P. Dolphin*, Wolsingham.

CROWN CASES RESERVED.

Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

Saturday, May 3, 1873.

(Before BOVILL, C.J., BRAMWELL, B., BLACKBURN, J., ARCHIBALD, J., and HONYMAN, J.)

REG. v. CULLUM.

Embezzlement—Servant—Receipt of money as such
—24 & 25 Vict. c. 96, s. 68.

Prisoner was employed by B. to navigate a barge and was entitled to half the earnings after deducting the expenses. His whole time was in S's service, and his duty was to account to S. on his return after every voyage.

*In October prisoner was sent with a barge load of bricks to L., and was there forbidden by S. to take back manure for P. Notwithstanding this prisoner took the manure and received 4*l.* for the freight, and appropriated it to his own use. It was not proved that he professed to carry the manure or receive the freight for his master, and the servant who paid the 4*l.* said that it was for the carriage of the manure, but he did not know for whom it was paid.*

Held, that the prisoner could not be convicted for embezzlement, as the money was not received in the name or for or on account of his master.

CASE reserved for the opinion of this court at the adjourned quarter sessions for the county of Kent held on the 7th March, 1873.

Samuel Cullum was indicted as servant to George Smeed for stealing 2*l.* the property of his master George Smeed.

The evidence showed that the prisoner was employed by Mr. Smeed, of Sittingbourne, Kent, as captain of one of Mr. Smeed's barges.

The prisoner's duty was to take the barge with the cargo to London and to receive back such return cargo, and from such persons as his master should direct.

The prisoner had no authority to select a return cargo, or take any other cargoes but those appointed for him.

The prisoner was entitled by way of remuneration for his services to half the earnings of the barge after deducting half the sailing expenses, Mr. Smeed paid the other half of such expenses.

The prisoner's whole time was in Mr. Smeed's service.

It was the duty of the prisoner to account to Mr. Smeed's manager on his return home to Sittingbourne after every voyage. In October last, by direction of Mr. Smeed, the prisoner took a load of bricks to London. In London he met Mr. Smeed, and asked if he should not on his return take a load of manure down to Mr. Pye, of Cuxton. Mr. Smeed expressly forbade his taking the manure to Mr. Pye, and directed him to return with his barge empty to Burham, and thence take a cargo of mud to another place, Murston.

Going from London to Burham he would pass Cuxton.

Notwithstanding this prohibition, the prisoner took a barge load of manure from London down to Mr. Pye at Cuxton, and received from Mr. Pye's men 4*l.* as the freight.

It was not proved that he professed to carry the manure, or to receive the freight for his master. The servant who paid the 4*l.* said that he paid it to the prisoner for the carriage of the manure, but that he did not know for whom.

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Early in December the prisoner returned home to Sittingbourne, and professed to give an account of his voyage to Mr. Smeed's manager. The prisoner stated that he had taken the bricks to London, and had returned empty to Burham as directed by Mr. Smeed, and that there he had loaded with mud for Murston.

In answer to the manager's inquiries, the prisoner stated that he had not brought back any manure in the barge from London, and he never accounted for the 4*l.* received from Mr. Pye for the freight for the manure.

The jury found the prisoner not guilty of larceny, but guilty as servant to Mr. Smeed of embezzling 2*l.*

It appearing to the Justices doubtful whether the prisoner having taken the cargo of manure without the authority and contrary to the expressed direction of his master, could be said to have received the 4*l.* for his master or by virtue of his employment, and it not being shown that he professed to receive it for or on account of his master, the Justices request the opinion of the Court of Crown Cases Reserved upon the question, namely,

Whether on the above-mentioned state of facts the prisoner could properly be convicted of embezzlement.

(Signed) JOHN G. TALBOT,
Chairman of West Kent Quarter Sessions.

No counsel appeared for the prisoner.

E. J. Smith (*Morton W. Smith* with him) for the prosecution.—The question is whether the conviction for embezzlement as a servant can be sustained. The 24 & 25 Vict. c. 96, s. 68, differs from the previous enactment, 7 & 8 Geo. 4, c. 29, s. 47, by the omission of the words, "by virtue of such employment." Under the former Act it was not sufficient that a clerk or servant had received and embezzled the money of his employer, unless he had received it by virtue of his employment. [*BOVILL, C. J.*—The case of *Rees v. Snowley* (4 Car. & P. 399), is almost identical with this, but that case was before the 24 & 25 Vict. c. 96. *BLACKBURN, J.* How do you make out that on the receipt of the money by the prisoner, it was received into the possession of the prosecutor, his employer? If upon that receipt it became the master's property, there would be an end of the case, but how do you establish that?] The money was paid to the prisoner for the owner of the barge. In *Rees v. Hartley* (Rus. & Ry. 139), which was like this case, the facts were these:—The prosecutor had a colliery and barges, and employed the prisoner as captain of one of his barges to carry out and sell coals, and his duty was to bring back the money for which the coals sold, but he was entitled to two-thirds of the difference between such money and the value at the colliery and duties. He sold coals so received by him at 18*s.* per chaldron, the value at the colliery being 14*s.* He embezzled the money received. It was held that he was a servant within the statute, and guilty of embezzling so much of the money as equalled the value at the colliery and duties. [*BLACKBURN, J.*—The way the money was earned here was in express disobedience of the master's commands. *BOVILL, C. J.*—It seems to be a misuser of his employer's property by the prisoner to earn money for himself. *ARCHIBALD, J.*—Could the master have brought an action for money had and received for this money?] In *Reg. v. Harris* (6 Cox C. C. 363; *Dears. C. C.*

334), a miller of a county gaol, grinding corn contrary to his duty and appropriating the money received for the grinding, was held not to have received the money by virtue of his employment, and upon a case reserved, *Pollock, C. B.* delivered the following judgment:—"The only point on which we give our unanimous opinion is, that upon the facts stated it appears that the prisoner had no right to receive and grind any corn on behalf of his masters, except such as was brought to him with a ticket. The reasonable conclusion to be drawn from his receiving and grinding the grain without a ticket is, that he intended to make an improper use of the machinery intrusted to him, by using it not for the benefit of his masters, but for the benefit of himself. We think therefore that the money which he received was not received on account of his masters, and that he cannot be said to be guilty of embezzlement." *Mr. Greaves, in 2 Rus. on Crimes, 453* (4th edit.), has the following note upon *Reg. v. Harris*:—"In *Reg. v. Harris*, *Pollock, C. B.*, in the argument said, 'If a workman employed in a blacksmith's shop, who has engaged to give his master his whole services, is asked by some one to do a little work in the shop which only requires labour, and he does the work and says to the man, 'Pay me twopence for the job and say nothing about it,' the workman could not be indicted for embezzling the twopence, though he might be guilty of a breach of his contract, which was to give his master his entire labour. The supposed case is plainly distinguishable from this case. There the man's own bodily labour would earn the money. Here the money was earned by the mill of the county, and clearly for any work done by it the county might recover payment. The decision itself seems to be erroneous; for the prisoner could only work the mill 'by virtue of his employment,' and it is quite clear that the county might recover from the prisoner any money received by him as money had and received to their use, for it was earned by their mill, and the prisoner was paid for all the work he contributed towards it, and this plainly proves that the money was in fact received for and on account of his masters, though by a fraudulent juggle he attempted to show it was not so received. *Rees v. Snowley*, was approved of by *Parke, B.*, in this case; but in the Committee of the Lords on the Criminal Bills of 1860, on my reading that case, *Lord Wensleydale* and all the law lords greatly disapproved of it, and unanimously agreed to the propriety of preventing such a failure of justice in future by altering the clause as it now stands, and there is no doubt that it will meet such a case as the present." In *Reg. v. Thorpe* (8 Cox, C. C. 28, D. & B.), the prisoner, a servant of the agent of a railway company who was employed to deliver goods according to a delivery book furnished by the company, and to account for moneys received to his master, received moneys and gave receipts in name of the company. Held nevertheless that the moneys were received on account of his master.

BOVILL, C. J.—Under the former Act the words "virtue of such employment" led to difficulties. And in *Rees v. Snowley*, and *Reg. v. Harris*, where the money embezzled had been received by a servant for his master, but not by virtue of his employment, it was held that the servant could not be convicted of embezzlement. In 24 & 25 Vict. c. 96, s. 68, those words have been left out, and it

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is enacted that whosoever being a clerk or servant or being employed for the purpose or in the capacity of a clerk or servant, shall fraudulently embezzle any money, &c., which shall be delivered to, or received, or taken into possession by him for or in the name, or on the account of his master or employer, shall be deemed to have feloniously stolen the same from his master or employer. It is still necessary, therefore, that the money be delivered to, or received, or taken into possession by the servant for, or in the name, or on the account of the master or employer to constitute embezzlement. Now in this case what the prisoner did was to use the barge for his own purpose to earn money, not for his master, but for himself. It is expressly stated, "that it was not proved that he professed to carry the manure, or to receive the freight for his master, and that the servant who paid the 4l. said that he paid it to the prisoner for the carriage of the manure, but that he did not know for whom." On the facts stated, it is more consistent to infer that the prisoner was using his master's property for his own purposes than for those of his master. If that be the true view, the money was received by the prisoner for himself and not for his master. The case is therefore not within the statute, and the conviction must be quashed.

BRAMWELL, B.—I am of the same opinion. We must look at the substance of the thing. The wrong done was not in not paying over the money to his master, but in improperly using his master's chattel, and the case is well illustrated by a man improperly using his master's barge at a boat race, and charging persons so much apiece to stand upon it to see the race. The man is no otherwise dishonest except in using his master's barge improperly. The case is certainly not within the words of the statute. The money was not received by the prisoner for or in the name or on account of his master. I doubt whether, though he had used his master's name in the transaction, the case would have been within the statute. For suppose a servant had a cart and a horse of his own, and had used that as if it had been his master's, would a receipt of money in his master's name have done then? In the desire to avoid difficulties, words have been introduced into the enactment, which I think may at some future time create a difficulty.

BLACKBURN, J.—I am of the same opinion. It is still necessary, under the present Act, that the servant should have stolen his master's property, and it must still be the master's money when received by the servant. I cannot see that that is the case here. The prisoner had no authority to carry the manure in his master's barge; he was acting in a way that he had been forbidden to do by his master, and so earned the money. In what sense can it be said that the money so earned was the master's? If the money had not been paid, could the master have sued for it? There was no contract made with him.

ARCHIBALD, J.—I am of the same opinion. The only doubt raised is, whether the money earned by the use of the master's barge could be said to be the master's on an implied contract, but I think that when the manure was carried, as in this case, no action could have been brought by the owner of the barge for the freight of the manure.

HONTMAN, J. concurred.

Conviction quashed.

REG. v. W. BROWN MATTHEWS.

Larceny—Finding—Bailes.

The prisoner found two heifers which had strayed, and put them on his own marshes to graze. Soon afterwards he was informed by S. that they had been put on S.'s marshes and had strayed, and a few days after that that they belonged to H. Prisoner left them on his marshes for a day or two, and then sent them to a long distance as his own property. He then told S. that he had lost them, and denied all knowledge of them.

The jury found (1) that at the time the prisoner found the heifers he had reasonable expectation that the owner could be found, and that he did not believe that they had been abandoned by the owner. (2) That at the time of finding them he did not intend to steal them, but that the intention to steal came on him subsequently. (3) That the prisoner when he sent them away did so for the purpose and with the intention of depriving the owner of them, and appropriating them to his own use.

Held, that a conviction of larceny, or of larceny as bailes could not be sustained under the above circumstances.

CASE reserved for the opinion of this court by the Recorder of Norwich.

This was an indictment tried before me at the Quarter Sessions for the City of Norwich, held on the 31st day of December, 1872.

It charged that William Brown Matthews, in the month of September last, at the Hamlet of Thorpe, in the county of the City of Norwich, feloniously did steal two heifers, the property of Robert Huggins, value 30l.

The prisoner is a publican, and also hires marshes, which he uses for the agistment of stock belonging to various persons. These marshes adjoin Carron Bridge-road, and on the other side of the road are similar marshes, under the charge of Christopher Stiles, which are used for the same purpose, and cattle are sometimes left by the owners on these marshes, without notice to the persons in charge, and the agistment afterwards paid on their being taken away. They are near to the prisoner's house, but the fences thereof are defective.

The prosecutor, on the 14th of September, sent the two heifers in question to be agisted on the marshes, under the management of Stiles. The person who brought them did not inform Stiles he had done so, but Stiles afterwards saw them there.

On or about the following Wednesday, the 18th September, the heifers strayed out of the marshes on to the public road, and were there found by the prisoner, who put them upon his own marshes.

Soon after, the prisoner told Stiles that he had found two heifers, and asked if he knew to whom they belonged. Stiles told the prisoner that he did not then know, but that they had been put on the marshes which were under his care, and the prisoner then said he had them on his marshes, to which Stiles made no objection.

A few days after Stiles told the prisoner that the heifers belonged to Mr. Huggins. At that time the prisoner had the heifers on his aforesaid marshes, and so kept them for a day or two, and until the 10th of October, when he sent them away 25 miles from Norwich, to be taken care of for him, at a place called Ryburgh, by a person who knew nothing of the circumstances, and received them

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as the property of the prisoner. About three days afterwards the prisoner told Stiles he had lost the heifers, and though he perfectly well knew where the heifers were, he on two other occasions denied all knowledge of where they were or what had become of them. On the 16th of December, the police found the heifers at Ryburgh, where they had been kept for the prisoner, and with his knowledge, for more than two months after he had learned who the owner was.

I told the jury first that if the prisoner, at the time he found the heifers, had a reasonable expectation of ascertaining who the owner was, and did not believe that they were abandoned, and took them into his possession with the intention of appropriating them to his own use and depriving the owner of them, that would amount to a felonious taking in law, and they ought to find the prisoner guilty.

Secondly, that if, after the conversation with Stiles, in which he had been informed that the heifers had been left in his (Stiles's) marshes by an owner then unknown, he continued to hold them for such owner, and shortly afterwards sent them away with the intent and for the purpose of depriving the owner of his heifers, and appropriating them to his own use, I should advise them to find that he was guilty of a felonious taking.

The jury found the prisoner guilty, but in order to raise the questions submitted by the counsel for the prisoner, I put the following questions to the jury, and received the following answers:—

Firstly, whether at the time the prisoner first took the heifers he had reasonable expectation that the owner could be found, or did he believe that they had been abandoned by their owner.

Secondly, when the prisoner first took the heifers did he intend to steal them, or did the intention to steal come upon him subsequently to his first conversation with Stiles on the subject of the heifers.

Thirdly, whether when the prisoner sent them away on the 10th October, it was for the purpose of depriving the owner of them, and appropriating them to his own use.

At the request of the prisoner's counsel I submitted the question also to the jury whether at the very time he first possessed himself of the heifers the prisoner had an intention of appropriating them to his own use. The jury found:—

Firstly, that at the time the prisoner found the heifers he had reasonable expectation that the owner could be found, and that he did not believe that they had been abandoned by the owner.

Secondly, that at the time of finding the heifers the prisoner did not intend to steal them, but that the intention to steal came on him subsequent to his first interview with Stiles.

Thirdly, that the prisoner, when he sent the heifers away on the 10th of October, did so for the purpose and with the intention of depriving the owner of them, and that the prisoner did intend to appropriate them to his own use.

But as to the question, also submitted to the jury, whether at the very time he found the heifers the prisoner had an intention of appropriating them to his own use, the jury replied "No." Upon the foregoing finding of the jury, I directed the verdict of guilty to be recorded, and allowed the prisoner's counsel to take a case for the opinion of the Court, and directed that the prisoner should be admitted to bail upon his

finding sufficient sureties. Judgment was deferred until next sessions.

As the prisoner is unable to obtain bail he still remains in custody.

(Signed) P. FRED. O'MALLEY,
Recorder of Norwich.

No counsel appeared to argue on either side.

BOVILL, C.J.—We have considered this case, and have come to the conclusion that the conviction must be quashed. The jury have found that at the time the prisoner found the heifers he had reasonable expectation that the owner could be found, and that he did not believe that they had been abandoned by the owner. But at the same time they have found that at the time of finding the heifers the prisoner did not intend to steal them, but that the intention to steal came on him subsequently to the first interview with Stiles. That being so, the case is undistinguishable from *Reg. v. Thurborn* (1 Den. C.C. 338), and the cases which have followed that decision. Not having any intention to steal when he first found them, the presumption is that he took them for safe custody, and unless there was something equivalent to a bailment afterwards, he could not be convicted of larceny. On the whole we think there was not sufficient to make this out to be a case of larceny by a bailee.

Conviction quashed.

REG. v. NEGUS.

Embezzlement—Clerk or servant.

A person engaged to solicit orders and paid by commission on the sums received, which sums he was forthwith to hand over to the prosecutors, was at liberty to apply for orders when he thought most convenient, and was not to employ himself for any other persons.

Held, not a clerk or servant within 24 & 25 Vict. c. 96, s. 68 (embezzlement.)

CASE reserved for the opinion of this Court.

John Negus was tried before me at the Middlesex sessions on the 25th March, 1873 for embezzling the sum of 17l as clerk and servant to Roape and others.

The prisoner was engaged by the prosecutors to solicit orders for them, and he was to be paid by a commission on the sums received through his means. He had no authority to receive money, but if any was paid to him, he was forthwith to hand it over to his employers. He was at liberty to apply for orders whenever he thought most convenient, but was not to employ himself for any other persons than the prosecutors.

Contrary to his duty he applied for payment of the above sum, and having received it he applied it to his own use, and denied when asked that it had been paid to him.

The prisoner's counsel contended that he was not a clerk or servant within the meaning of the statute, but I refused to stop the case, and directed the jury to find him guilty, subject to a case to be reserved for the decision of this Honourable Court.

The question for the opinion of this Honourable Court is: Whether upon the facts herein stated the prisoner was a clerk or servant, and as such rightly convicted of the crime of embezzlement.

If this Honourable Court shall decide this question in the affirmative, the conviction is to be

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affirmed. If, on the contrary, the conviction is to be quashed.

The prisoner remains in the Middlesex House of Correction, Clerkenwell.

(Signed)

W. H. BODKIN,
Assistant Judge.

No counsel appeared to argue for the prisoner.

F. H. Lewis for the prosecution.—It is submitted that the prisoner was a clerk or servant within the meaning of the statute. This is not like the case of *Reg. v. Bowers* (10 Cox C. C. 250; 35 L. J., M. C., 206), where a person who was employed to sell coals on commission, and to collect monies on account of such orders, was held not to be a clerk or servant, he being at liberty to dispose of his time as he thought best, and to get or abstain from getting orders as he might choose. [BOVILL, C.J.—Here the case states that the prisoner was at liberty to apply for orders whenever he thought most convenient.] In *Reg. v. Bailey* (12 Cox C. C. 56), a person employed as traveller to solicit orders and collect monies due on the execution of the orders, and paid by commission, and who was at liberty to get orders when and where he pleased within his district, but was to give his whole time to the service of the prosecutors, was held to be a clerk or servant within the statute. So in *Reg. v. Tite* (L. & C. 13; 8 Cox C. C. 458), where a traveller paid by commission, and employed to get orders and receive payments, but bound to devote the whole of his time to his employer's service, was held to be within the statute, although he was at liberty to receive orders for other persons also. So in *Reg. v. William Turner* (11 Cox C. C. 551), a traveller who agreed to employ himself in going from town to town in the United Kingdom, and solicit orders for the prosecutor, and not to act without the prosecutor's assent for himself or any other person, was held to be a clerk or servant within the statute. In this case the prisoner engaged not to employ himself for any other persons.

BOVILL, C.J.—The question submitted to us is whether on the facts stated the prisoner was a clerk or servant, the learned judge at the trial having directed the jury to find him guilty, subject to a case reserved for the decision of this court. Generally speaking the question whether a person employed is a clerk or servant depends on so many considerations, that it should be left to the jury. It is extremely difficult on the mere statements in this case to say whether the prisoner was a clerk or servant. It appears to me that there is not enough stated to make out that he was a clerk or servant. One ground is to ascertain whether the person was bound to obey the orders of his employer so as to be under the control of his employer. There is not sufficient stated here to show that the prisoner was under the control and bound to obey the orders of or to devote the whole of his time as his employer directed, all that is stated is that he was not at liberty to employ himself for any other persons than the prosecutors; he was at liberty to amuse himself or get orders as he pleased. The facts stated do not make out that the prisoner was a clerk or servant. In all these cases it is more convenient that the question should be left to the jury.

BRAMWELL, B.—The conviction must be quashed unless we see on the facts stated that the prisoner must have been a clerk or servant. I am of

opinion that the court cannot see that. The statute applies not to the cases of agents, but, in popular language, to cases of master and servant. In *Reg. v. Bowers*, Erle, C.J., says: "The cases have established that a clerk or servant must be under the orders of his master or employer to receive the monies of his employer to be within the statute; but if a man be entrusted to get orders and receive money, getting the orders when and where he chooses, and getting the money when and where he chooses, he is not a clerk or servant within the statute" That I think is good law and applicable to this case.

BLACKBURN, J.—I am of the same opinion. The test whether a person is a clerk or servant within the meaning of the statute, is whether the person is under the control of and bound to obey the orders of his employer; he may be so without being bound to devote the whole of his time to his employer's service. In this case there is nothing inconsistent with the prisoner's being a commission agent, except that he engaged not to employ himself for any other persons than the prosecutors. On these facts, I think he was not shown to be a clerk or servant within the statute.

ARCHIBALD and HONYMAN, JJ., concurred.

Conviction quashed.

MIDDLESEX SESSIONS.

Thursday, June 19, 1873.

(Before Mr. Serjt. Cox, Deputy Assistant Judge).

REG. v. RADCLIFFE.

False pretences—Larceny—Second suit for same offence—Distinction between a false pretence and larceny by trick.

The prisoner was indicted for feloniously stealing a dress, a shawl, and other articles of wearing apparel.

The evidence was that the prisoner, who had a wife living, but who represented himself as a widower, was paying his addresses to the prosecutrix, who was a widow; that in the course of conversation he told her that his late wife's father had just died (which was true), that his sister-in-law was unable to go to the funeral, being too poor to purchase mourning; that thereupon the prosecutrix, without request or suggestion from him, offered to lend her clothes for the purpose, and placing the articles in question in a bag gave them to the prisoner to take to his sister-in-law. Some of these articles of dress were worn by the prisoner's wife at the funeral, others were found to have been pawned by a woman not identified, who gave her name as that of the prisoner's wife. The prosecutrix afterwards made repeated requests to the prisoner to return the clothing she had lent to his sister-in-law, but could not obtain them. It appeared that the prisoner's wife had two sisters. One of them only was called for the prosecution to prove that the clothing had not been given to her by the prisoner.

It was contended for the prosecution that this was larceny by a bailee. The prosecutrix had given the clothes to the prisoner to deliver them to his sister-in-law, but instead of doing so he had converted them to his own use.

Held, that there was no case for the jury, inasmuch as, there being two sisters-in-law, there was no

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evidence that the prisoner had not delivered the clothes to a sister-in-law in pursuance of the terms of the bailment, and also that there was no evidence of conversion to his own use, it not being proved that the clothes were pawned by the prisoner, but by a woman who might have been the sister-in-law, who was not called to prove the non-receipt of the clothes by her.

The prisoner was then indicted for the misdemeanor of obtaining the same articles of clothing, by falsely pretending, *inter alia*, that his sister-in-law was poor and unable to buy mourning where-with to attend the funeral of her father.

An objection was taken on behalf of the prisoner that inasmuch as the possession only and not the property had been passed or intended to be passed by the prosecutrix, the offence, if any, was larceny and not false pretences.

So held.

It was then contended for the prosecution that by sect. 88 of 24 & 25 Vict. c. 96, it had been expressly enacted that the defendant may be convicted, although it appear at the trial that the offence amounts to larceny and not merely to obtaining money, &c., by false pretences, and therefore that if the jury should be of opinion that the property was obtained by a trick with intent to steal, it would amount to a larceny in law, and the prisoner might be convicted under this indictment by virtue of this provision of the statute.

For the prisoner it was contended, that having been acquitted upon the same evidence on a charge of larceny for stealing these very articles, it would be contrary to the spirit of the law if he could be convicted of the same larceny under the form of an indictment for false pretences.

The whole case was left to the jury, the judge intimating his concurrence with the views advanced on behalf of the prisoner, and stating that if necessary, he should reserve the question for the Court of Criminal Appeal.

The distinction between a false pretence and a trick. INDICTMENT for larceny.

Beasley for the prosecution.

The prisoner was undefended.

The facts proved may be shortly stated thus:—The prosecutrix was a widow; as she was walking through the Strand the prisoner, who was a stranger to her, accosted her, said he knew what she was by her dress, stated that he was a widower, and, expressing sympathy with her, asked her to meet him again. They met accordingly, and ultimately he became a formal suitor. But the prisoner's wife meeting them together in the street, a scene ensued and the intimacy was broken off. Shortly before this the prisoner told her that the father of his deceased wife had just died, which was true, and that his deceased wife's sister wanted to go to the funeral, but was too poor to buy mourning. Upon this the prosecutrix, out of compassion to the prisoner's sister-in-law, put a quantity of her own mourning clothes into a bag and gave it to the prisoner, directing him to take them to his sister-in-law, and to return them to her after the funeral. The clothes were not returned, and when she asked for them the prisoner made evasive answers. Subsequently some of the clothes were found to have been pawned, but not by the prisoner. The person pawning them was a woman, not identified by the pawnbrokers, who gave the name of the prisoner's wife. A sister-in-law of the prisoner was called to prove that she

was at the funeral, but that the clothes in question had not been given to her, and that the prisoner's wife wore some of them on that occasion. She proved also that she had another sister living, who was not called, but of whom all she could say was that she was not in circumstances likely to require borrowed mourning. After the warrant had been issued for the apprehension of the prisoner, the prosecutrix had repeated private interviews with him.

Beasley for the prosecution, said that he charged this as a larceny by a bailee. The clothes had been given to the prisoner to give to his sister-in-law, which he had not done.

The JUDGE.—This is not proved. There are two sisters-in-law, and only one is called. *Non constat* but that the prisoner may have given them to the other sister-in-law, and then he would have done with them what he was directed to do. The burden of proof is upon the prosecution. It must be proved that the prisoner did not execute his contract of bailment, and that instead of so doing he feloniously converted the property to his own use. This has not been done. I must direct an acquittal.

The prisoner was again indicted for obtaining the same articles of clothing by false pretences.

The false pretence charged as being that which induced the prosecutrix to give the prisoner the clothes was, in substance, a statement by the prisoner that his deceased wife's father was dead, that his sister-in-law had no mourning, and was therefore unable to go to her father's funeral.

The evidence was the same as stated above.

Moody (*amicus curiæ*) said that as the prisoner was undefended he wished to direct his Lordship's attention to the cases in which it had been decided that, if the possession merely, and not the property, had been passed, or intended to be passed, the charge of misdemeanor could not be sustained.

The JUDGE.—Here the prosecutrix had clearly parted with the possession only and designed no more. The charge of false pretences could not be sustained.

Beasley, for the prosecution, submitted that it was competent for him, under this indictment, to show it to have been a larceny. The 88th section of the 24 & 25 Vict. c. 96, expressly enacts that "if upon the trial of any person indicted for such misdemeanor it should be proved that he obtained the property in question in any such manner as to amount in law to larceny, he shall not by reason thereof be entitled to be acquitted of such misdemeanor; and no person tried for such misdemeanor shall be liable to be afterwards prosecuted for larceny upon the same facts." Under this provision it would be a question for the jury if the possession was obtained by a trick, and, if so, it would be larceny, and thus the case would clearly come within the provision.

Moody (*amicus curiæ*).—That raises another objection. The prisoner has been already tried and acquitted of the larceny of the self-same articles upon the same evidence. He could not now be convicted of the offence of which he has been acquitted.

Beasley.—The statute makes no such exception. The only proviso is that, if acquitted of the misdemeanor, he shall not be liable for the larceny. It makes no provision for such a case as the pre-

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sent where he has been tried for the larceny and acquitted.

The JUDGE.—The point is new and very important, for, if Mr. Besley's argument is right, the effect of this statute will be to destroy the great principle of our law, that no man shall be twice put in peril for the same offence. It deprives the prisoner of his plea of *autrefois acquit*. I cannot take upon myself to set aside the express words of the section, but I shall reserve the point for the judges. The question here raised is most important. I will leave the facts to the jury, and on their finding take the opinion of the Court of Criminal Appeal on all the points that have been mooted, and I thank Mr. Moody for the assistance he has rendered to the court.

The JUDGE to the jury.—It is distinctly proved that the clothes were parted with to the prisoner by reason of a statement that his sister-in-law was too poor to buy mourning, and therefore was prevented from attending her father's funeral. This statement roused the compassion of the prosecutrix, who thereupon offered to lend her own clothes to the woman, and delivered them to the prisoner for that purpose, with an injunction to return them after such use. It is, therefore, clearly shown that the prosecutrix parted with the possession only and not the property, and it has been decided that where this is the case the offence, if any, is larceny, and that an indictment for false pretences cannot be sustained. Here, then, I should have withdrawn the case from your consideration, but for a provision of the Criminal Law Amendment Act, that in any trial on a charge of false pretences, if the offence proved shall amount in law to larceny, the prisoner shall not be therefore acquitted, but may be convicted as if he had been indicted for larceny. It is contended on the part of the prosecution that this is a case coming directly within that provision of the Act, and that if you are of opinion that the prisoner obtained possession of the clothes by a trick, the offence would amount in law to larceny, and he might be convicted under this indictment. On the other hand, it has been suggested that as the law says that no man shall be put in peril twice for the same offence, and as the prisoner has been already tried for larceny of these very clothes and acquitted, it would be a violation of a most wholesome law if it could be permitted that, under the form of an indictment for false pretences, he should be tried again and possibly convicted of the larceny. I fully share in this objection, and I have great doubt whether such a construction would be put upon the statute. But as the language is clear and express, and there is no prohibition, as in the contrary case of an indictment for false pretences being first preferred, I cannot take upon myself to say that the statute does not intend what it appears to declare, and, if necessary, I shall reserve the point for the consideration of a superior court. But the question which I now leave to you, and of which I ask your opinion is, if upon the evidence it is proved to your satisfaction that the prisoner obtained the clothes by a trick and not by a false pretence; if you are of opinion that it was a trick, and not merely a false pretence, it would amount to a larceny in law, and the prisoner might be convicted. Therefore, I will endeavour to assist you in deciding this by directing your attention to the difference between false pretence and larceny

by a trick. I can find no clear definitions in the books from which I can show you distinctly where the two offences differ. The boundary line is very fine indeed, and the cases are not clear, and upon this point also I shall ask the opinion of the judges. My own view of it is this: That a false pretence is a lie told or acted to influence the mind; but obtaining by a trick, so as to constitute larceny, is an imposition upon the senses. If this is not the distinction, I do not know what it is. Obviously, every indictable false pretence is in one sense a trick and a fraud, and anything obtained by it is obtained by trickery and fraud. And if the contention of the counsel for the prosecution be right, every false pretence would amount to larceny in law, and the misdemeanor might be abolished. My reading of the statute is this: That if the alleged false pretence should turn out not to be what is familiarly termed "a good false pretence," by reason of being something more, that is to say, if it appeared upon the evidence to be a larceny and not a false pretence (as was often found before the statute, when the endeavour was to prove that the prisoner had committed larceny and not merely a false pretence, and which, if sustained, procured an acquittal) in such case the prisoner should not be acquitted, but might be convicted of the larceny. Was this, then, a false pretence merely, or a trick? If you are of opinion that it was a false pretence merely, for the reason that I have stated you must acquit the prisoner. But if it be your opinion that it was a trick, and that it was done with design to obtain possession of the clothes, and with intent, at the moment of taking them into possession, to convert them to his own use—that is, to steal them—you will say that he is guilty. But you must be satisfied that he had such intent in his mind at the time of practising the trick, and at the moment of receiving the clothes from the prosecutrix; for if it arose subsequently, as after having given them to his wife she had pawned them, or otherwise, he would not be guilty of larceny. Should you convict him, I shall reserve both the points I have stated for the consideration of the Court of Criminal Appeal.

Not Guilty.

V.C. MALINS' COURT.

Reported by T. H. CARSON, and F. GOULD, Esqrs.,
Barristers-at-Law.

Thursday, June 5, 1873.

CLARK v. SCHOOL BOARD FOR LONDON.

Light and air—Elementary Education Act 1870—Lands Clauses Act 1845—Injury to premises not taken under compulsory powers—Injunction.

The defendants having, under the above Acts, acquired land as a site for a school, proceeded to build so as to interfere with the light of an adjoining owner whose houses they had not acquired power to take.

Held, that the board were not entitled by their building to interfere with the plaintiff's rights, leaving him to claim compensation under sect. 68 of the Lands Clauses Act, but that the plaintiff was entitled to an injunction.

THE School Board for London had, under the Elementary Education Act 1870 and the Lands Clauses Act 1845, taken a piece of land at Pentonville, for the purpose of building a school thereon,

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and the plaintiff was the owner of some leasehold houses adjoining the land.

The board had not taken the plaintiff's houses, nor had they at the time of the institution of the suit any compulsory power to take them.

In May 1873 the board began to erect the school house within a distance of about 4ft. from the plaintiff's windows, which were ancient lights, and had already built up higher than the windows, when the plaintiff filed a bill to restrain them from interfering with his lights. An interim injunction having already been granted, the plaintiff now moved to continue it.

Glasse, Q.C. and F. A. Lewin for the motion.

Cotton, Q.C. and Speed, for the defendants, submitted that as the board were acting under their parliamentary powers, and had not taken any of the plaintiff's land, his remedy was under sect. 68 of the Lands Clauses Act. The board were willing to pay compensation. They cited:

Hutton v. London and South Western Railway Company, 7 Ha. 259;

Brand v. Hammersmith Railway Company, L. Rep. 4 E. & L. App. 171; 21 L. T. Rep. N. S. 238;

Thicknesse v. Lancashire Canal Company, 4 M. & W. 472;

Broadbent v. Imperial Gas Company, 7 De G. M. & G. 436, 457; 26 L. T. Rep. O. S. 329;

Eagle v. Charing Cross Railway Company, L. Rep. 2 C. P. 638; 16 L. T. Rep. N. S. 593.

Glasse, Q.C. in reply, cited:

Crofts v. Haldane, L. Rep. 2 Q. B. 194; 16 L. T. Rep. N. S. 116;

Bigg v. Corporation of London, 15 Eq. 376; 23 L. T. Rep. N. S. 336.

[He was stopped by the court.]

The VICE-CHANCELLOR.—Nobody doubts that this is an unlawful act. The proprietors, under whom the Board claim, could not have done that which they are doing. The injunction must be continued.

Plaintiff's solicitors, *Lewin and Co.*

Defendants' solicitors, *Sydney Gedge and Co.*

COURT OF QUEEN'S BENCH.

Reported by J. SHORT and M. W. McKELLAR, Esqrs.,
Barristers-at-Law.

April 30 and May 23, 1873.

MARKET HARBOROUGH AND BRAMPTON TURNPIKE TRUSTEES (appellants) v. MARKET HARBOROUGH HIGHWAY DISTRICT BOARD (respondents).

Highway—Contribution—Tolls conditional upon repairs—Apportionment—4 & 5 Vict. c. 59, s. 1.

The appellants were authorised to take tolls upon a piece of road in one of the respondents' parishes, in case they should keep and continue, at all times, in good repair that part of the said road; they received a larger amount in tolls upon this piece of road than the repairs cost; but the funds for the whole trust, which with the exception of this piece of road was outside the respondents' district, were insufficient to meet the repairs.

Held, that the justices were right in refusing to make an order of contribution upon the respondents, under 4 & 5 Vict. c. 59, s. 1.

THIS was a case stated by four justices for the county of Leicester, under statute 20 & 21 Vict., c. 43, on the application in writing of the appellants, who were dissatisfied with their determination upon the question of law which arose as hereinafter stated on the 14th May 1872, at Market

Harborough, in the said county. The appellants had duly entered into a recognizance to prosecute the appeal.

At a special sessions for highways, held at Market Harborough, in the county of Leicester, on the 14th May 1872, an information by Geoffrey Hawkins, clerk to the appellants, was exhibited before the justices, under 4 & 5 Vict., c. 59 (which statute has been continued by several subsequent statutes to the present time) stating that the funds of the said Turnpike trust, called the Market Harborough and Brampton Turnpike Trust, were insufficient for the repairs of the turnpike road, within the parish of Great Bowden in the county of Leicester, and within the Market Harborough Highway district, and praying that the justices would proceed to make such judgment and order in the premises as upon examination to the justices should seem meet, and as to law did appertain.

Upon the hearing of the information, the following facts were proved or admitted by both parties:—

That this turnpike trust originated under an Act of Parliament, 25 Geo. 2, c. lvii., being an Act for repairing and widening the road leading from Market Harborough, in the county of Leicester, to the Pound, in the parish of Brampton, in the county of Huntingdon, but such road did not enter or affect the parish of Great Bowden.

The trustees, by virtue of several clauses in the said Act of 25 Geo. 2 contained, diverted, and turned a part of the old road into an old highway in the parish of Great Bowden, which piece of road is the subject of this appeal; and the Act of 27 Geo. 2, c. xxviii., was passed to remove doubts as to the legality of such alteration; and powers were given to the trustees to collect tolls thereon.

That the turnpike trust was continued by the Acts of Parliament, 33 Geo. 2, c. xxxviii., and 39 Geo. 3, c. l., and 1 Geo. 4, c. lxxx.

That, by the Act 1 Geo. 4, c. lxxx., which recites the former Acts, at p. 13, the powers of the trustees to take tolls on part of the portion of the road in Great Bowden parish were restricted.

That, by an Act 4 Vict., c. xxiv., all the former Acts were repealed, and the whole of the road was put into the general trusts without any special clauses affecting the piece of road in Great Bowden parish.

That, in the following session, 5 Vict., c. lix., an Act reciting the last Act was obtained, which relates solely to the part of the turnpike road in Great Bowden parish, and the subject of this case.

That, at the present time, the trustees maintain double toll gates, one being across the piece of road which is not affected by the said Act of 5 Vict., the other across the piece of road affected by that Act. At the former gate they charge the higher rate of tolls as regulated in the Act of 1841, at the latter the lower rate of tolls as set out in the Act of 1842.

That the funds for the whole trust are insufficient to meet the repairs for the year ending 31st Dec. 1872 to the extent of 800*l.*, and that the proper proportion to be contributed for the parish of Great Bowden would be 21*l.* 16*s.* 4*d.*

That, the tolls received at the gate across the portion of road affected by the Act 5 Vict. (1842) are considerably more than sufficient to repair that portion of the road.

Q. B.] MARKET HARBOURGH, &C., TRUSTEES v. MARKET HARBOURGH HIGHWAY BOARD. [Q. B.]

The several Acts above mentioned are made part of this case.

The respondents contended that under the operation of the above-mentioned Act the piece of road between Market Harborough and St. Mary's Road-bridge has always been separated from, or been made a special part of the entire trust; and that the trustees may, or may not, avail themselves of the discretionary powers vested in them of receiving the tolls and repairing the road; that the Highway Board is not liable to make up the deficiency on the whole road; but if the trustees decline to receive the tolls and repair the road, the board must repair the same as an ordinary highway within their district.

The appellants contended that this portion of the road still formed part of the entire trust; that the tolls received therefrom must be brought into the general fund; and that the Highway Board were liable to contribute to the general deficiency.

The justices were of opinion that the respondents' contention was right, and made an order dismissing the information.

The appellants were dissatisfied with the determination of the justices as being erroneous in point of law.

If the court be of opinion that the decision of justices was correct, then the same is to be affirmed.

If the court be of opinion that the decision was erroneous in law, then the decision is to be amended by ordering that the sum of 21*l.* 16*s.* 4*d.* shall be paid by the said Highway Board to the trustees of the said turnpike trust.

The appellants' points were, First, that a portion of the Market Harborough and Brampton Turnpike Road (which portion of the said road is the subject of this appeal) lies within the parish of Great Bowden, in the respondents' highway district, and that the whole of such portion of road, or some part of such portion, is comprised within, and forms part of, the said turnpike trusts; secondly, that the appellants, as trustees of the said turnpike trusts, are empowered to demand and take, and do demand and take, certain tolls upon the said portion of road, which lies in the said parish of Great Bowden in the said respondents' said highway district; and the appellants have kept, and continue to keep the said portion of road in good repair; thirdly, that the tolls so demanded and taken on the whole of the said portion of road are brought into, and the same, or the tolls taken over a part of the said portion of road belong to, and form part of the general funds of the appellants' said trust; fourthly, that the funds of the appellants' said trust being insufficient to meet the repairs of the said turnpike road, as found in the said case, the respondents are liable to contribute towards the repairs of the said portion of the said turnpike road, or of a part of such portion thereof as lies within the said parish of Great Bowden, in the said respondents' highway district.

The respondents' points were, First, that the piece of road between Market Harborough and St. Mary's Road-bridge was an ancient queen's highway, and formed no part of the appellants' trust; and by the Acts passed since the creation of such trust relating to such trust, that highway has always been treated separately and made a special part of such trust; secondly, that if the appellants keep the said highway in repair they

are limited by 5 Vict., c. lxi., referred to in the case of the tolls therein mentioned for remuneration for such repairs, and have no right to contribution to the deficiency of the entire trust, under 4 & 5 Vict. c. 59; thirdly, that the tolls received by the appellants under 5 Vict., c. lxi., in respect of the said highway are considerably more than sufficient to keep that highway in repair; fourthly, that the obvious intention of the Acts was to relieve the said highway from liability as much as possible; fifthly, that, as seen by the preamble to the 27 Geo. 2, c. xxviii., the appellants trust was considerably in debt before the highway in question was included in such trust; and although by that Act the highway was added in general terms, still by 1 Geo. 4, c. lxxx. no toll was to be levied on the said highway, unless the appellants repaired it, and then they were limited to one-half of their ordinary tolls; sixthly, if the appellants do not repair the said highway, the respondents could be compelled to do so; seventhly, that the determination of the justices appealed against was right in point of law.

Manisty, Q.C. (with him *Speke*) argued for the appellants.—The first section of 4 & 5 Vict. c. 59, empowers justices at highway sessions to examine the revenues and debts of turnpike trusts, and to ascertain the repairs and length of the roads; "and if, after such examination, it shall appear to the justices necessary or expedient for the purposes of any turnpike road so to do, then to adjudge and order what portion, if any, of the rate or assessment levied, or to be levied by virtue of 5 & 6 Wm. 4, c. 50, shall be paid by the parish surveyor, and at what time or times, to the trustees, or to their treasurer, or other officers appointed by them; such money to be wholly laid out in the actual repairs of such part of such turnpike road as lies within the parish from which it was received." There is nothing in the local Acts to compel the trustees to devote the whole of the tolls taken on this piece of road to this piece only. The deficiency for the repairs of the whole trust should be made up rateably by the several parishes.

H. James, Q.C. (with him *J. O. Griffiths*) for the respondents.—Here the trustees are authorised to take tolls on this portion of the road only on condition that they keep it in repair. It was held in *The Brighton, &c., Turnpike Roads Trustees v. the Surveyors of the Parish of Preston* (L. Rep. 5 Q. B. 146), that where the roads of a turnpike trust pass through several parishes, and the funds of the trusts applicable to the repairs of the roads are insufficient, the funds ought to be apportioned to the roads in each parish, according to the amount of repairs in each parish, and not according to the mileage in each; and the deficiency thus left in each parish may be supplied by contribution out of the highway rates, under 4 & 5 Vict. c. 59, s. 1. The trustees are not bound to repair this road if they give up the tolls; it would then become the duty of the parish of Great Bowden to keep it in repair: (*R. v. Netherthong*, 2 B. & Ald. 179.)

Manisty in reply.

Cur. adv. vult.

May 23.—QUAIN J. delivered the judgment of the court (Blackburn, Quain, and Archibald, JJ.).—This is an appeal from the decision of certain justices of the county of Leicester, refusing to make an order under the 4 & 5 Vict. c. 59, s. 1, on the parish of Great Bowden, in the same county,

to pay a portion of the highway rate to the appellants, in aid of the funds of the above turnpike trust. The case states that a portion of an old highway within the parish of Bowden was made a part of the turnpike trust, and that the funds for the whole trust were insufficient to meet the repairs of the roads within the trust, for the year ending 31st Dec. 1872, to the extent of 800*l.*, and that the proper proportion to be contributed by the parish of Great Bowden was 21*l.* 6*s.* 4*d.* The justices refused to make an order for the payment of this sum, on the ground of a special exemption of the parish of Great Bowden, with regard to the part of the turnpike road within that parish, by virtue of the 5 Vict. c. l*ix.* The first Act to which it is necessary to refer as originating the alleged exemption of the parish of Great Bowden is 1 Geo. 4, c. l*xxx.*, ss. 18 & 19. Sect. 18, after reciting that the trustees have collected tolls on that part of the road leading from Market Harborough to St. Mary's Bridge (the road now in question), but "have not expended any part of such tolls in putting that part of the road in repair," prohibits the trustees from collecting any tolls on that part of the road. Sect. 19, however, enacts that, in case the trustees shall put and keep at all times this part of the road in good and effectual repair, it shall be lawful for them to take on this part of the road one half the tolls which they were authorised by the recited Act to take on the other roads within the trust. By the 4 Vict., c. xxxv. this Act and the other Acts regulating the turnpike trust were repealed, and the repealing Act by which the trust was in future to be regulated, contained no special provisions as to that part of the road between Market Harborough and St. Mary's Bridge. This omission was, however, supplied by an Act passed in the following year, viz., 5 Vict. c. l*ix.* This Act in effect re-enacts the provisions of 1 Geo. 4, c. l*xxx.*, in favour of that part of the road between Market Harborough and St. Mary's Bridge, and is the Act now in force. After referring to the Act 1 Geo. 4, c. l*xxx.* s. 1. it recites, "that the repeal of certain provisions of that Act is injurious to the public, inasmuch as they are thereby subjected to the payment of an excessive toll for travelling on that part of the road between Market Harborough and St. Mary's Bridge;" and the Act then prohibits the trustees from taking any toll on that part of the road. But sect. 2 of the same Act provides (in the same manner as the 19th section of 1 Geo. 4, c. l*xxx.* above cited), that "in case the said trustees shall keep and continue at all times in good repair that part of the said road which lies between the town of Market Harborough and St. Mary's Bridge aforesaid, then and in such cases it shall be lawful for the said trustees, from and after the passing of this Act, to demand or take, or cause to be demanded or taken," certain tolls therein specified. It seems to us that the effect of this legislation is to create a special bargain between the trustees and the inhabitants of the parish of Great Bowden, to the effect that the trustees can only take tolls on this part of the road on the express condition that they keep it in repair, and that as long as they take the tolls an obligation is imposed on them to keep the road in good repair at all times. Since the passing of this Act the trustees have continued to take tolls on the part of the road, and it is stated in the case that the tolls received at the gate across it

are considerably more than sufficient to keep it in repair. Under these circumstances the clerk of the trustees has exhibited an information before the justices under the 4 & 5 Vict. c. 59, s. 1 (a public Act) alleging that the funds of the turnpike trust were insufficient for the repairs of the turnpike road, within the parish of Great Bowden, and asking that a portion of the highway rate, amounting to 21*l.* 3*s.* 4*d.*, should be ordered to be paid by the parish surveyor to the trustees, for the purpose of such repairs. It was contended on the part of the trustees that notwithstanding the special legislation before mentioned, the parish of Great Bowden, as one of the parishes within the trust, was liable to pay a contribution under the 4 & 5 Vict. c. 59, s. 1, when the funds of the whole trust were insufficient to keep in repair the turnpike roads passing through the several parishes within it. The justices refused to make the order prayed for on the grounds stated in the case, and we think they were right in so refusing. It appears to us that as long as the trustees continue to take tolls on the part of the road in question, under the 5 Vict. c. l*ix.*, and those tolls are sufficient to keep in repair such part of the road, they cannot be permitted to allege, as they do in the present information, that the funds of the trust are insufficient to repair that part of the road, inasmuch as they are themselves bound to keep such part of the road in good repair, as long as they continue to take tolls upon it. If an order to pay a contribution were made on the parish of Great Bowden, under the 4 & 5 Vict. c. 59, s. 1. the money when received would not go into the general funds of the trust, to be expended in repair of all the roads within the trust; but, on the contrary, by the express words of the Act, it would have to be wholly laid out in the actual repairs of that part of the turnpike road which lies within the parish of Great Bowden. The contribution, therefore, if ordered to be paid would go to relieve the trustees from the performance of the duty of repairing the road expressly imposed on them by the Act of Parliament, as long as they take the tolls, and those tolls are sufficient to repair it. It would be, in effect, to permit the trustees to take the tolls without performing the conditions (the performance of which is expressly imposed by the Legislature) before any tolls are allowed to be taken on this part of the road. The trustees may, if they please, cease to collect the tolls in question, and then the parish of Great Bowden, or the highway district within which it is situate, would have to repair the road like any other parish, but we are of opinion that, as long as the trustees continue to take the tolls specified in the 5 Vict. c. l*ix.* on the part of the road between Market Harborough and St. Mary's Bridge, and those tolls are sufficient to keep in repair such part of the road, they must themselves keep that part of the road in good repair, and cannot, in addition to the tolls, claim to have an order made on the parish of Great Bowden, for the payment of a further sum under the 4 & 5 Vict. c. 59, s. 1. to be laid out in the doing of the same repairs which the trustees are themselves already bound to perform. For these reasons we think that this appeal should be dismissed.

Judgment for respondents.

Attorneys for appellants, *Milne, Riddle, and Mellor*, for *Archbould and Hawkins*, Thrapston.

Attorneys for respondents, *Vizard, Crowder and Co.*

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Wednesday, May 28, 1873.

REG. v. POWELL.

Highway—Stopping-up of highway—Notice of "special purpose" of vestry—Sufficiency of notice—5 & 6 Will. 4, c. 50, s. 84—59 Geo. 3. c. 69, s. 1.

Proceedings having been instituted by one J. P. against the surveyor of a district highway board, to compel the repairing of a road called the Blaenan Bach road, a notice signed by the overseers of the parish was published that a meeting of the ratepayers of the hamlet would be held on a day named "for the purpose of taking into consideration the proceedings now taken by Mr. J. P. against the surveyor of the district highway respecting Blaenan Bach road, and for other purposes connected with the highways of the above hamlet."

At the meeting held in pursuance of this notice, a resolution was passed that Blaenan Bach road should be stopped up, upon which a certificate was made by justices to stop it up.

Held, that the above notice was a sufficient notice of the "special purpose" for which the meeting was summoned within the meaning of sect. 1 of 59 Geo. 3, c. 69.

In this case a rule had been obtained by Byles calling on the prosecutors to show cause why an order of sessions confirming a certain certificate of the Rev. H. Bold and the Rev. Rees Price, two of H.M.'s justices of the peace for the county of Brecon, dated the 27th Feb. last, for stopping up a certain highway, called the Blaenan Bach road, in the hamlet of Trevecca, in the parish of Talgarth, in the said county, together with the necessary proofs, and ordering the same together with the plan thereto annexed, to be enrolled amongst the records of the court of quarter sessions for the said county, and also why the said certificate should not be quashed on account of the insufficiency thereof.

The following is a copy of the order of quarter sessions dismissing the appeal against the certificate of the magistrates:

Brecon to wit.—At the general quarter sessions of the peace held at the Shire hall, Brecon, in and for the county of Brecon, on Tuesday in the first week next after the 31st March, to wit, on Tuesday the 9th April, in the 35th year of the reign of our sovereign lady Victoria, by the grace of God, and in the year of our Lord, 1872, before Penry Williams, Esq. Henry Allen, Esq. J.P., Gwynne Holford, Esq. M.P., Major Conway Lloyd, and others, their associates, justices, &c.

JOHN JAYNE, Esq. Sheriff.

EVAN POWELL (app.) AND THE PARISH OFFICERS OF THE PARISH OF TALGARTH, AND WM. RHYE DAVIES (the Surveyor of the Talgarth District of Highways) (resps.).

Mr. Games on behalf of Evan Powell appealing against the certificate of the Rev. Hugh Bold and the Rev. Rees Price, two magistrates of this county, bearing date the 27th Feb. last, for stopping up a certain highway called the Blaenan Bach road, in the hamlet of Trevecca, in the parish of Talgarth, in this county, of which the following is a copy.

County of Brecon, to wit.—Whereas on the 12th Jan. 1871 the inhabitants of the hamlet of Trevecca, in the parish of Talgarth, in the said county of Brecon, being then duly assembled in vestry, at the vestry room of Talgarth church, in the said parish, in pursuance of a notice signed by Thomas Williams, overseer of the poor of the said hamlet of Trevecca, and duly affixed to the principal door of the church of Talgarth aforesaid, before the commencement of divine service, on Sunday, the 8th Jan. 1871, for the purpose of determining whether it was expedient, under the provisions of the Act passed

in the session of Parliament, held in the 5th and 6th years of the reign of King William IV. intituled "An Act to consolidate and amend the laws relating to highways in that part of Great Britain, called England," that a certain highway, situate, lying, and being in the hamlet of Trevecca, in the parish of Talgarth, in the said county of Brecon, called Blaenan Bach road, and leading from and out of a certain highway, situate in the hamlet aforesaid, commonly called the Old road, and passing near to and between certain farm houses, land, and premises, called respectively, Pendre and Blaenan Bach, within the hamlet of Trevecca aforesaid to and into a certain other highway situate and within the said hamlet of Trevecca, commonly called the New road, leading from the town of Talgarth, towards Criekhowell, in the said county, a distance of 610 yards, or thereabouts, and commencing at a certain gate in the plan hereinafter referred to and marked "B," now standing, and being where the said highway now proposed to be entirely stopped, and adjacent to the before mentioned highway, commonly called the Old road, and leading from thence and passing by and through certain lands and hereditaments, the respective properties of Mr. John Parry, Mr. Evan Powell, and Mrs. Anna Maria Elenora Gwynne Holford, and terminating at its junction with the highway before mentioned, called the New road on the said plan, marked "A," shall be entirely stopped up, as being unnecessary, did resolve that it was expedient that the said public highway should be stopped up as being useless and unnecessary, under the provisions of the said Act, and the chairman of the said vestry meeting, by an order in writing, under his hand, on the day and year last aforesaid, directed the surveyor of the highway of the district of Talgarth aforesaid, in which the said hamlet of Trevecca and parish of Talgarth, are comprised, to apply to two of Her Majesty's justices of the peace in and for the said county of Brecon, to view the said highway as aforesaid, in pursuance of the said statute; and whereas, in pursuance of an application of the said surveyor of the highways of and for the said district of Talgarth, in which the said hamlet of Trevecca is comprised as aforesaid, in that behalf made unto us, the Rev. Hugh Bold and the Rev. Rees Price, whose names are hereunto set, being two of Her Majesty's justices of the peace, in and for the said county of Brecon, and acting in and for the said county, and in and for the petty sessional division of Talgarth, within which the said hamlet and parish are situated, we, the said justices, on the 19th Dec. 1871, together, and in the presence of each other, and at the same time, viewed the said public highway hereinbefore described, and so resolved to be entirely stopped up as aforesaid, and which is wholly situated in the said hamlet and parish; and whereas upon such view made on the application of the said surveyor as aforesaid, it appeared to us, the said justices, that the said public highway hereinbefore described, and so resolved to be entirely stopped up as aforesaid, is useless and unnecessary; and whereas we, the said justices, on the said 19th Dec. 1871, did direct the said surveyor of the said highway district of Talgarth, in which the said hamlet and parish are comprised, to affix, and in pursuance of such directions in that behalf the said surveyor for four successive weeks next after we the said justices so viewed the said public highway hereinbefore described, namely, on the 23rd and 31st days of Dec. 1871, on the 7th and 14th days of January last respectively, did affix, a notice to the effect of schedule 19 annexed to the statute, in legible characters at the place and by the side of such ends of the said public highway hereinbefore described, and so resolved to be entirely stopped up as aforesaid, and hereby gave notice that on the 9th April next, or on such other day as the said next general quarter sessions of the peace for the said county shall be held, application would be made to her Majesty's justices of the peace, assembled at quarter sessions, in and for the county of Brecon, at the Shire Hall, in the town of Brecon, for an order for entirely stopping up the said public highway, so resolved to be entirely stopped up as aforesaid, and that the certificate of two justices having viewed the same together with the plan of the said highway would be lodged with the clerk of the peace for the said county, at his office at Brecon, in the said county, on the 1st March next, and whereas the said surveyor, in pursuance of the like directions to him, by us given, in that behalf, for four successive weeks next after we, the said justices,

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so viewed the said public highway hereinbefore described, namely, on the 23rd and 31st Dec. 1871, and on the 6th and 13th Jan. last respectively, inserted the same notice, as last aforesaid, and the same notice for the said four successive weeks appeared in a certain newspaper, commonly called the *Brecon County Times*, published and generally circulated in the said county of Brecon, and also on four successive Sundays, after the making of such view by us, the said justices as aforesaid, namely, on Sunday the 24th and Sunday the 31st days of Dec. 1861, and Sunday, the 7th and 14th days of Jan. last, the said surveyor affixed a like notice, as last aforesaid, on the principal door of the parish church of the said parish of Talgarth. And, whereas, proof hath now this day been here given unto, and before and to the satisfaction of us the said justices, as well by the evidence of witnesses upon oath, as otherwise, that the said several notices and resolutions of vestry hereinbefore mentioned, have been respectively given, made, agreed to, affixed, and published in the manner, and at the times and places hereinbefore particularly mentioned and recited, and in manner and form as by the said statute, in that case made and provided is required, and a plan has now, at the same time, been here delivered to us the said justices, particularly describing the said highway by metes, bounds, and admeasurements thereof, and which said plan has now this day been here verified to, and before us, the said justices, by the evidence, upon oath, of Rees Davies, a competent surveyor. Now, we, whose names are hereunto set, so being such justices as aforesaid, in pursuance of the aforesaid statute in such case made and provided, do hereby certify that on the 19th Dec. 1871, we, together, and in the presence of each other, at the same time viewed the said highway, so resolved to be entirely stopped up as aforesaid, and that upon such view we found that the said highway is useless and unnecessary, and we, the said justices, hereby further certify that the reason why the said public highway so proposed and resolved to be entirely stopped up as unnecessary, are, that for several years last past there have been and still are more convenient and better public highways situate in the said hamlet of Trevecca, and parish of Talgarth, and delineated on the said plan, which lead directly from and to the same several points and places as the said highway, so proposed and resolved, to be entirely stopped up as aforesaid, and which public highways are at present, and for several years last past have been, used by the public, and all the liege subjects of our lady the Queen, and because the said highway so resolved to be stopped up is narrow and unfit for travelling with horses and carts, and carriages, and travelling of every description is rendered impracticable. Given under our hands at the Police station, Talgarth, in the said county of Brecon, and within which the aforesaid hamlet of Trevecca and parish of Talgarth, are situated, the 27th Feb. 1872.

HUGH BOLD,
R. PRICE.

After hearing the advocates on both sides it is ordered that the appeal be dismissed and that the said certificate with the necessary proofs now read by the clerk of the peace in open court be confirmed, and that the same, together with the plan thereunto annexed, be enrolled by the clerk of the peace, amongst the records of quarter sessions for this county, and that the said highway be stopped up accordingly, subject to a case for the opinion of one of the superior courts at Westminster, as to whether the notice of appeal given by the appellant to the respondents was served in time, there not being fourteen days between the service of the notice of appeal, and the day of holding the quarter sessions,

By the court,

EDWARD WILLIAMS, Clerk of the Peace.

The following is the notice which was posted on the church door during divine service on Sunday 8th Jan. 1871:

HAMLET OF TREVECCA.

I, the undersigned hereby give you notice that a meeting of the ratepayers of the above hamlet will be held at the vestry-room of Talgarth church, in Talgarth at 10 o'clock in the forenoon of Thursday the 12th Jan. 1871, for the purpose of taking into consideration the proceedings now taken by Mr. John Parry, of Trebeshun, against Mr. Rhys Davies, surveyor of the Talgarth District Highway Board, respecting Blaeman Bach road,

and for other purposes connected with the highways of the above hamlet.

THOMAS WILLIAMS, overseer of the poor
for the hamlet of Trevecca aforesaid.

College Farm, Jan. 7, 1871.

A number of affidavits were filed in the case, from which it appeared that a Mr. John Parry had instituted proceedings against the surveyor of the highway board to compel the repairing of the road. The affidavits dealt with other matters to which the court refused to take into consideration as not affecting the only question in the case, viz. whether the notice above set out was sufficient, under the Act 58 Geo. 3, c. 89, s. 1.

B. T. Williams, showed cause against the rule, and contended that the notice was sufficient, 58 Geo. 3, c. 89, s. 1, enacts "that no vestry or meeting of the inhabitants in vestry of or for any parish shall be holden until public notice shall have been given of such vestry, and of the place and hour of holding the same, and the special purpose thereof, three days at least before the day to be appointed for holding such vestry, by the publication of such notices in the parish church or chapel, on some Sunday, during, or immediately after divine service, and by affixing the same, fairly written or printed, on the principal door of such church or chapel." Before any highway can be stopped up, certain steps must be taken which are enumerated at length in 5 & 6 Will. 4. c. 50, ss. 84, *et seq.* Any notice is good which states in general terms the object for which the vestry is summoned, so as to enable the vestry to pass any resolution which comes within the general purpose for which the vestry is summoned. Here notice was given that the object of the meeting was to take "into consideration the proceedings now taken by Mr. John Parry, of Trebeshun against Mr. Rhys Davies, surveyor of the Talgarth District Highway Board respecting Blaeman Bach-road, and for other purposes connected with the highways of the above hamlet." Everyone knew the nature of the proceedings which Mr. John Parry was taking against the surveyors, and everyone, therefore, had sufficient notice of the object of the meeting. In *Warner v. Gates* (2 Curt. 315) where a rate was made for defraying the expense of consecrating a new parish church, the notice given of the vestry meeting was "for making of a church rate, and other purposes." Sir Herbert Jenner, in delivering the judgment of the court, said, "certainly there is no specification of the exact object or purpose to which the rate was to be applied; but there is a notice that the meeting was to be for the making of a church rate, and it is hypercritical to say that every particular circumstance and object is to be stated in the notice. Mr. Gates was present at the meeting, and he proposed a rate of a fourth part of what was proposed by the churchwarden; but a shilling rate was carried by a large majority of the vestry for the purpose of making provision for the consecration of the church. I am of opinion, therefore, that the notice was sufficient, and that no one could have been taken by surprise." In *Smith v. Deighton* (8 Moore, P. C. C. 179) the notice of a vestry meeting issued by the churchwardens stated that the object of the meeting was "to levy a rate for the purpose of defraying the expenses incurred by the churchwardens in and about the repairing and restoring of the parish church of the parish of St. Michael,

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rendered necessary by reason of the late fire; or otherwise to consider the expediency of borrowing the amount of such expenses on the credit and securities of the church rates of the said parish, pursuant to the provisions of the statutes of the 58 Geo. 3, c. 45, or of the 59 Geo. 3, c. 134, and in case it shall be considered expedient to borrow the amount of such expenses, to authorise the churchwardens to take the necessary proceedings for that purpose, and to do all matters incident thereto." At the meeting two resolutions were passed, the first authorising the churchwardens to borrow upon security of the church rates, the amount to be paid by annual instalments of not less than one tenth of the loan with interest; the second, that in payment of the first instalment of the loan and the ordinary expenses of the parish church, a rate should be granted to the churchwardens. It was held that as to the second resolution the notice was insufficient, though sufficient as to the first. But it will be observed that there were no general words in the notice in this case as there were in the former case, and in the present one. *Warner v. Gates* (*ubi sup.*) having been referred to in the course of the argument, Lord Cranworth said, "In that case the objection was that the notice was too general; here the appellant contends that it is too particular to justify the rate." And Sir John Patteson said, "Does not the court in that case seem to think that a notice in general terms might be sufficient, but that if you choose to particularise you are confined to the special purpose stated in the notice?" The notice in the present case, besides referring specifically to the proceedings against the surveyor, with reference to the Blaenau Bach Highway, which Mr. John Parry was taking, contains the words, "and for other purposes connected with the highways of the above hamlet;" so that the objection, as put by Sir John Patteson, does not apply. The affidavits filed in the case show that the matter was one of public notoriety in the hamlet. [BLACKBURN, J.—If the notice was not a proper one, I do not think it will do to show that the thing was generally known. We cannot take any notice of these affidavits.] In *Blunt v. Harwood* (8 A. & E. 610) certain plans having been produced at a vestry meeting and referred to a committee, at a subsequent vestry meeting their report, recommending an enlargement of the parish church, was received and adopted, and a resolution passed for borrowing money on the parish rates to carry the plans into execution. In the notice of holding the latter the vestry stated the purpose of it to be "to receive a report from the church committee, and to adopt such measures as may appear necessary for carrying that report into execution;" and this was held to be sufficient notice of the intention to borrow money on the church rates for the purpose of executing the plans. [BLACKBURN, J.—That case seems to go even further than you require.] "Referring," said Lord Denman, C. J. "to the former proceedings which led to the report, no one would suppose that it could be carried into execution without raising money; and I think the notice does, in effect, call upon the parishioners to consider of borrowing a sum for the purposes which the report would bring under consideration. The statutes 58 Geo. 3. c. 45 and 59 Geo. 3. c. 134, do not require any stricter notice than has been given here. Stat. 58 Geo. 3, c. 45, s. 1, does indeed require

notice to be given of the vestry, 'and the special purpose thereof,' but I think the word 'special' carries us no further than the word, 'purpose,' alone would have done if we really and satisfactorily see that the parish had had notice of what was intended." So Littledale, J.—"I agree that the notice under stat. 58 Geo. 3, c. 69, s. 1, ought to inform the parishioners of the intention with which a vestry is called; but it was not necessary that this notice should say, in so many words, that a proposal would be made to borrow money if it stated that that would be taken into consideration which necessarily includes such a proposal. Now the words, 'such measures as may appear necessary for carrying that report into execution' do so include it; and I therefore think that the parishioners had notice that a proposal would be made at the vestry for borrowing the money requisite for giving effect to the report." The court here called on—

Brown, Q.C. and *Byles* to support the rule. —They contended that the notice was not sufficient. The Act of Parliament requires that the "special purpose" of the meeting should be stated in the notice. The statute 5 & 6 Will. 4, c. 50, in the provisions (ss. 84, 89) relating to the stopping up of highways surrounds the proceeding with every sort of precaution, so as to prevent the possibility of any person who had an interest in preventing the stopping up not having an opportunity of knowing of the intention, and of taking steps to prevent it. See the form of notice of diverting a highway given in the schedule to the Act. The notice in the present case should have stated that it was intended to be considered whether the highway should be stopped up or not. This would have carried out the object and spirit of the Act of Parliament, which the notice actually given does not. There are several affidavits filed in this case to show, if the court will allow them to be read, that as a matter of fact the intention to stop up the highway was not generally known in the hamlet. [BLACKBURN J.—The question is simply whether the notice was a sufficient one or not]. In *Smith v. Deighton* (*ubi sup.*) Dr. Lushington, delivering the judgment, said, "Undoubtedly it was the intention of the Legislature in framing this statute to provide that due information should be given to all the parishioners of the special purpose for which their attendance is required. These enactments were made to remedy the great evils that had arisen from convening a meeting upon a general notice, the parishioners being entirely ignorant of the particular purpose for which they were called upon to meet. We are clearly of opinion that in order to comply with the requirements of the statute the special purpose intended to be discussed should be stated in the notice calling the vestry," language which, it is submitted, is strictly applicable to the circumstances of the present case. As to *Blunt v. Harwood* (*ubi sup.*) the true view of it is given in *Prideaux on Churchwardens*, p. 104, "The Court of Queen's Bench gave no decided opinion as to the validity of the notice, as in the course of the proceedings it became unnecessary for them to do so; but the opinion of the court seemed to be against the sufficiency of the notice; and it is apprehended, both from the language of the learned judge in that case, and from the tenor of the decisions of the Court of Queen's Bench as to the requisites of

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notice of the grounds of appeal against the removal of a pauper, that the court, if it had been necessary to determine the question, would have decided against the notice, and granted a prohibition." [QUAIN, J.—The decision turned upon the words, "and to adopt such measures as may be necessary for carrying that report into execution," which are omitted in Mr. Prideaux's book]. No such words are contained in the notice in the present case. It was not a fair inference, from the notice given, that the stopping up of the highway was contemplated. [BLACKBURN, J.—If the only action which the vestry could effectually take was the stopping up of the highway, was not sufficient notice given of that?] The "other purposes" mentioned in the notice might well be thought to refer to the proceedings mentioned in the 111th section of 5 & 6 Will. 4, c. 50, which provides that "if the inhabitants of any parish shall agree at a vestry to defend any indictment found against any such parish, or to appeal against any order made by or proceeding of any justice of the peace in the execution of any powers given by this Act, or to defend any appeal, it shall and may be lawful for the surveyor of such parish to charge in his account the reasonable expenses incurred in defending such prosecution, or prosecuting or defending such appeal, after the same shall have been agreed to by such inhabitants at a vestry or public meeting as aforesaid, and allowed by two justices of the peace within the division where such highway shall be," &c.

BLACKBURN, J.—I am of opinion that the rule in this case must be discharged. The question, and the only one, is whether the vestry had authority to resolve that they would direct the surveyor to stop up this highway, and this sends us back to the General Vestry Act of 58 Geo. 3, c. 69, s. 1 of which enacts that "no vestry or meeting of the inhabitants in vestry of or for any parish shall be holden until public notice shall have been given of such vestry, and of the place and hour of holding the same, and the special purpose thereof, three days at least before the day to be appointed for holding such vestry, by the publication of such notice in the parish church or chapel on some Sunday," &c. Now the objection taken to this notice is, that the special purpose for which the vestry was called was to pass a resolution for stopping up the highway, and it has been said, and in my opinion correctly said, that if the notice is not in such terms as would give the inhabitants notice that that was one of the special purposes for which the meeting was summoned, it is not sufficient. I am disposed to agree with the argument, that unless the notice given states that, amongst other things, one of the purposes of the meeting is to stop up the highway, if necessary, a resolution that it should be stopped up would be *ultra vires*. Now the notice given was this, that the meeting was convened "for the purpose of taking into consideration the proceedings now taken by Mr. John Parry, of Trebinshun, against Mr. Rhys Davies, surveyor of the Talgarth District Highway Board, respecting Blaenan Bach road, and for other purposes connected with the highways of the above hamlet." That is the special purpose mentioned. Now the fact was, that Mr. Parry had taken proceedings against the surveyor to enforce the repairing of this road which had got out of repair. Now it does seem to me that when the vestry is summoned to take that into con-

sideration, as well as for other purposes connected with the highways of the hamlet, the case comes within the spirit of the observations made by Sir John Patteson in *Blunt v. Harwood* (*ubi sup.*), where he says: "No particular form of notice is directed by any of the three statutes; we have only to see that the notice published gives sufficient information to the inhabitants." Here I think that no person applying common sense to the subject could have the slightest doubt about the purpose of the meeting; that it would be understood that the object and intention of the meeting was to take steps to oppose and baffle the proceedings which Mr. Parry was taking against the surveyor as to this very road, and that with a view to that, they would exercise any powers which they had relating to the highways of the hamlet. The counsel who argued in support of the rule have not been able to point out any other purpose for which the vestry could be summoned in order to oppose the proceedings taken against the surveyor, except to stop up the highway. It was argued that the vestry might possibly have been summoned to consider the question of the surveyor's expenses in defending the indictment against him for non-repair of this road; but even that could not be taken to be the sole and exclusive object; and seeing that one of the most effectual steps which could be taken to stop the proceedings of Mr. Parry was to stop up the highway altogether, that must be taken to have been brought to the notice of any person reading the notice. The object of the meeting being to originate proceedings, I think that so far from greater particularity being required in the notice, the very opposite is the case. The object of the statute is that notice should be given of the sort of business to be transacted by the vestry, and a notice which gives sufficient information of that to the inhabitants is, as Sir John Patteson said, a sufficient notice. I think we should not, as to these notices, fall into the error, on the side of minuteness and particularity, committed as to poor law notices of appeal, which rendered necessary the interposition of the Legislature to remedy it. We should see what might reasonably be expected to give to an ordinary parishioner notice of what was intended to be done at the meeting; and, in every case, this is a question of common sense applied to the particular words used.

QUAIN, J.—I am of the same opinion. It would be extremely undesirable that recourse to a lawyer should be necessary before framing each notice of the purpose for which a vestry meeting is summoned; and this would be the consequence if the notice is to be construed with such strictness as has been contended for. It would never be safe to give a notice otherwise. In my opinion, the notice in the present case gives sufficient information to every parishioner of the special purpose of the meeting, so as to induce any person who takes an interest in the particular subject, to attend. Now the person who complains in the present case was a gentleman specially interested in the road referred to in the notice. He knew that proceedings had been taken against the surveyor to compel him to repair the road—proceedings which might end in an indictment. Now the notice calls express attention to the fact that the meeting was to take into consideration "the proceedings now taken by Mr. John Parry, of Trebinshun, against Mr. Rhys Davies, surveyor of

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the Talgarth District Highway Board, respecting Blaenan Bach road, and for other purposes connected with the highways of the above hamlet," in other words, to consider what was best to be done as regards these proceedings against the surveyor, whether under the 111th section of the Highway Act of Will. 4, or under any other authority which they possessed, and to take steps to baffle these proceedings. It seems to me to follow from this, that one of the questions to be considered by the vestry might well be whether the road was not an entirely useless one, and one which ought to be stopped up. If we were to require as much strictness in the notice as has been contended for, we should not, I think, be carrying out the intention of the Legislature. The notice gives sufficient information as to the subject matter which was to be considered by the vestry, one of the considerations naturally being, as I have said, whether it was more expedient to repair the road, or to stop it up altogether. I agree that the rule should be discharged.

ARCHIBALD, J.—I am of the same opinion. The real question is, whether the resolution to stop up the road falls reasonably within the scope of the purpose mentioned in the notice. The special purpose of the meeting must be stated; but it is not necessary to state it with any greater particularity than is requisite to give sufficient information to the parishioners. If it is couched in such terms as to mislead, it would be open to objection. If it had been restricted to the objects mentioned in the 111th section, the case would be different. But when we look at the notice itself, we see that it does fairly include the terms of the resolution. Taking into consideration "the proceedings taken by Mr. Parry against the surveyor as to this road, means taking into consideration the steps which it would be requisite to take in respect of these proceedings, which would be either by defending the proceedings, or perhaps by resolving that it would be better to stop up the road altogether as not worth repairing. Giving the notice a reasonable construction, and avoiding the laying down of any rule which would render it necessary to construe these notices with undue particularity, I am of opinion that this notice was sufficient, and that the rule should be discharged.

Rule discharged.

Attorney for prosecutor, *C. E. Abbott*, for *Bishop, Brecon*.

Attorneys for defendants, *Dobinson and Geare*.

Saturday, May 31, 1873.

HAYWOOD (app.) v. HOLLAND (resp.).

Alehouse licence—Selling beer at a fair—Non-necessity of occasional licence—Licensing Act, 1872 (35 & 36 Vict. c. 94), ss. 3, 72.

An alehouse keeper, who has obtained an ordinary justice's and excise licence, may, by virtue of such licence, sell beer in booths at any lawful fair. It is not necessary to get a special licence for that purpose.

CASE stated by Justices under 20 & 21 Vict. c. 43. This is a case stated by us the undersigned, two of Her Majesty's Justices of the Peace in and for the county of Lancaster, under the statute 20 & 21 Vict. c. 43, on the application in writing of the appellant, who was dissatisfied with our determi-

nation upon the question of law which arose before us, as hereinafter stated, on the 19th Sept. 1872, at a Petty Sessions for the division of Bolton in the said county, holden at the county sessions room, in the town hall in Little Bolton, in the said county, the appellant having duly entered into a recognisance to prosecute the appeal.

Upon the hearing of a certain information preferred by the respondent against the appellant under sect. 3 of 35 & 36 Vict. c. 94:

That he the said James Haywood, on the 4th Sept. in the year of our Lord 1872, at Turton, in the county of Lancaster, unlawfully did sell by retail certain quantities of intoxicating liquors, to wit, ale, beer, and porter, to certain persons whose names are unknown, in a certain tent there situate, the said James Haywood not being then and there duly licensed so to do.

We convicted the appellant of the said offence, and adjudged him to pay the sum of 20s. and costs, to be paid and applied according to law.

The following facts were either proved before us or admitted by both parties.

That the appellant was a licensed victualler residing at Bury, in the county of Lancaster, and was in possession of a licence granted to him by the justices of the county of Lancaster, acting in, and for, the division of Bury, in the said county, in pursuance of the 9 Geo. 4, c. 61, sect. 1, of which the following is an extract:

At the General Annual Licensing Meeting of the justices acting in and for the division of Bury, in the county of Lancaster, on the 4th Sept. 1871, the majority of justices then present authorised and empowered James Haywood, then dwelling at Fleet-street, Bury, in the division and county aforesaid, and keeping an inn, ale-house, or victualling house, at the sign of the Old Boar's Head Inn, in the township of Bury, in the division and county aforesaid, to sell by retail therein and on the premises thereunto belonging, all such excisable liquors as the said James Haywood should be licensed and empowered to sell under the authority and permission of any excise licence, and to permit all such liquors to be drunk or consumed in his said house, or in the premises thereunto belonging, until the 10th Oct. then next.

Upon this licence the appellant obtained from the excise authorities a licence, dated the 11th Oct. 1871, of which the following is an extract:

The said James Haywood therein described as residing in a house, known by the sign of the Old Boar's Head, in Fleet-street, in the parish of Bury, in the county of Lancaster, is authorised to exercise and carry on the under-mentioned trades or businesses in the said house and premises, but nowhere else, such house and premises being all adjoining or contiguous to each other, and situate in one place and held together for the same trades or businesses.

The following is the enumeration of trades, and the duties paid in respect thereof to the excise authorities namely:

	£	s.	d.
Retailer of beer, cider, or perry	3	6	1½
Do. of spirits	11	0	6
Do. of foreign wines	2	4	1
Dealer in tobacco	0	5	3
TOTAL	16	15	11½

CHARLES SHERIFF, Collector (L.S.)

J. COLEMAN, Supervisor (L.S.)

That the township of Turton forms no part of the petty sessional division of Bury, but is in the petty sessional division of Bolton, in the said county.

That it was proved that for more than forty years last past a horse and cattle fair has been held in the said township of Turton annually, on the 4th and 5th Sept.

That on the 4th Sept. last the appellant erected

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a tent or booth in the said township of Turton, where the said fair was being held, and sold in the said tent spirits and beer.

That the said appellant had no authority whatever to sell spirits and beer, except the magistrate's licence, and the excise licence, extracts from which are set forth in the 3rd and 4th paragraphs of this case.

On the part of the appellant it was contended that under the 6 Geo. 4, c. 81, s. 11, the appellant, being a licensed victualler, was legally entitled to sell at a public fair, without further or other authority than his excise licence, which permitted him to sell at a certain house and premises at Bury, as set forth in paragraph 4 of this case.

It was also further contended on behalf of the appellant that he was entitled to sell at the said Turton Fair, on the said 4th Sept. last, by virtue of the 20th section of the 32 & 33 Vict. c. 27, inasmuch as that section was in the schedule to the Licensing Act, 1872, distinctly left unrepealed, and was then in force, and also by the Licensing Act, 1872, sect. 72, 6th subsection thereof, exempted from the operation of the 3rd section of the last named Act the sale of intoxicating liquors on special occasions in pursuance of the provisions in that behalf enacted.

By 25 & 26 Vict. c. 22, s. 12, the exemptions contained in 6 Geo. 4, c. 81, s. 11, were taken away, but by 26 & 27 Vict. c. 33, s. 21, the right to licensed persons to sell at public races and lawful fairs was again granted s. 21 of 26 & 27 Vict. c. 33, after reciting the 12th section of 25 & 26 Vict. c. 22, enacting that from and after the passing of this Act, nothing herein contained shall extend to prohibit any person duly licensed by the excise to retail spirits, beer, or wine, as in the 11th sect. of the Act, 6 Geo. 4, c. 81 is mentioned, from carrying on his trade or business for which he shall be so licensed, in booths, tents, or other places, at the time and place, and within the limits of holding any lawful and accustomed fair, by virtue of any law or statute in that behalf, or any public races, in like manner as such person might lawfully have done under the said last-mentioned Act, if the said Act of the last session of Parliament had not been passed.

On the part of the respondent it was contended that the 6 Geo. 4, c. 81, and the 26 & 27 Vict. c. 33, are both excise Acts, and that the sections relating to fairs and races contained in both the said Acts only exempt persons selling at fairs and races from obtaining an additional excise licence; and that therefore a magistrate's licence was necessary to enable the appellant to sell at Turton-fair.

That the 35 & 36 Vict. c. 94 is what may be termed an Act for police purposes, and sect 3 of that Act, under which these proceedings were taken enacts that "No person shall sell or expose for sale by retail any intoxicating liquor without being duly licensed to sell the same, or at any place where he is not authorised by his licence to sell the same. Any person selling or exposing for sale by retail any intoxicating liquor which he is not licensed to sell by retail, or selling or exposing for sale any intoxicating liquor at any place where he is not authorised by his licence to sell the same, shall be subject to certain penalties;" and by sect. 74 of the said 35 and 36 Vict. c. 94, the expression, "licence," is defined as follows:

Licence means a licence for the sale of intoxicating liquors, granted by justices in pursuance of the Intoxicating Liquor Act 1828, including a certificate of justices granted under the Wine and Beerhouse Acts and including a licence for the sale of sweets, which is hereby authorised to be granted in the same manner as if sweets were wine, and including a licence for the retail of spirits granted to a wholesale spirit dealer by the justices in pursuance of this Act.

On behalf of the respondent, the case of *Ash (app.) v. Lynn (resp.)* (35 L. J., N. S., 159, M. C.) was cited, which decided that the exemption in 6 Geo. 4, c. 81, s. 11, in favour of persons duly licensed to sell beer, &c., and carrying on their trade in booths, tents or other places within the limits of any lawful fair or public races, relates only to the excisable penalties imposed by the Act, and does not protect any person selling beer, &c. from his liabilities under 35 Geo. 3, c. 113, s. 1, for selling without a magistrate's licence.

We, being of opinion that the appellant ought to have had a magistrate's licence authorising him to sell at Turton fair, gave our determination against the appellant in the manner before stated.

The question of law upon which this case is stated for the opinion of the court, therefore, is whether the appellant was duly licensed to sell spirits, &c. at Turton fair, he having only a magistrate's licence and an excise licence to sell at Bury, and having no magistrate's licence to sell at Turton.

Given under our hands this 25th day of Nov. in the year of our Lord, 1872, at Little Bolton in the county aforesaid.

JNO. CANNON.

SAM. GEE.

Baylis, for the appellant, contended that the conviction was wrong, as a special licence was not necessary to entitle the appellant to sell at a fair. Sect. 3 of the Licensing Act, 1872 (35 & 36 Vict. c. 94) no doubt exacts that "no person shall sell or expose for sale, by retail, any intoxicating liquor without being duly licensed to sell the same, or at any place where he is not authorised by his licence to sell the same," and subjects to penalties any persons so doing; but sub-sect. 6 of the 72nd section excepts from the application of the Act, "the sale of intoxicating liquor on special occasions in pursuance of the provisions in that behalf enacted." Now, by the interpretation clause (sect. 7-), "licence" means a licence for the sale of intoxicating liquors granted by justices in pursuance of the Intoxicating Liquor Licensing Act. 1828 (9 Geo. 4, c. 61), including a certificate of justices, granted under the Wine and Beerhouse Acts; and sect. 36 of the Intoxicating Liquor Licensing Act 1828 (9 Geo. 4, c. 61) provides that nothing in that Act contained is "to prohibit any person from selling beer in booths or other places at the time and within the limits of the ground or place, in or upon which is holden any lawful fair, in like manner as such person was authorised to do before the passing of this Act." The earlier Acts contain a similar exemption in the case of beer sold at fairs. [The learned counsel went through the various Acts back to the time of Edw. 6.] The appellant, therefore, did not require a special licence to enable him to sell at the fair.

No counsel appeared for the respondent.

BLACKBURN, J.—I think you have made out a *prima facie* case that the justices were wrong in

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convicting the appellant, and there is no one here on their behalf to contend that they are right, though I cannot help thinking that it is a case which should be argued by counsel. In order to find out the meaning of the Act, from the manner in which it is drawn, the justices have to do what no ordinary justice can be expected to do, that is, to go through the various preceding statutes on the subject back to the time of Edw. 6. It is not to be wondered at that they have made a mistake.

QUAIN, J. concurred.

Judgment for the appellant.

COURT OF COMMON PLEAS.

Reported by H. F. POOLLEY and JOHN ROSE, Esqrs.,
Barristers-at-Law.

Tuesday, May 6, 1873.

THE VESTRY OF THE PARISH OF BERMONDSEY *v.*
JOHNSON.

General line of buildings—Penalty within six months—Metropolis Local Government Act (25 & 26 Vict. c. 102), ss. 75, 107.

The respondent erected a building in 1871, beyond the general line of buildings in the metropolitan district, without the written consent of the Metropolitan Board of Works. In June 1872, the superintending architect decided that the appellant's premises were not in the general line of building, but had been erected beyond that line, contrary to the provisions of the Metropolis Local Management Act (25 & 26 Vict. c. 102), s. 75. The respondent, on being summoned before the magistrate, contended that the jurisdiction of the magistrate was ousted by the 107th section, the offence having been committed more than six months ago, and accordingly the magistrate dismissed the summons:

Held, that the 107th section did not apply, and that therefore the fact that more than six months had elapsed prior to the complaint being made was immaterial.

Brutton v. The Guardians of St. George's, Hanover-square (L. Rep. 13 Eq. 339), dissented from.

CASE.

1. CASE stated under 20 & 21 Vict. c. 43.

2. This was a summons under the Metropolis Management Amendment Act (25 & 26 Vict. c. 102), s. 75, charging that Robert Johnson, the defendant, did, in the parish of Bermondsey, unlawfully erect a certain building beyond the general line of buildings, in a street called Mark-place, in the said parish, without the consent in writing of the Metropolitan Board of Works. The date of the complaint and summons was the 29th Aug. 1872. The complaint alleged no special date as the time of commission of the offence.

3. It was proved that the building in question was erected in Jan. 1871, and there was no evidence of its coming formally to the knowledge of the vestry till towards the end of Dec. 1871.

4. In Jan. 1872, the vestry applied to the superintending architect of the Metropolitan Board of Works to decide the general line of buildings, but did not obtain his decision till the 26th June 1872.

5. I was of opinion that the general line so decided by the superintending architect was the general line of buildings in the street in question; that the building erected by the defendant was a building within the meaning of the Act, and had been erected beyond such general line.

6. But it was contended on behalf of the defendant that, the building having been erected so far back as Jan. 1871, and having been discovered, if not before, at least as far back as December in the same year, more than six months had elapsed, within which complaint respecting such offence must be made under sect. 107 of the same Act, in order to make offending parties liable to a penalty or forfeiture by order of a justice.

7. By the vestry, the present appellants, on the other hand, it was contended that the offence was not completed until the general line of buildings had been established by the decision of the superintending architect; that the complaint was therefore made in time, and that there ought to be a conviction.

8. I decided, much guided in my opinion by the case of *Brutton v. The Vestry of the Parish of St. George's, Hanover-square* (41 L. J., N. S., 134, Ch.), that lapse of time had taken away the rights of the vestry or of the justice to demolish or interfere with the buildings forming the subject of the complaint, and I accordingly dismissed the summons.

9. I request the opinion of the court whether, in point of law, having regard to all the circumstances of the case, my decision was right, or whether I had jurisdiction to hear and determine the case on its merits. Should the latter be the opinion of the court, I request that the case be remitted to me for rehearing.

Alfred Wills, Q.C. (with him *E. Thomas*), for the appellant, referred to the 107th section of the 25 & 26 Vict. c. 102, and contended that it applied only to the liability of persons for the payment of any pecuniary penalty and forfeiture within six months after the commission or discovery of an offence, and not to proceedings under the 75th section, by which buildings erected out of the general line can be demolished.

No counsel appeared for the respondent.

KEATING, J.—I come to the conclusion, although with considerable reluctance, that the limitation clause, that no person shall be liable for the payment of any penalty or forfeiture unless the complaint respecting such offence have been made before such justice within six months next after the commission or discovery of such offence, does not apply. I have great reluctance in so deciding, but the answer is, that so the Legislature have willed it, and we must execute their direction. The 75th section creates the offence, or rather the preliminary procedure, and by the statute passed in the reign of George IV. (7 Geo. 4, c. 142), power was given to the authorities to pull down buildings without any limitation as to time. That was, however, thought hard; and, by the 75th section, now the vestry may make a complaint to a justice of the peace in case any infringement of the line of buildings takes place, and then the justice will, if the complaint be proved, make an order directing the demolition of the offending erection. In the present case, proceedings were taken under that section, and a summons taken out charging the defendant with wrongfully erecting a certain building beyond the general line of buildings in a street called Market-place, in the parish of Bermondsey, without the consent in writing of the Metropolitan Board of Works. The case came on to be heard before the magistrate, and he was of opinion that the 107th section was applicable to this case; he founded his opinion on the authority of a decision in a case recently decided before one

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of the learned judges of the Court of Chancery. Now the magistrate, on that authority, decided that this was under the 107th section a proceeding to make a person liable for a penalty or a forfeiture. I cannot myself see how this case can be brought within those words. The magistrate deferred to the opinion of the Vice-Chancellor, and dismissed the case. The case comes before us, and we should defer to the opinion of that learned judge as far as we consistently can. The case of *Brutton v. The Vestry of the Parish of St. George's, Hanover-square* (L. Rep. 13 Eq. 339; 41 L. J. 134, Ch.) was similar to the present. The certificate of the superintending architect being obtained, the vestry proceeded against the builder; the points called to the attention of the court were, that the six months' limit of time had expired, and that the proceedings were wrong as against the builder, and not against the owner of the house. Although the fact was pointed out by the counsel who argued the case, that the 107th section did not apply, the Vice-Chancellor seems not to have paid any attention to the argument, and thought that it was applicable. This statement was, however, extra-judicial, for he had already decided the case, on the ground that the proceedings being brought against the wrong person were a nullity. Though we differ with him in his conclusion, we do not mean to over-rule his decision on a different point. This case cannot be brought within the 107th section, and although I should have gladly done so, I am unable to find any words to bring it within the limitation imposed by the Act. The case must therefore go back to the magistrate.

HONYMAN, J.—I am of the same opinion, but not without reluctance, for I think this construction of the section is likely to work hardship and injustice. The ground on which I think we have no option is, that by sect. 143 of the 18 & 19 Vict. c. 120, the vestry are enabled to demolish any building erected beyond the regular line, and to recover the expenses incurred from the owner; and by the earlier Act of 7 Geo. 4, c. 142, any building erected except under the powers of that Act was to be deemed a nuisance. Those being formerly the existing provisions, the 25 & 26 Vict. c. 102, s. 75, repealed those Acts, and substituted the mode of proceeding at present in existence, by which the vestry issue a summons requiring the owner or occupier to go before the magistrate to answer to the complaint made against him. If the Vice-Chancellor had deliberately expressed an opinion, I should have had some hesitation before we over-ruled his decision; but the Vice-Chancellor did not discuss the argument, and I therefore agree that this case must be sent back to the magistrate.

Judgment for appellant.

Attorney for appellant, *Wilkinson*.

Wednesday, May 7, 1873.

PRETTY ET UX. V. BICKMORE.

Nuisance—Coal—Vault entrance in street—Cover plate defective—Tenant under covenant to repair—Injury to passenger—Liability of owner for—18 & 19 Vict. c. 120, s. 102.

The owner of a house having a coal vault entrance covered by a plate in a public street, who has let the premises to a tenant by a lease containing the usual covenant on the part of the lessee to repair,

is not responsible to a passenger for injury caused through the defective condition of the coal plate, if the lessor has not concealed from the tenant its dangerous state at the time of the demise. The occupier and not the owner of the premises is, in such case, the person liable for the nuisance.

MOTION for a rule to set aside a nonsuit, and for a new trial.

This was an action brought against the owner of a house, in the parish of St. John, Hampstead, for negligently suffering a coal plate covering a vault entrance in the highway before such house to be out of repair, and a dangerous nuisance, and for letting the house to a tenant without obliging him to repair the same, whereby the female plaintiff lawfully passing along the highway, fell through the aperture and was injured. In one count of the declaration was alleged a duty on the defendant, under the Metropolitan Local Management Act 1855 (18 & 19 Vict. c. 120), as owner of the premises to repair and keep in repair the vault and openings thereto. The defendant denied his liability. At the trial, before Brett, J., in Middlesex, on the 6th May, the plaintiff proved the accident, and the occupier of the house was called as a witness on her behalf. He produced a lease from the defendant to himself of the premises in question. It contained the usual covenant by the lessee to keep them in repair. He said that the house was in course of alteration by the defendant at the time of the occurrence—that the plate was defective when his occupation began, and that he had repeatedly informed the defendant of that fact.

The learned judge nonsuited the plaintiff.

Campbell Foster in support of his motion.—The defendant let his premises with a dangerous nuisance upon them, and is not absolved from liability because he is not in actual occupation. *Reg. v. Pedley* (1 A. & E. 822), a case cited with others by Erle, C.J., in *Todd v. Flight* (3 L. T. Rep. N. S. 325; 30 L. J. 21, C. P.), thus, "These cases are authorities for saying if the wrong causing the damage arises from the non-feasance or mis-feasance of the lessor the party suffering damage from the wrong may maintain an action." [BOVILL, C.J.—*Todd v. Flight* was decided on demurrer and there was an allegation that the defendant continued the nuisance and that it was his duty to keep the premises in repair.] *Gandy v. Jubber* (32 L. J., 151 Q. B.) The Metropolitan Local Management Act(a) imposes on the owner a duty to repair.

BOVILL, C.J.—I think this nonsuit was right, and that we ought not to grant a rule for a new trial. *Prima facie* a person in possession of a house and cellar with a flap opening into the

(a) 18 & 19 Vict. c. 120, s. 102 enacts. "All vaults, arches, and cellars made either before or after the commencement of this Act under any street in any parish or district mentioned in either of the schedules (A) and (B) to this Act, and all openings into the same in any such street, shall be repaired and kept in proper order by the owners or occupiers of the houses or buildings to which the same respectively belong; and in case any such vault, arch, or cellar be at any time out of repair, it shall be lawful for the vestry or district board of such parish or district to cause the same to be repaired and put into good order, and to recover the expenses thereof from such owner in the manner hereinafter provided."

In schedule (A) part 2, the parish of St. John Hampstead is mentioned.

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pavement is the person responsible to the public for the dangerous state of the entrance. In this case the defendant was not in possession of the premises, he had let the premises to a tenant, and so *prima facie* there is no responsibility on the lessor. Undoubtedly in many cases it has been held that where the landlord had let the premises in their defective state, which caused the damage to the plaintiff, or had not obliged his tenant by the terms of the agreement between them to do the necessary repairs, he, the landlord, was liable for the injury subsequently resulting. But in all those cases it will be found that the landlord had done some act towards the continuance of what had caused the damage, and by letting the premises had authorised the nuisance—for example, by building a wall in a dangerous state, and then letting them. As in *Todd v. Flight (sup.)*, where the defendant had let the premises; but there was an allegation in the declaration that the defendant wrongfully suffered and permitted the chimneys to be and continue, and kept, and maintained the same in the ruinous state until the same afterwards fell and injured the building of the plaintiff. Now, taking that statement as the reason on which the decision of the court was based, is it applicable to the present case, or are any of the cases cited by Mr. Campbell Foster? Here, it is true, the cellar flap was in a dangerous state. Under these circumstances the defendant let the premises to a tenant, but did he authorise the continuance of the cellar flap? And whether that was in a dangerous state or not, can it be said he maintained it, was the continuance of the cellar flap the wrongful act of the lessor or of the lessee? Mr. Foster says the covenant in the lease did not oblige the tenant to repair the damaged cellar cover. I entirely differ, and think that the premises being let in a state when repair was required, that fact being known to the lessee, there was a duty on him under the ordinary covenant to repair, to put them into a proper state. I think there was no obligation on the lessor. If an action had been brought against the lessee he would have had no remedy against the lessor, who cannot be said to have caused or maintained the dangerous state of the cover plate (not having been in possession on his part) when he had done all in his power to remedy the defect by casting on the lessee the duty of doing the repairs. If he had been under obligation to repair and failed to do so, then the neglect would have been his fault, or if he had kept the lessee in ignorance of the defect; but such is not the case here, for the lessee well knew the defective state of the coal plate. Under these circumstances I think the nonsuit was right.

KEATING, J.—I am of the same opinion. In this case something must be shown whence it can be inferred that the lessor, after the lease of the premises, authorised the continuance of the defective coal plate. That may be inferred sometimes from the fact of his still retaining in himself the obligation to repair, and not repairing. It has been suggested that he has the opportunity of putting an end to the tenancy, and that from his not doing so his continuance of the nuisance would be inferred. But no fact has been stated by Mr. Foster from which any such inference can be drawn. The landlord took a covenant to repair from the lessee, and could not enter the premises himself to repair afterwards. I entirely

agree in the nonsuit, for the reasons pointed out by my Lord.

HONYMAN, J.—I am of the same opinion. *Prima facie* the occupier, and not the owner, is responsible for such an accident as this, and it lies on the plaintiff, if he seeks to make the owner responsible, to show that the defendant, although not the occupier, maintains the nuisance—according to the language used in *Todd v. Flight (sup.)*. Probably if the defendant, knowing of the nuisance, had demised the premises with an express stipulation that it should be lawful to the tenant to keep them as they are, or if he left them without imposing an obligation on the tenant to repair, he might be responsible; but when, as here, he says, "Mind there is a nuisance on the premises, you must repair it," how can it be said that relieves the tenant, and inculpates the landlord? The cases cited do not go so far. I think the rule should be refused.

Attorney for the plaintiff, Johnson.

Monday, May 26, 1873.

WHILLIER v. ROBERTS AND OTHERS.

Building committee—Liability of member for orders given by the committee—Ceasing to act.

A building committee having been formed for the purpose of erecting a church, the defendant became a member of it.

The defendant at one meeting seconded a resolution that the design submitted by the architect should be adopted, provided the amount did not exceed 5500l., which resolution was carried.

He was not present when the contract was made with the builder, nor did he attend any subsequent meetings; he, however, never formally resigned.

In consequence of unexpected expenses, the amount required came to a sum considerably more than 5500l., and the subscriptions proved inadequate to pay the builder.

In an action by the builder against the defendant to recover the balance due to him,

Held, in the absence of evidence that the defendant had, after absenting himself from the committee meetings, authorised anyone to pledge his credit, or had subsequently ratified the acts of the committee, that he was not personally liable to the plaintiff.

THIS was an action brought by the plaintiff, a builder, against the defendant, a member of a building committee, to recover the balance of an amount due to him for building a church at Lower Clapton.

It appeared that the inhabitants of Lower Clapton were anxious to build a permanent church in the place of a temporary one, and a meeting was accordingly called at which the defendant was present. At this meeting, among other resolutions, one was proposed by the vicar, and seconded by the defendant, that a building committee should be formed, consisting of certain gentlemen of whom the defendant was one, and this resolution was carried unanimously. A subscription list was opened, and the inhabitants of the neighbourhood subscribed towards the building fund for the erection of the new church. Several meetings of the building committee were held at which the defendant was unable to attend, but on the 20th of Nov. 1869 he did attend, and at that meeting certain

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plans were submitted to the consideration and approval of the committee, and a motion was then proposed and carried that whatever plan should be selected should be accepted, provided a reliable tender could be obtained at a cost not exceeding ten per cent. on the sum specified in the instructions to the architects, namely, 5000*l*. It was also proposed by Mr. Russell, and seconded by the defendant, that the secretary be directed to communicate with Messrs. Wigginton and Morris, architects, who were competing that their plan was accepted, subject to the terms of the above resolution, and also the introduction of certain alterations to be suggested.

The architects having made the required alterations, six builders were invited to tender for the erection of the church, and the plaintiff's tender being the lowest was accepted, and the result was that a contract was entered into between the plaintiff of the one part, and Mr. Read on behalf of the building committee of the other part, for the building of the church. The defendant ceased to attend all committee meetings after the 26th Nov. After the building had been commenced it was found necessary that some further sums should be expended in draining the foundations beyond the contract price, and these orders were given by Mr. Read on behalf of the building committee. Several other extras were also incurred, and, the subscriptions having proved inadequate to meet them, the builder remained unpaid. In an action before Keating, J. and a special jury at the Middlesex sittings after Michaelmas Term 1872, the jury found for the plaintiff, the learned judge giving leave to the defendant to move for a rule calling upon the defendant to show cause why the verdict should not be entered for the defendant, or why a nonsuit should not be entered on the ground that there was no evidence of liability against the defendant.

Garth, Q.C., having obtained a rule accordingly, *Henry Matthews, Q.C.* (with whom was *Graham*), showed cause.—The defendant became a member of the building committee and never resigned; in his absence the committee acted for him. By the resolution of the 20th of November 1869, he authorised the committee to pledge his credit, and held himself out as a person liable; and having done so, he now endeavours to evade this claim by saying he never gave any authority to the committee. The defendant was perfectly aware that it was understood by all parties he was a member of the committee. *The Earl of Mountcashell v. Barber* (14 C. B. 53; 23 L. J., 43 C.P.), is in point. In that case A. and B. and twenty-four other persons were members of the committee of management of a club. The club being in debt, a resolution was passed at a general meeting of the club on the 1st of June that a loan of 4000*l* was necessary to free the society from outstanding liabilities, and that the committee be empowered to raise that sum on a guarantee of the society. At a meeting on June 15, when B. was not present, the resolution was confirmed. At a later meeting, at which B. was not present, the terms of the loan were arranged. Subsequently various cheques were drawn by B. and other members for the expenses of the club; an action having been brought, and judgment recovered against A., it was held that there was evidence of B's assent to and ratification of the acts of the committee, and that he was liable to contribution.

Garth, Q.C. (with him *Holl*), were not called upon.

BOVILL, C.J.—It is clear that the building has been done under a contract between the plaintiff and one of the building committee, and also that the defendant Roberts was no party to that contract. With regard to the adoption of the contract after it was made, there is no evidence. The defendant never attended a meeting of the committee after the contract was signed. All that appears is that he was interested in the erection of the church, and he became a member of the building committee. The money for the church was to be raised by subscriptions, and a certain amount was promised, some absolutely, some conditionally. In order to ascertain the amount which would be required, the committee obtained plans from several architects, and they made certain stipulations and resolutions as to the limit of expense to which they would go. To all this the defendant was a party, and so far he authorised the committee to accept the architects' plans, and to invite tenders for the building. It is a totally different thing whether he authorised the committee to invite tenders, or whether he pledged his credit for such when accepted; and here there is no contract with the builder or any one else to make him personally liable. It was argued that there was a holding out by the defendant that he took the responsibility; but I see nothing to show he is bound or that he pledged his credit, and unless express authority is proved he is not liable. As to the case of the *Earl of Mountcashell v. Barber* (14 C. B. 53), that does not apply, for there the defendant, after the contract for the money was made, ratified the act of the committee by drawing cheques, and so made himself personally responsible. That has no application to the case we are now considering, and is no ground for saying the plaintiff ought to recover in the present case.

KEATING, J.—I am of the same opinion.

BRETT, J.—I am of the same opinion. It seems to me there is no evidence that the defendant authorised any one to pledge his credit; but if there was evidence that he authorised some one to contract, or that he afterwards ratified the contract or held himself out as a person who had done so, then he would be liable. But the evidence does not go that length. The evidence mainly relied upon is the resolution passed at the meeting of the building committee on the 26th Nov. 1869; but that resolution was that if the work could be done for 5500*l*., including the alterations, they should accept such a tender. That resolution was not an order to build the church; they must first obtain the tenders and select a builder. There was therefore, I think, no evidence of the defendant's authority being given to pledge his credit, and no evidence of ratification. The rule, therefore, must be made absolute to enter a verdict for the defendant.

Rule absolute.

Attorney for plaintiff, *Helsham*.

Attorneys for defendant, *Combe and Wainwright*.

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CROWN CASES RESERVED.

Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

Jan. 18, 25, and June 7, 1873.

(Before COCKBURN, C.J., BOVILL, C.J., KELLY, C.B., MARTIN, B., BRAMWELL, B., KEATING, J., BLACKBURN, J., MELLOR, J., PIGOTT, B., LUSH, J., BRETT, J., CLEASBY, B., GROVE, J., DENMAN, J., and ARCHIBALD, J.)

REG. v. MIDDLETON.

Larceny—Parting with possession of money under mistake—Animus furandi.

A depositor in a post office savings bank obtained a warrant for the withdrawal of 10s., and presented it with his depositor's book to a clerk at the post office, who, instead of referring to the proper letter of advice for 10s., referred by mistake to another letter of advice for 8l. 16s. 10d., and placed that sum upon the counter. The clerk entered 8l. 16s. 10d. in the depositor's book as paid, and stamped it. The depositor took up that sum and went away. The jury found that he had the *animus furandi* at the moment of taking the money from the counter, and that he knew the money to be the money of the Postmaster-General when he took it up, and found him guilty of larceny.

Held, by a majority of the Judges, that he was properly convicted of larceny.

Per Cockburn, C.J., Blackburn, J., Mellor, J., Lush, J., Grove, J., Denman, J., and Archibald, J., that the clerk, and therefore the Postmaster-General, having intended that the property in the money should belong to the prisoner through mistake, the prisoner, knowing of the mistake, and having the *animus furandi* at the time, was guilty of larceny.

Per Bovill, C.J., Kelly, C.B., and Keating, J., that the clerk, having only a limited authority under the letter of advice, had no power to part with the property in the money to the prisoner, and that therefore the conviction was right.

Per Pigott, B., that, before possession of the money was parted with, and while it was on the counter, the prisoner having the *animus furandi*, and taking it up, was therefore guilty of larceny.

Per Martin, B., Bramwell, B., Brett, J., and Cleasby, B., that the money was not taken *invito domino*, and therefore that there was no larceny.

Per Bramwell, B., and Brett, J., that the authority of the clerk authorized the parting with the possession and property in the entire sum laid down on the counter.

CASE reserved for the opinion of the Court for the Consideration of Crown Cases Reserved by the Deputy Recorder of the City of London.

The case came on to be argued in the ordinary course before five Judges, but on the argument they were not agreed, and the case was adjourned to be argued before all the Judges. Pollock, B. was absent at chambers, and Quain, J. was unwell. The above-named fifteen Judges heard the case, and, after time taken to consider, eleven of them were of opinion that the conviction ought to be affirmed, but Martin, B., Bramwell, B., Brett, J., and Cleasby, B. dissented.

At the session of the Central Criminal Court held on Monday, 23rd Sept. 1872, George Middleton was tried before me for feloniously stealing

certain money to the amount of 8l. 16s. 10d., the moneys of the Postmaster-General.

The ownership of the money was laid in other counts in the Queen and in the mistress of the local post-office.

It was proved by the evidence that the prisoner was a depositor in a post-office savings bank, in which a sum of 11s. stood to his credit.

In accordance with the practice of the bank he duly gave notice to withdraw 10s., stating in such notice the number of his depositor's book, the name of the post-office, and the amount to be withdrawn.

A warrant for 10s. was duly issued to the prisoner, and a letter of advice was duly sent to the post-office at Notting-hill to pay the prisoner 10s. He presented himself at that post-office and handed in his depositor's book and the warrant to the clerk, who, instead of referring to the proper letter of advice for 10s., referred by mistake to another letter of advice for 8l. 16s. 10d., and placed upon the counter a 5l. note, three sovereigns, a half sovereign, and silver and copper, amounting altogether to 8l. 16s. 10d.

The clerk entered the amount paid, viz., 8l. 16s. 10d. in the prisoner's depositor's book, and stamped it, and the prisoner took up the money and went away.

The mistake was afterwards discovered and the prisoner was brought back, and upon being asked for his depositor's book said he had burnt it.

Other evidence of the prisoner having had the money was given.

It was objected by counsel for the prisoner that there was no larceny because the clerk parted with the property and intended to do so, and because the prisoner did not get possession by any fraud or trick.

The jury found that the prisoner had the *animus furandi* at the moment of taking the money from the counter, and that he knew the money to be the money of the Postmaster-General when he took it up.

A verdict of guilty was recorded, and I reserved for the opinion of the Court for Crown Cases Reserved the question whether, under the circumstances above disclosed, the prisoner was properly found guilty of larceny.

I discharged the prisoner on recognizance with sureties to appear and receive judgment when called upon.

(Signed) THOMAS CHAMBERS.

No counsel appeared for the prisoner.

The Attorney-General (Metcalf and Slade with him) for the prosecution.—It is submitted that the prisoner was properly found guilty of larceny. The facts bring the case within the definition of larceny by Bracton, bk. 3 c. 32 p. 150. "*Furtum est secundum leges, contractatio rei alienae fraudulenta, cum animo furandi, invito illo domino cuius res illa fuerit. Cum animo dico, quia sine animo furandi non committitur.*" Here the prisoner took the 8l. 16s. 10d., which he at the time knew not to be his own, and to belong to the Postmaster-General, and without the consent of the Postmaster-General. It is not a satisfactory test of whether a fraudulent taking is larceny to see whether upon the facts an action of trespass would lie for the taking, as has been sometimes said it is. If a person finds a cheque in the street and takes it up, that is not a trespass, but if he applies it to his own use it is. The present case cannot be put

higher than a finding, and if so, the prisoner was guilty of larceny. The case of *Merry v. Green* (7 M. & W. 623), shows that. That was an action of false imprisonment, and the defendant pleaded a justification on the ground that the plaintiff had committed a larceny. The facts were that the plaintiff had purchased at a public auction, a bureau, which contained a secret drawer wherein was a purse and money which he appropriated to his own use, and it was held that if the plaintiff had express notice that the bureau alone, and not its contents (if any) was sold to him, or if he had no reason to believe that anything more than the bureau itself was sold, the abstraction of the money was a felonious taking, and he was guilty of larceny in appropriating it to his own use; but that if he had reasonable ground for believing that he bought the bureau with its contents (if any), he had a colourable right to the property, and it was no larceny. Parke, B., delivered the judgment, and in the course of it said: "It was contended that there was a delivery of the bureau and the money in it to the plaintiff as his own property, which gave him a lawful possession, and that his subsequent misappropriation did not constitute a felony. But it seems to us that though there was a delivery of the bureau, and a lawful property in it thereby vested in the plaintiff, there was no delivery so as to give a lawful possession of the purse and money. The vendor had no intention to deliver it, nor the vendee to receive it, both were ignorant of its existence, and when the plaintiff discovered that there was a secret drawer containing the purse and money, it was a simple case of finding, and the law applicable to all cases of finding applies to this. It is said that the offence cannot be larceny unless the taking would be a trespass, and that is true; but if the finder, from the circumstances of the case, must have known who was the owner, and, instead of keeping the chattel for him, means from the first to appropriate it to his own use, he does not acquire it by a rightful title, and the true owner might maintain trespass. And it seems, also, from *Wynne's case* (Leach C. C. 413; 2 East P. C. 664), that if under the like circumstances he acquire possession and mean to act honestly, but afterwards alters his mind and open the parcel with intent to embezzle its contents, such unlawful act would render him guilty of larceny." [BRAMWELL, B.—Suppose in this case the Postmaster-General had brought an action of trespass, and the defendant had pleaded not guilty and leave and licence, could he have made out a defence?] No. It is clear that if the prisoner had obtained the possession by any act or word amounting to misrepresentation, it would have been a case of larceny; but because he was silent, and took advantage of a mistake on the part of the clerk, is it to be said that it was not a larceny? [COCKBURN, C.J.—In *Res v. Oliver*, cited in 4 Taunt. 274, the prisoner offered to give the prosecutor gold for bank notes, upon which the prosecutor put down a number of bank notes for the purpose of their being so exchanged. The prisoner took up the notes and made away with them, and this was holden to be larceny. If the jury believed that the prisoner intended to run away with the notes and not to return with the gold.] In this case the jury found that the prisoner took the 8l. 16s. 10d. from the counter *animo furandi*. [BRETT, J.—Was the taking here against the will of the owner? The clerk

had a general authority to pay the warrant.] There is nothing to show that he had any authority to part with the 8l. 16s. 10d., except to the person to whom it belonged. His duty was to pay in accordance with the letter of advice in each case. In *Reg. v. Prince* (L. Rep. C. C. R. 150; 11 Cox C. C. 193), where it was held that money knowingly obtained on a forged cheque from a cashier at a bank is not larceny, Blackburn, J. said, "As the law now stands, if the owner intended the property to pass, though he would not so have intended had he known the real facts, that is sufficient to prevent the offence of obtaining another's property from amounting to larceny; and where the servant has an authority coequal with his master's, and parts with his master's property, such property cannot be said to be stolen, inasmuch as the servant intended to part with the property in it. If, however, the servant's authority is limited, then he can only part with the possession, and not with the property; if he is tricked out of the possession the offence so committed will be larceny." [BRETT, J.—What difference is there between a clerk at the post office and a clerk in the Bank? COCKBURN, C.J.—This was the mistake of a person who stood *in loco* of the owner.] In *Reg. v. Longstreeth* (1 Moo. C. C. 137), it was held that obtaining *animo furandi* a parcel from a carrier's servant by falsely pretending to be the person to whom it was directed is larceny. The following cases were also referred to:

Reg. v. Campbell, 1 Moo. C. C. 179;
Clough v. London and North-Western Railway Company, 41 L. J. 17, Ex.;
Reg. v. West, Dears, 402; 6 Cox C. C. 415;
Reg. v. Glyde, 11 Cox C. C. 103; 37 L. J. 107, M.C.
Our. adv. vult.

Jan 25.—KELLY, C.B. said that the majority of the judges were of opinion that the conviction should be affirmed. But as it was important that the grounds of the decision should be known, the reasons for the judgment would be delivered on a future day.

June 7.—BOVILL, C.J.—I will proceed to deliver the judgment of the Lord Chief Justice, and of my brothers Blackburn, Mellor, Lush, Grove, Denman and Archibald, which is as follows: The points raised by the case are in effect three. The uniform course of indictments for larceny, from the earliest times, has been to allege that the prisoner "feloniously stole, took, and carried away" the goods of a named person, and Lord Hale in his "Pleas of the Crown," vol 1, p. 165, states with perfect accuracy that the words "feloniously stole and took" are essential to the crime. In the present case the jury have found that the prisoner had the *animus furandi* at the moment of taking the money from the counter, and that he knew the money to be the money of the Postmaster-General when he took it up. So far, therefore, as the guilty knowledge and felonious intention are ingredients in the crime of stealing, we must take it as proved that the prisoner was guilty. But the case states facts which raise the doubt whether, under the circumstances stated, this was a "taking," and also whether it was a "stealing" within the meaning put by the law on these averments in an indictment for larceny. The circumstances which raise that doubt are as follows:—Assuming that the clerk who actually was engaged in the transaction had such authority

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from the Postmaster-General that all he did is to be taken as done by the Postmaster-General, it is the first question whether the money can be said to have been taken by the prisoner within the meaning of the averment, inasmuch as the clerk (who on this hypothesis is equivalent to the Postmaster-General) certainly meant that the prisoner should take up that money, though he only meant this because of a mistake he made as to the identity of the prisoner with the person really entitled to that money. Then a second question arises, whether it can be properly said that he stole the money, inasmuch as the clerk, and therefore on this hypothesis the Postmaster-General, intended that the property in the money should belong to the man before him, though he intended that, in consequence of a mistake as to his identity, and the prisoner from the beginning knew of the mistake, and had at the time of the taking the guilty intention to steal the money. A third question arises in the event of the first two questions being determined in favour of the prisoner, viz., whether the clerk really had such general authority as to represent the Postmaster-General, or whether his authority was not limited to paying the money specified in the letter of advice, viz. 10s. which special authority, if it was so limited, he did not pursue. The majority of the judges, eight in number, have formed their judgment on the decision of the first two points in favour of the crown, which therefore renders it unnecessary for them to decide the last. The Lord Chief Justice of the Common Pleas and the Lord Chief Baron and my brother Keating, who agree with the majority in thinking the conviction should be affirmed, do so solely on the last ground, that the authority of the clerk was a special authority not pursued, and their reasons are stated in two separate judgments. It is not to be understood that the eight who form the rest of the majority decide this question the other way, but merely that they consider it unnecessary to decide it at all. We now proceed to state the reasons on which we think it ought to be held that there was under the circumstances stated a "taking," within the meaning of the averment in the indictment. We agree that, according to the decided cases it is no felony at common law to steal goods if the goods were already lawfully in the possession of the thief, and that therefore at common law a bailee of goods, or a person who finds goods lost, and not knowing or having the means of knowing whose they were, takes possession of them, is not guilty of larceny if he subsequently, with full knowledge, and a felonious intention, converts them to his own use. It is to say the least very doubtful whether this doctrine is either wise or just, and the Legislature in the case of bailees have by statute enacted that bailees stealing goods, &c. shall be guilty of larceny, without reference to the subtle exceptions engrafted by the cases on the old law, but in such a case as the present there is no statute applicable, and we have to apply the common law. Now, we find that it has been often decided that where the true owner did part with a physical possession of a chattel to the prisoner (and therefore in one sense the taking of the possession was not against his will), yet if it was proved that the prisoner from the beginning had the intent to steal, and with that intent obtained the possession, it is a sufficient taking. We are not concerned at pre-

sent to inquire whether originally the judges ought to have introduced a distinction of this sort, or ought to have left it to the Legislature to correct the mischievous narrowness of the common law, but only whether this distinction is not now established and we think it is. The cases on the subject are collected in "Russell on Crimes," 4th edit. vol. 2, p. 201. Perhaps those that most clearly raise the point are *Davenport's* case and *Savage's* case, 2 Russell on Crimes, 201. In the present case the finding of the jury, that the prisoner at the moment of taking the money had the *animus furandi*, and was aware of the mistake, puts an end to all objection arising from the fact that the clerk meant to part with the *possession* of the money. On this part of the case, there is no difference of opinion. On the second question, namely, whether (assuming that the clerk was to be considered as having all the authority of the owner), the intention of the clerk (such as it was) to part with the *property* prevents this from being larceny, there is more difficulty, and there is in fact a serious difference of opinion, though the majority, as already stated, think the conviction right. The reasons which lead us to this conclusion are as follows: At Common Law the property in personal goods passes by a bargain and sale for consideration, or a gift of them accompanied by delivery, and it is clear from the very nature of the thing that an intention to pass the property is essential both to a sale and to a gift. But it is not at all true that an intention to pass the property, even though accompanied by a delivery, is of itself equivalent to either a sale or a gift. We will presently explain more fully what we mean, and how this is material. Now it is established that where a bargain has been made between the owner of a chattel and another, by which the property is transferred to the other, the property actually passes, though the bargain has been induced by fraud. The law is thus stated in the judgment of the Exchequer Chamber in *Clough v. London and North-Western Railway Company* (7 L. Rep. 34, Ex.), where it is said, "We agree completely with what was stated by all the Judges below, that the property in the goods passed from the London Pianoforte Company to Adams by the contract of sale. The fact that the contract was induced by fraud did not render the contract void, or prevent the property from passing, but merely gave the party defrauded a right, on discovering the fraud, to elect whether he would continue to treat the contract as binding, or would disaffirm the contract and resume his property. . . . We think that so long as he made no election he retains the right to determine it either way, subject to this, that if in the interval, whilst he is deliberating, an innocent third party has acquired an interest in the property, or if, in consequence of his delay, the position even of the wrongdoer is affected, it will preclude him from exercising his right to rescind." It follows obviously from this, that no conversion or dealing with the goods before the election is determined can amount to a stealing of the vendor's goods, for they had become the goods of the purchaser, and still remained so when the supposed act of theft was committed. There are accordingly many cases, of which the most recent is *R. v. Prince* (L. Rep. 1 C. C. Rep. 150; 11 Cox. C. C. 193), which decide that in such a case the guilty party must be indicted for obtaining the goods by false pretences,

and cannot be convicted of larceny. In that case, however, the money was paid to the holder of a forged cheque payable to bearer, and therefore vested in the holder, subject to the right of the bank to divest the property. In the present case the property still remained that of the Postmaster-General, and never did vest in the prisoner at all. There was no contract to render it his which required to be rescinded; there was no gift of it to him: for there was no intention to give it him or anyone. It was simply a handing it over by a pure mistake, and no property passed. As this was money we cannot test the case by seeing whether an innocent purchaser could have held the property; but let us suppose that a purchaser of beans goes to the warehouse of a merchant, with a genuine order for so many bushels of beans, to be selected from the bulk, and so become the property of the vendee, and that by some strange blunder the merchant delivers to him an equal bulk of coffee. If that coffee was sold (not in market overt) by the recipient to a third person, could he retain it against the merchant on the ground that he had bought it from one who had the property in the coffee, though subject to be divested? We do not remember any case in which such a point has arisen, but surely there can be no doubt he could not, and that on the principle enunciated by Lord Abinger, in *Chester v. Hopkins* (4 M. & W. 404), when he says, "If a man offers to buy peas of another and he sends him beans, he does not perform his contract; but that is not a warranty: there is no warranty that he should sell him peas, the contract is to sell peas, and if he sends him anything else in their stead, it is a non-performance of it." We admit that the case is undistinguishable from the one supposed in the argument of a person handing to a cabman a sovereign by mistake for a shilling; but after carefully weighing the opinions to the contrary, we are decidedly of opinion that the property in the sovereign would not vest in the cabman, and that the question whether the cabman was guilty of larceny or not would depend upon this—whether, at the time he took the sovereign, he was aware of the mistake, and had then the guilty intent, the *animus furandi*. But it is further urged that if the owner, having power to dispose of the property, intended to part with it, that prevents the crime from being larceny, though the intention was inoperative and no property passed. In almost all the cases on the subject the property had actually passed, or at least the court thought it had passed; but two cases, *Reg. v. Adams* (1 Den. C. C. 38), and *Reg. v. Atkinson* (2 East. P. C. 673) appear to have been decided on the ground that an intention to pass the property, though inoperative, and known by the prisoner to be inoperative, was enough to prevent the crime from being that of larceny. But we are unable to perceive or understand on what principle these cases can be supported, if *Davenport's* case and the others involving the same principle are law; and, though if a long series of cases had so decided we should think we were bound by them, yet we think that in a court such as this, which is in effect a Court of Error, we ought not to feel bound by two cases which, as far as we can perceive, stand alone, and seem to us contrary both to principle and justice.

BOVILL, C. J. then read his own judgment, in which KEATING, J. concurred.—The proper defini-

tion of larceny according to the law of England, from the time of Bracton downwards, has been considered to be the wrongful or fraudulent taking and carrying away by any person of the personal goods of another from any place without any colour of right, with a felonious intent to convert them to the taker's own use, and make them his own property, without the consent and against the will of the owner; and the question for our consideration is, whether the facts of the present case bring it within that definition. Under the Act for establishing Post office Savings banks (24 Vict. c. 14) deposits are received at the post offices authorised by virtue of that Act, for the purpose of being remitted to the principal office (sect. 1). By sect. 2 the Postmaster-General is to give an acknowledgment for such deposits and by the 5th section all moneys so deposited with the Postmaster-General are forthwith to be paid over to the Commissioners for the reduction of the National Debt. By the same section all sums withdrawn by depositors are to be repaid out of those moneys through the office of the Postmaster-General; and by sect. 3 the authority of the *Postmaster-General for such repayments shall be transmitted to the depositor* who is to be entitled to repayment at a post office within ten days. It appears to us that the moneys received by the postmasters at their respective offices, by virtue of this Act, are the property of the Crown or of the Postmaster-General, and that neither the postmasters nor the clerks at the post offices have any power or authority, either general or special, to part with the property in, or even the possession of, the moneys so deposited, or any part of them, to any person, except upon the special authority of the Postmaster-General. In this case the prisoner had received a warrant or authority from the Postmaster-General entitling him to repayment of 10s. (being part of a sum of 11s. which he had deposited) from the post office at Notting hill, and a letter of advice to the same effect was sent by the Postmaster-General to that post office, authorising the payment of the 10s. to the prisoner. Under these circumstances we are of opinion that neither the clerk to the postmistress nor the postmistress personally had any power or authority to part with the five-pound note, three sovereigns, the half sovereign, and silver and copper, amounting to 8l. 16s. 10d. which the clerk placed upon the counter and which was taken up by the prisoner. In this view the present case appears to be undistinguishable from other cases where obtaining articles *animus furandi* from the master of a post office, though he had intentionally delivered them over to the prisoner, has been held to be larceny, on the principle that the Postmaster had not the property in the articles, or the power to part with the property in them. For instance, the obtaining the mail bags by pretending to be the mail guard, as in *Reg. v. Pearce* (2 East P. C. 603), the obtaining a watch from the postmaster by pretending to be the person for whom it was intended, as in *Reg. v. Kay* (D & B. 231; 7 Cox C. C. 289), (where *Reg. v. Pearce* was relied upon in the judgment of the court), and the obtaining letters from the postmaster under pretence of being the servant of the party to whom they were addressed, as in *Jones's* case (1 Den. C. C. 188), and in (*Reg. v. Gillings*, 1 F. & F. 36), were all held to be larceny. The same principle has been acted upon in other cases where the person having merely the

possession of goods, without any power to part with the property in them, has delivered them to the prisoner, who has obtained them *animo furandi*; for instance, such obtaining of a parcel from a carrier's servant, by pretending to be the person to whom it was directed, as in *Reg. v. Longstreet* (1 Mood. C. C. 137) or obtaining goods through the misdelivery of them by a carman's servant, through mistake to a wrong person, who appropriated them *animo furandi*, as in *Reg. v. Little* (10 Cox C. C. 559), were in like manner held to amount to larceny. In all these and other similar cases, many of which are collected in 2 Russell on Crimes, 211 to 215, the property was considered to be taken without the consent and against the will of the owner, though the possession was parted with by the voluntary act of the servant to whom the property had been entrusted for a special purpose. And where property is so taken by the prisoner knowingly, with intent to deprive the owner of it, and feloniously to appropriate it to himself, he may in our opinion be properly convicted of larceny. The case is very different where the goods are parted with by the owner himself, or by a person having authority to act for him, and where he or such agent intends to part with the property in the goods, for then, although the goods be obtained by fraud, or forgery, or false pretences, it is not a taking against the will of the owner, which is necessary in order to constitute larceny. The delivery of goods by the owner upon an order which was in fact forged, as in *Reg. v. Adams* (1 Den. 38), the payment of money by a banker's cashier on a cheque which turned out to be a forgery, as in *Reg. v. Prince* (11 Cox C. C. 193), and the delivering up of pledges by a pawnbroker's manager by mistake, and through fraud as in *Reg. v. Jackson* (1 Mood. 119), are instances of this kind, and where the intent voluntarily to part with the property in them prevented the offence being treated as a larceny. In the present case not only had the postmistress or her clerk no power or authority to part with the property in this money to the prisoner, but the clerk in one sense never intended to part with the 8l. 16s. 10d. to the person who presented an order for only 10s. and he placed the money on the counter by mistake, though at the time he (by mistake) intended that the prisoner should take it up, and by mistake entered the amount in the prisoner's book. When the money was lying upon the counter the prisoner was aware that he was not entitled to it, and that it could not be, and was not really intended for him, yet, with full knowledge on his part of the mistake, he took the money up and carried it away, intending at the time he took it to deprive the owner of all property in it, and feloniously to appropriate it to his own use. There was, therefore, as it seems to us, a wrongful and fraudulent taking and carrying away of the whole of this money by the prisoner, without any colour of right, *animo furandi*, and against the will of the real owner. For these reasons and upon the authorities before stated, we think the prisoner was properly convicted of larceny.

KELLY, C.B.—The facts of this case, simply stated, are these: The prisoner, having deposited 10s. in the Post-office Savings Bank, and taken the necessary steps to withdraw it, proceeded to the post office and presented his order for the 10s. The post office clerk having looked at the letter of

advice for the payment of the 10s. and at another letter of advice for the payment to another depositor of 8l. and a fraction, by mistake took up the 8l. odd destined for the other depositor, and laid it upon the counter before the prisoner, who took up the money and went away with it, and applied it to his own use. The jury expressly found that he knew the 8l. odd did not belong to him, and that it did belong to the Postmaster-General, and that he took it up and carried it away with him *animo furandi*. Upon these facts, and this finding, I cannot bring myself to doubt that the prisoner was guilty of larceny. He saw the money upon the counter before him; he knew that it was not his own, and that it was another person's money, and he took it up and took it away with the intent to steal it. If he had gone into the office knowing that he had to receive 10s., and that somebody had to receive 8l., and he had seen the 10s. and the 8l. lying upon the counter before him, and had taken away the 8l. *animo furandi*, no question could have been raised about his guilt. Does it then make any difference that the clerk placed the money before him and intended that he should take it? If the money had belonged to the clerk, and the clerk had intended to pass the property in the money from himself to the prisoner, or if, the money belonging to the Postmaster-General or the Queen, the clerk had been authorized to pass the property in that money to the prisoner, the case might have been different. But this money did not belong to the clerk, and he had no authority to pass the property in the money to the prisoner. *Reg. v. Prince* was cited, where a banker's clerk, to whom a forged cheque was presented, paid the money in ignorance of the forgery, and the receiver, who intended to defraud the banker of the money was acquitted of larceny on the ground that the clerk had authority to receive the cheque and to dispose of the money which he had paid to the prisoner, and was the agent of the banker in so doing; so that the case was the same as if the banker himself, who was the owner of the money, had delivered it to the prisoner. There, however, the clerk was not only the agent of the banker, but he acted strictly in the discharge of his duty, for he had not only the authority of his employer to pay the money, but in the absence of any suspicion, or reason to suspect, that the cheque was forged, it was his duty to pay it, and he did pay it with the banker's money. And there are other cases where the owner of a chattel delivers it to another with the intent to pass the property, and the receiver has been acquitted of larceny. But in this case the post office clerk was not the owner of the 8l., and had no authority whatever to deliver that sum of money to the prisoner, which is precisely the case excepted in the judgment of the *Queen v. Prince*, and brings it within the *Queen v. Longstreeth* therein cited. The case appears to me to be the same (indeed I suggested it during the argument) as if the prisoner had left a watch at a watchmaker's to be repaired, and afterwards goes to the watchmaker's, where he sees his watch hanging up behind the counter, and another watch of greater value, and belonging to another person, hanging beside it, and upon his asking for his watch, the shopman, by mistake, hands him the watch belonging to the other person. He sees his own watch; he knows that the watch handed to him does not belong to him, but is the property

of another, and that the shopman has no authority whatever to deliver the watch of another to him. I have no doubt, therefore, that one who had so received and taken away another man's property would have been guilty of larceny, and that the shopman in such a case and the clerk in this case is in the condition of a mere stander-by, who, without authority and by mere mistake, hands to him a chattel which he sees before him. Even *Prince's* case may be said to be founded on a fiction, for it is not true that the banker had authorized his clerk to pay his money upon a forged cheque; but the fiction is more undisguised and palpable when it is asserted that the clerk was authorized by the Postmaster-General to pay the sum of 8*l.* to a man who had presented an order or warrant for 10*s.* And I must take leave to record my deliberate opinion that the creating of fictions, which, as the term imports, is the assuming to be true that which is untrue, and of which the direct consequence is to defeat justice, is a practice which, in administering the law, ought not to be extended. Moreover, this case is distinguishable from *Prince's* case on the ground of the decision in *Reg. v. Longstreeth*, where a carrier's servant delivered a parcel to one who received it *animo furandi*, knowing it not to be his own, and it was held that he had no authority to deal with the property in the goods, but only with the possession, and that the receiver was guilty of larceny. I think that decision governs the present case, and conclusively shows that if a servant delivers to the wrong person a chattel which it was no part of his duty, and which he had no authority to deliver to any but the owner, and the receiver takes it, knowing it is not his but belongs to another, and *animo furandi*, such receiver, although the delivery is made in the ordinary performance of the duty of the servant, is guilty of larceny. Upon these grounds I think the conviction should be affirmed.

MARTIN, B.—I have read the judgments of my brothers, Bramwell, B. and Cleasby, B., and fully concur in them. I think that upon the facts and on the principles of the Criminal Law there was no larceny committed in this case. In my judgment the case of *Reg. v. Prince* is not distinguishable from this case. There the prisoner committed a more gross offence, and yet the Court held it not to be larceny. The true principle of larceny is to be found in Coke's 3rd Instit. 107: "Larceny is the felonious and fraudulent taking and carrying away by any man or woman of the mere personal goods of another, neither from the person nor by night in the house of the owner." And, "Secondly, there must be an actual taking, for an indictment *quod felonice abduxit æquum* is not good because it wanteth *cepit*: by taking, not bailment, or delivery, for that is a receipt, and not a taking: and therewith agreeth Glanvil." The cases collected in 2 Russ. on "Crimes" shew that there must be a taking, and it is essential to the crime of larceny that the act of taking should be a trespass. In my opinion what the prisoner did was not taking in that sense, and not a trespass, but only a receipt. The civil remedy to recover back the money would have been trover and not trespass.

BRAMWELL, B.—As the prisoner has now undergone his nominal sentence, I should think it better that the small minority in this case, of whom I am one, should give up their opinions to the majority,

if the case turned on its own particular circumstances, and no principle was involved. But, in my opinion, great and important principles, not only of our law, but of general jurisprudence, arise here, on which I feel bound to state my views. It is a good rule in criminal jurisprudence not to multiply crimes; to make as few matters as possible the subject of criminal law; and to trust, as much as can be, to the operation of the civil law for the prevention and remedy of wrongs. It is also a good rule not to make that a crime which is the act or partly the act of the party complaining—*volenti non fit injuria*; as far as he is willing let it be no crime. Here the taking was consented to. This is undoubtedly a rule of the English Common Law. Obtaining goods by false pretences was no offence at common law. Ordinary cheating was not. Embezzlement by a servant was not larcenous. Breaches of trust by trustees and bailees were not; so also fraudulently simulating the husband of a married woman, and having connection with her was not. And most particularly was and is this the case in larceny, for the definition of it is that the taking must be "*invito domino*." Whether this law is good or bad is not the question. We are to administer it as it is. I think those statutes that have made offences of such matters as I have mentioned improved the law, because the business of life cannot be carried on without trusting to representations that we cannot verify, and without trusting goods to others in such a way that the owner loses all power of watching over them; and it is reasonable that the law should protect persons who do so, by making criminals of those who abuse that confidence. But something was to be said in favour of the old law, viz., that the opportunity for the crime was afforded by the complainant. Further, there is certainly a difference between the privy taking of property without the knowledge of the owner, or its forcible taking, and its taking with consent by means of a fraud. The latter perhaps may properly be made a crime, but it is a different crime from the other taking. I say, then, that on the principles of general jurisprudence, on the general principles of our law, and on the particular definition of larceny, the taking must be *invito domino*. That does not mean contrary to or against his will, but without it—all he need be is *invitus*. This accounts for how it is that a finder of a chattel may be guilty of larceny. The *dominus* is *invitus*. So in the case of a servant who steals his master's property. There are certain cases apparently inconsistent with this, but which are brought within the rule, but by reasoning which ought to have no place in criminal law. I mean such cases as where a carrier broke bulk and stole the contents or part, and was guilty of larceny, but would not have been had he taken the whole package; and cases where possession was fraudulently obtained *animo furandi* from the owner, who did not intend to part with the property. In such cases it has been held that the breach of trust by the carrier in breaking bulk revested the possession in the owner; and in the other case, the obtaining of possession was a fraud and so null, and that therefore in such cases the possession reverted to or remained in the true owner, and so there was a taking *invito domino*. So also cases where the custody is given to the alleged thief, but not possession or property, as where the price of a chattel delivered is to be paid ready money: (*B.*

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v. *Cohen*, 2 Den. 249.) These are not exceptions to the rule, but are brought within it by artificial, technical, and unreal reasoning. But where the *dominus* has voluntarily parted with the possession, *intending to part with the property* in the chattel, it has never yet been held that larceny was committed, whatever fraud may have been used to induce him to do so; nor whatever may be the mistake he committed; because in such case the *dominus* is not *invitus*. So also where the possession has been parted with in such a way as to give the bailee a special property: (See 2 Russell, on Crimes 191, citing 2 East P. C. 682; *R. v. Smith*, B. & M. C. C. R. 473; *R. v. Goodbody*, 8 C. & P. 655.) It is not necessary that the property should pass; the intent to pass it is enough (see *R. v. Coleman*, 2 East, P. C. 672, 2 Russell 200). It is clear that the property did not pass in that case, even voidably—not to the prisoner, because the prosecutor's contract was not with him, nor to Mrs. Cook, for it was not with her. The same remark applies to *Adams's case* (2 Russell, 200); see also *Atkinson's case* (2 Russell, 207). The principle of that case seems misunderstood in the text. It is cited as a case where the property passed, but it is clear no property passed to anyone. It is argued that here there was no intent to part with the property, because the post-office clerk never intended to give to Middleton what did not belong to him. A fallacy is involved in this way of stating the matter. No doubt the clerk did not intend to do an act of the sort described, and give to Middleton what did not belong him. Yet he intended to do the act he did. What he did he did not do involuntarily, nor accidentally, but on purpose. See what would follow from such reasoning. A. intends to kill B.; mistaking C. for B., he shoots at C. and kills him. According to the argument, he is not guilty of intentional murder, not of B., for he has not killed him, nor of C., for he did not intend to kill him. There is authority of a very cogent kind against this argument. A man, in the dark, gets into bed to a woman, who, erroneously believing him to be her husband, lets him have connection with her. This is no rape, because it is not without her consent; yet she did not intend that a man not her husband should have connection with her. I have noticed the above as another illustration of how the common law refuses to punish an act committed with the consent of the complainant. To proceed with the present matter, —If the reasoning as to not intending to give this money is correct, then, as it is certain that the post-office clerk did not intend to give Middleton 10s., it follows that he intended to give him nothing. That cannot be. In truth, he intended to give him what he gave, because he made the mistake. This matter may be tested in this way: A. tells B. he has ordered a wine merchant to give B. a dozen of wine. B. goes to the wine merchant, *bonâ fide* receives and drinks a dozen of wine. After it is consumed the wine merchant discovers he gave B. the wrong dozen, and demands it of B., who, having consumed it, cannot return it. It is clear that the wine merchant can maintain no action against B., as B. could plead the wine merchant's leave and licence. But it is said that if B. knew of the mistake, and took the wine *animo furandi*, then he would have taken it *invito domino*. So that whether the *dominus* is *invitus* or not depends, not on the state of his own mind,

but on that of B. It is impossible to say that there was a taking here sufficient to constitute larceny, because the money was picked up; but if it had been put in the prisoner's hand there was not such a taking. But for the point, then, I am about to mention, I submit the *dominus* was not *invitus*, that he consented to the taking, and that it was partly his act. No doubt the prisoner was a dishonest man—may be what he did ought to be made criminal—but his act was different from a privy or forcible taking; he was led into temptation, the prosecutor had very much himself to blame, and I certainly think that Middleton, if punished, should be so on different considerations from those which should govern the punishment of a larcenous thief. But a point is made for the prosecution on which I confess I have the greatest doubt. It is said that here the *dominus* was *invitus*—that the *dominus* was not the post office clerk, but the Postmaster-General, or the Queen, and that therefore it was an unauthorised act in the post office clerk, and so a trespass *in invito domino*. I think one answer to this is, that the post office clerk had authority to decide under what circumstances he would part with the money with which he was entrusted. But I also think that, for the purposes of this question, the lawful possessor of the chattel, having authority to transfer the property, must be considered as the *dominus*, at least when acting *bonâ fide*. It is unreasonable that a man should be a thief or not, not according to his act or intention, but according to a matter which has nothing to do with them, and of which he has no knowledge. According to this, if I give a cabman a sovereign for a shilling by mistake, he taking it *animo furandi*, it is no larceny; but if I tell my servant to take a shilling out of my purse, and he by mistake takes a sovereign and gives it to the cabman, who takes it *animo furandi*, the cabman is a thief. It is ludicrous to say that if a man, instead of himself paying, tells his wife to do so, and she gives the sovereign for a shilling, that the cabman is guilty of larceny, but not if the man gives it. It is said that there is no great harm in that a thief in mind and act has blundered into a crime. I cannot agree. I think the Criminal Law ought to be reasonable and intelligible. Certainly a man who had to be hung owing to this distinction might well complain; and it is to be remembered that we must hold that to be law now which would have been law when such a felony was capital. Besides, juries are not infallible, and may make a mistake as to the *animus furandi*, and so find a man guilty of larceny when there was no theft and no *animus furandi*. Moreover, *Prince's case* is contrary to this argument, for there the bankers' clerks had no authority to pay a forged cheque if they knew it. They had authority to make a mistake, and so had the post office clerk. And suppose in this case the taking had been *bonâ fide*. Suppose Middleton could neither write nor read, and some one had made him a present of the book without telling him the amount, and he had thought the right sum had been given to him, would his taking of it have been a trespass? I think not, and that a demand would have been necessary before an action of conversion could be maintained. No doubt the cases on this point are difficult, but I think not inconsistent with this opinion. In *Longstreeth's*

case (3 Russ. 203) the servant had no authority to *change property* in the thing delivered. So in *Wilkins' case* (3 Russ. 211). In *Small's case* (*id* 213), the servant had authority to part with the possession only if he got a good half-crown, and the prisoner knew that. So in *Stewart's case* (1 Cox C. C. 174), where the reasoning of Alderson, B., is very important. In *Shepherd's case* (9 C. & P. 121), the servant had no authority to sell the mare, and the prisoner, his confederate, knew the mare was not the property of the servant. So in *Hench's case* (2 Russ. 215), the servant had no authority to pass the property. As to *Pearse's case* (2 East P. C.), there was no intention to pass the property. As to *Reg v. Kay* (2 Russ. 217), the reasoning by which the conviction is justified is, I repeat, such as ought not to exist in any law, most especially not in the criminal law. But, as it is said in the note to that case, there was no intention to part with the property. On these grounds I think the conviction was wrong. I need not profess my respect for those whose opinions are the contrary, but I feel bound, as I have said, to express mine, because I think very important principles are involved, and because I think it desirable to show that those opinions I share may be (and probably are) in the wrong, considering the numerous and weighty reasons the other way. There is more doubt in the case than has appeared to some who seem to me to reason thus: The prisoner was as bad as a thief (which I deny); and being as bad, ought to be treated as one (which I deny also). To such reasoners I give the recommendation contained in an excellent article in the *LAW TIMES* of Jan. 25th, 1873, p. 228, where it is said "A Metropolitan County Court Judge might with advantage read and inwardly digest Paley's *Moral and Political Philosophy*, or some approved treatise, in which the necessity for positive rules of general application, and the doctrine of 'particular and general consequences,' and the superior importance of and regard due to 'general consequences' are already expounded."

PIGOTT, B.—I agree in the judgment of the majority of the court; except that I do not adopt the reasons which are there assigned for holding that the mistaken intention of the clerk did not under the circumstances here prevent the case from being one of larceny on the part of the prisoner. I quite accede to that proposition, but my reason is that, in the view I take of the facts, the intention and acts of the clerk are not material in determining the nature of the prisoner's act and intent; because the transaction between them stopped short of placing the money completely in the prisoner's possession, and could in no way have misled the prisoner. The case states, the clerk placed the money on the counter. He then entered the amount of it in the prisoner's book and stamped it. This no doubt gave the prisoner the opportunity of taking up the money, and he did so in the presence of the clerk; but before doing so he must have seen by the amount that the clerk was in error, and that the money could not really be intended in payment of his order, and therefore was not for him, but for another person. It was with full knowledge of this mistake that he resolved to avail himself of it and, in fact, to steal the money. The interval afforded him the opportunity, and he did in fact conceive the *animus furandi*, while as yet he had not taken the money in his manual possession. The dividing line may

appear to be a fine one; but it is, I think, very distinct and well defined in fact, for it was with this formed intention in his mind that he took possession of the money. If complete possession had been given by the clerk to the prisoner, so that no act of the latter were required to complete it after his discovery of the mistake and his own formed intention to steal it, I should not feel myself at liberty to affirm this conviction. In that case the prisoner would have done nothing to defraud the clerk, and the latter intending (to the extent to which he had such intention) as much to pass the property as the possession in the money, there would be nothing to deprive the matter of the character of a business transaction fully completed. I desire to adhere to the law stated in the 3rd Institute, p. 110:—"The intent to steal must be when it cometh to his hands or possession; for if he hath the possession of it once lawfully, though he hath *animus furandi* afterwards, and carrieth it away, it is no larceny." But the facts satisfy me, and the jury have found upon them, that the prisoner had the *animus furandi* while the money was yet on the counter, and that at the moment of taking it up he knew the money to be the Postmaster-General's. The case is therefore very much like that of a finder who immediately on finding it knows or has the means of knowing the owner and yet determines to steal it. (2 Russell, 169.) The same facts satisfy the requirements in the definition of larceny, that the taking must be *invito domino*. The loser does not intend to be robbed of his property, nor did the clerk in this case; and the prisoner's conduct is unaffected by the clerk's apparent consent, in ignorance of its real nature. I therefore agree in affirming the conviction.

BRETT, J.—This case has been considered in three different ways. It has been said that a proper inference of fact to be drawn from the facts stated is, that the prisoner took and carried away the money without any consent to his so doing by the clerk, who was present, and that in such case the same rule of law is applicable as would be if the prisoner had taken and carried away the money in the absence of the clerk, and that the prisoner was therefore properly convicted. It has been said that the facts which are stated show that, as a matter of fact, the clerk in this case had no general authority to part with the property in the money entrusted to him on behalf of the Postmaster-General, but only a limited authority to part with a particular sum of money to the prisoner, which was not the sum of money he did part with, or to hand a sum similar to that which he in fact handed to the prisoner to someone else and not to the prisoner, and that consequently the prisoner was by law properly convicted of larceny, even though the clerk intended the prisoner to take and keep the money, or, in other words, even though the clerk intended to part with both the possession of and the property in the money. It has been said that even though the clerk had a general authority to part with the possession of and property in the money, an authority equal to that of the Postmaster-General if he had been present, and even though the clerk intended to part with the possession of and property in the money, yet that the prisoner was properly convicted, because no property in the money did in point of law at any time pass to the prisoner. Any difference of opinion as to the first proposition can only arise upon a

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difference of view as to the proper inference of fact to be drawn. And I think also that the only difference of opinion with regard to the second proposition is a difference as to the true interpretation of the clerk's authority as matter of fact. But the difference as to the last proposition is a difference as to the criminal law. The difference of opinion that has arisen upon that proposition makes it necessary, as it seems to me, to refer to the definition of larceny, and to point out the exact part of that definition which is in question. The definitions which have been generally, and, until now I think, universally accepted are, that "larceny consists in the wrongful or fraudulent taking and carrying away by any person of the mere personal goods of another from any place, with a felonious intent to convert them to his (the taker's) own use and make them his own property, *without the consent of the owner*," and again, "the felonious taking the property of another *without his consent and against his will*, with intent to convert it to the use of the taker." The indictment for larceny is invariably founded upon these definitions, and comprises by necessary inference, if not in express terms, every part of them. It has always been held that each allegation of each part of these definitions is a material allegation in the indictment, and that every one of such allegations must be proved. Where criminal law is so accurately and so mercifully administered as it is in England, and with so firm a determination that no man shall be convicted of crime unless the prosecutor can prove that the case is brought in every particular within the recognised or enacted definition of the crime, it was to be expected that there would be, and it is the fact that there have been, critical decisions on every part of the definition of the crime of larceny. To some people such decisions appear to be subtle; to others carefully and rightfully accurate. One part of the definition is that the taking relied upon as the stealing should be a taking "without the consent and against the will of the owner." That is the part of the definition which is in question in this case. It has always been held to be a necessary part of the definition. "Besides the *animus furandi* it is necessary that the taking of the goods should also be without the consent of the owner," *"invito domino."* (2 Rus., Crimes, 189, ed. 4.) This is of the very essence of the crime of larceny, as well as essential in robbery. The cases quoted are, as to robbery, *Reg. v. McDaniel* (Fost. 121), and as to larceny, *Reg. v. Egginton* (2 Leach, 913). Where the taking which is alleged to be felonious has occurred without the knowledge of the owner or of the person in charge, no difficulty can arise upon this part of the definition. The difficulties which have arisen have been where the goods have been delivered to the prisoner, or have been taken by the prisoner, with the consent of the owner or of the person in charge. In such cases a distinction has been made between the terms "delivery," "possession," and "property." Where the goods are obtained by the prisoner by willing delivery of them to him by the owner, the first proposition of law which has been affirmed is as follows: "If it appear that, although there is a *delivery* by the owner in fact, yet there is clearly no change of property, nor of *legal possession*, but the *legal possession* still remains exclusively in the owner, larceny may be committed exactly as if no such delivery had been made. Thus, if a person

to whom goods are *delivered* has only the *bare charge* or *custody* of them and the *legal possession* remains in the owner, such person may commit larceny by a fraudulent conversion of the goods to his own use." The next received proposition is thus stated: "Where there is a delivery of the goods by the owner, it is a settled and well-established principle that if the owner part with the property in the goods taken there can be no felony in the taking, however fraudulent the means by which such delivery was procured." And, according to the common law, if the owner had not parted with the property in the goods, but only with the *possession* of them, the question of larceny remains open, and depends on the fact whether at the time of the alleged felonious taking the owner parted with the *possession* of the goods in such a manner and to such an extent as to exclude the idea of trespass. If the possession be obtained by fraud, there may be larceny, assuming that the other parts of the definition are fulfilled. If the possession be obtained without fraud, the taking by which the possession is obtained cannot be treated as a taking by trespass, and, consequently, not as a taking without the consent of the owner. The propositions thus expressed leave open a question as to whether they mean that the property in the goods has passed in consideration of law, or whether they mean that "it was the intention of the owner that the property should pass." Now they are addressed to the question whether the thing alleged to have been stolen was taken "without the consent of the owner." Consent or non-consent is an action of the mind; it consists exclusively of the intention of the mind. These propositions, therefore, are treating of a question of intention. If it be said that a man intends to part with the property in a thing which he delivers to another, the meaning of the words is, that he intends that the other should take the thing and keep it as his own. It seems a contradiction in sense to say that the thing so delivered is taken from him "without his consent." It seems to follow that the real meaning of the propositions, when they speak of the owner parting with possession or parting with the property, is as if they were written, "if the owner intend to part with the possession, or intend to part with the property." All the cases are consistent with this view, though it is not expressed in terms in all. In *Reg. v. Harvey* (9 C. & P. 353), Alderson, B., asked the jury whether the prosecutor meant that the prisoner should leave the jugs with the lady, and either bring back the money or make a bargain. In *Reg. v. Johnson* (5 Cox C. C. 37), the jury found, under direction, that the prosecutor *did not intend* to part with the property in the cheque. In *Parke's case* (2 East P. C. p. 671), the question left was, whether there was a sale by Mr. Wilson, and a delivery of the goods with intent to pass the property. The jury found that Mr. Wilson did not intend to give credit. The conviction was indeed set aside, but on the ground, as I apprehend, that there was no evidence to justify the finding of the jury. In *Rez v. Nicholson* (2 East, P. C. p. 669), the conviction was held to be wrong by the judges, on a case reserved, on the ground that the property in the post bills and cash was parted with by the prosecutor *under the idea that it had been fairly won*. The ground of the judgment seems to me to be the *intention* or

idea of the prosecutor. In the case of *R. v. Adams*, it seems to me impossible to say that any property in the hat passed to the prisoner in consideration of law. The hat was delivered by the owner to an innocent messenger of the prisoner upon an assertion that he, the messenger, was sent by Paul. No property passed to Paul, because there was no delivery to him or to an agent of his. No property passed in law to the prisoner, because there was no intention that he should have the hat. But the act of taking relied on was the delivery of the hat by the prosecutor to the messenger, and the prosecutor *intended to part with the property* in the hat, or, in other words, that it should be taken away and kept. The judges, on a case reserved, held that there could be no felony. The decision in the cases of *Reg v. Davenport* and *Reg v. Savage* seem to me to be founded entirely on discussions and considerations as to the *intention of the prosecutor* to pass the property. In *Atkinson's case* (2 East, P. C. 673), the decision of the judges upon a case reserved is, in terms, that there was no felony, as it appeared that the property was intended to pass by the delivery of the owner. In the last case upon this point, the case of *R. v. Prince*, the proposition of law is thus stated by Blackburn, J.: "If the owner *intended* the property to pass, though he would not so have *intended* had he known the real facts, that is sufficient to prevent the offence of obtaining another's property from amounting to larceny; and where the servant has an authority co-equal with the master's, and parts with his master's property, such property cannot be said to be stolen, inasmuch as the servant *intends* to part with the property in it." The question has always been a question left to the jury, and has never hitherto been treated as a difficult question of the law of property to be ruled by the judge. There is no trace in the books of the treatment now sought to be applied. The preamble to the statute 33 Henry 8, c. 1, draws the distinction between goods taken "by stealth" and goods "delivered by the owner willingly, on being deceived by false tokens." On consideration, then, of the authorities, and of the definitions with which they dealt, and on principle, I am of opinion that the proposition of law which would have been applicable in this case if the owner himself had been present is, when accurately stated, that "where there is a delivery of the goods by the owner, there can be no felony if the owner *intend to part with the property* in the goods, however fraudulent the means by which such delivery was procured." Where the delivery is made by a servant or agent of the owner, and the servant or agent have an authority to pass the possession of and the property in the goods as if the owner were present, the same rule is applicable as if the delivery had been made by the master (*R. v. Jackson* and *Reg v. Prince*). But if the delivery be by a servant or agent whose authority is limited, intending only to pass the possession and not to pass the property, then the proposition applicable is that which applies when the master delivers only the possession, and not the property. Although the servant delivers the goods, intending to pass both possession and property, the prisoner may be convicted of larceny, if he obtained the delivery by fraud (*R. v. Longstreeth*, and many other cases); just as if by fraud he obtained

delivery from the owner who intended by such delivery to give possession only, and not to pass the property. Such I believe to be the propositions of law which have been acted upon by a long series of most able and careful judges, and which therefore the present judges, in my opinion, have no authority to overrule. It follows that I cannot agree with a judgment which decides that, even though the clerk had a general authority to part with the possession of and property in the money, an authority equal to that of the Postmaster-General if he had been present, and even though the clerk intended to part with the possession of and property in the money, yet that the prisoner was properly convicted. I think that such a judgment is founded upon and enunciates a wrong proposition of law. Upon the assumptions of fact thus stated, I am of opinion that a prisoner could not be convicted according to the law of larceny. But if the clerk had only a limited special authority to part with the possession of the money entrusted to him, or a limited special authority to part with the property in a different sum from that which he delivered to the prisoner, or a limited special authority to part with a similar sum to that which he delivered to the prisoner, not to the prisoner but to another person, then I am of opinion that the prisoner, upon the assumption that the other parts of the definition of larceny were proved, was properly convicted of taking the money without the consent of the Postmaster-General, and properly convicted of larceny. This reduces the difference of opinion as to the first proposition which has been stated in this case to a difference of opinion as to what was the intention of the clerk with regard to delivering the money; and, for the second proposition as to what was the authority in fact of the clerk. It seems to me that, with regard to passing the possession of and property in the money entrusted to him, he had the same authority as any other bank clerk. If he acted with strict accuracy, his duty was to part with so much money as he was directed to part with by a genuine warrant, and to pay such sum of money to the person mentioned in such warrant. But he had authority to part, not with any specific money, but with any of the money entrusted to him, to anyone of all the persons who should properly present a genuine warrant. That seems to me to be a general authority. To all such persons he had authority to give possession of the money, in order that they might keep it; that is to say, he had authority to pass to all such persons the possession of and property in the money which he handed to them. It seems to me, therefore, that as to passing the possession of and property in the money which he should deliver, he had a general authority to deal with the money as if in place of the owner. It seems to me that the clerk intended to pass to the man who stood before him, that is to say, the prisoner, the possession of and the property in the whole of the money which he laid on the counter for the prisoner to take up, and entered into the prisoner's book as paid to the prisoner; and it seems to me to follow that the prisoner, notwithstanding his fraudulent knowledge of the clerk's mistake, and his fraudulent reticence, and his fraudulent acceptance of what he knew was not due to him, cannot legally be convicted of larceny. I think that the conviction was wrong.

CLEASBY, B.—The case is not affected by the Acts of Parliament extending the criminal responsibility for larceny to bailees and others, because the prisoner was clearly not a bailee so as to be guilty by subsequently converting the money to his own use, and he does not come within any other Act of Parliament. We have, therefore, to deal with a case in which a crime is charged which under the old law would have been punishable with death, and in early times generally received that punishment. The punishment was so severe that the crime was strictly defined, and from the earliest times was not committed by fraudulently dealing with or appropriating the property of others, but was only committed when the property was taken by the accused; and it must be taken fraudulently without the consent of the owner. It is laid down in Foster's Crown Law, p. 123, "It is of the essence of the offence of robbery and larceny that the goods be taken against the will of the owner." Lord Coke, in the 3rd Institute, under the head of larceny or theft, p. 107, quotes the definition in the Mirror of Justice to the above effect, and he then gives the explanation of the words in the Mirror as follows, quoting from the translation, "It is said a taking for bailing or delivery is not in this case." And Lord Coke himself says afterwards, p. 107, "Secondly, it must be an actual taking; by taking and not bailment or delivery, for that is a receipt and not a taking;" and therewith agreeth Glanvil, "*Furtum non est ubi initium habet detentionis per dominium rei*." This continues the law except so far as altered by statute. But the taking does not necessarily mean a taking by force or surreptitiously; and the cases as to what constitutes a taking occupy nearly 100 pages in Russell on Crimes, Vol. 2, page 152, 4th edit. They seem to establish, first, that where delivery is fraudulently obtained from any person having no authority to deal with the property, it is a taking from the owner. The instances of this are obtaining delivery from a mere servant by a false representation of the master's orders; obtaining delivery from a carrier whose only authority is to change the possession from A. to B. by a false representation of being B. Another instance more like the present because there is a mistake is where a person leaves his umbrella or cloak with any person, to be returned on application, and he afterwards fraudulently identifies as his own a more valuable umbrella or cloak belong to another person. This would be a taking, because the parties had no transaction or dealing connected with property, the person in charge having only an authority to return to each person his chattel. Secondly, the cases establish that when the owner himself delivers them, but only for the purpose of some office or custody, as of a man delivering sheep to his shepherd (an instance put by Coke), if the shepherd had them in his charge and fraudulently converted them to his own use it would be a taking, because the right of possession (much less of property) was not for an instant changed. But the cases also establish that where there is a complete dealing or transaction between the parties, for the purpose of passing the property, and so the possession is parted with, there is no taking, and the case is out of the category of larceny. Considering what the penalty was, there was nothing unreasonable or contrary to the spirit of our laws in drawing a dividing line, and holding

that whenever the owner of property is a party to such a transaction as I have mentioned, such serious consequences were not to depend upon the conclusion which might be arrived at as to the precise terms of the transaction, which might be complicated and uncertain and difficult to ascertain. And this agrees with Hawkins's opinion (Pleas of the Crown, Book 1, c. 33, sect. 3), where (in dealing with the question of what shall be a felonious taking), after pointing out that unless there has been a trespass in taking goods there can be no felony in carrying them away, he adds, "And herein our law differs from the civil, which having no capital punishment for bare thefts, deals with offences of this kind (that is fraudulent appropriation of things not taken, as in strict justice most certainly it may; but our law which punishes all theft with death if the thing stolen be above the value of twelve pence, and with corporal punishment if under, rather chooses to deal with them as civil than criminal offences." I believe the rule is as I have stated, and that it is not limited to cases in which the property in the chattel actually passes by virtue of the transaction. I have not seen that limitation put upon it in any text book on the criminal law, and there are, unless I am mistaken, many authorities against it. The cases show no doubt beyond question that where the transaction is of such a nature that the property in the chattel actually passes (though subject to be resumed by reason of fraud or trick), there is no taking and therefore no larceny. But they do not show the converse, viz., that when the property does not pass there is no larceny. On the contrary, they appear to me to show that where there is an intention to part with the property along with the possession, though the fraud is of such a nature as to prevent that intention from operating, there is still no larceny. This seems so clearly to follow from the cardinal rule that there must be a taking against the will of the owner, that the cases rather assume that the intention to transfer the property governs the case than expressly decide it. For how can there be a taking against the will of the owner when the owner hands over the possession, intending by doing so to part with the entire property? As far as my own experience goes, many of the cases of false pretences which I have tried have been cases in which the prisoner has obtained goods from a tradesman upon the false pretence that he came with the order from a customer. In these cases no property passes either to the customer or to the prisoner, and I never heard such a case put forward as a case of larceny. And the authorities are distinct upon cases reserved for the judges that in such cases there is no larceny. In *Reg. v. Adams* the prisoner was indicted for stealing a quantity of bacon and hams, and it appeared that he went to the shop of one Aston, and said he came from Mr. Parker for some hams and bacon, and produced the following note, purporting to be signed by Parker: "Have the goodness to give the bearer ten good thick sides of bacon and four good hams at the lowest price. I shall be in town on Thursday next, and will come and pay you. Yours respectfully, T. PARKER." Aston, believing the note to be the genuine note of Parker (who occasionally dealt with him), delivered the articles to Adams. The jury convicted, but upon a case reserved, upon the question whether the offence was larceny, the judges were

all of opinion that the conviction was wrong. *Coleman's case* (2 East, P. C. c. 16, s. 104, p. 672), is to the same effect. In that case the prisoner got some silver as change, falsely pretending to come from a neighbour for it; and it was held not to be a case of larceny. *Atkinson's case* was a similar one, and the prisoner was convicted; but on a reference to the judges after conviction, all present held that it was no felony, on the ground that the property was intended to pass by the delivery of the owner (2 East, c. 16, s. 104, p. 673). There is also a large class of cases in which it has been held that there was no taking so as to constitute larceny where the possession had been wholly parted with (not by way of mere charge or custody, as in the case of the shepherd or butler), though there was no intention to pass the property. And the distinction has been drawn between delivering yarn to a weaver to work up on the employer's premises, in which there is no complete parting with the possession, and the delivery to a weaver to take home and work up there. In the latter case the possession is wholly parted with, and previous to recent legislation there could be no larceny by subsequent appropriation (2 East, P. C. c. 16, s. 109); so the giving cloth to a tailor to make into a coat. In like manner delivering a horse to be agisted at so much a week (*R. v. Smith, R. & M. C. C. 473*), or cattle to a drover, to be sold on the road, if he could do so (*R. v. Goodbody*, 8 C. & P. 665). In all these cases, the legal possession being wholly transferred, there could be no taking in the nature of a trespass, and they were not formerly cases of larceny. I will only further refer to the case of *R. v. Barnes* (2 Den C. C. 59), and I do so from its resemblance to the present case. The prisoner was indicted for larceny. He was clerk to the prosecutors, and it was his duty to pay dock and town dues. He fraudulently represented that a sum of 3*l.* 10*s.* 4*d.* was required to make the payments, when only 1*l.* 3*s.* was wanted, and obtained the larger sum, intending to appropriate the difference to his own use. Upon a case reserved it was held not to be larceny. The main difference between that case and the present is, that the prisoner there dishonestly made use of falsehood to obtain the larger amount; in the present case he obtained the larger amount by dishonesty, omitting to correct the mistake of the postmistress. In both cases the over-payment was made under a mistake of the facts. In my opinion, all the authorities warrant the proposition of law as laid down by my brother Blackburn, in the last reported case on the subject (*Reg. v. Prince*), which was like the present, a case of payment under a mistake of fact. "If the owner intended the property to pass, though he would not have so intended had he known the real facts, that is sufficient to prevent the offence of obtaining another's property from amounting to larceny; and where the servant has no authority co-equal with the master's, and parts with his master's property, such property cannot be said to be stolen, inasmuch as the servant intends to part with the property in it." With these authorities before me, I cannot accept as the proper test, not the intention of the owner to deliver over the property (which is a question of fact), but the effect of the transaction in passing the property, which might raise in many cases a question of law. This appears to be a novelty, at variance with the definition of larceny, which makes the mind and

intent of the owner the test, and irreconcilable with the manner in which these cases have always been dealt with. And it is of great importance to abide by cases already decided by the judges, because the law of larceny being the same in Ireland as in England, the decisions ought to be the same; and the judges in Ireland may feel themselves bound by adjudged cases (recognised in all the text-books, and long acted upon), though we may assume to overrule them, and so there may be an undesirable divergence of opinion. And it must be borne in mind that the cases which must be overruled, if this new test be adopted (*Adams's case Coleman's case, Atkinson's case*), are not decisions of the Court for Crown Cases Reserved, but the unanimous decisions of all the Judges upon cases submitted to them. However desirable it may be that the law should now be changed, I am not at liberty to set aside or qualify the rule of law so long settled, and to say that an acquisition of a chattel by dishonest means is now a felony. Nor do I feel myself at liberty to leave such a question to the jury. If the transaction is of the nature which I have mentioned, the dishonest mind of the person receiving is immaterial upon the charge of felony, and ought not, therefore, to be left to the jury, otherwise the jury would be misled by their disapproval of anything dishonest into the erroneous conclusion of a felonious intent to do that which is not a felony. But the person with whom the transaction takes place, and from whom the delivery is received, must be a person qualified to enter into the transaction and capable of passing the property. In the present case the transaction was with the clerk of the postmistress. The clerk was the person placed in the office for the purpose (*inter alia*) of making payments and taking receipts. He is called the clerk, and, therefore, his act within the general scope of his authority would be the act of the postmistress. But it is suggested that the postmistress was not in any sense the agent of the Postmaster-General, but had in each case a separate and particular authority to make the payment. And, upon looking into the Act of Parliament 24 & 25 Vict. c. 14, I should not be prepared to decide this case upon the ground that the postmistress had a general authority, or more than a particular one, to make the payment of 10*s.* to the prisoner. And if at the time when the payment was made the postmistress or clerk had done some act wholly out of the authority, as, for instance, payment to a stranger, I should feel a difficulty in saying it must be regarded as the act of a person capable of passing the property in such a transaction. But upon this it is not necessary to give a decided opinion, because the prisoner was the person to be paid the 10*s.* for which he applied under the order, and the authority was to pay him that sum. The exercise of power in making too large a payment on behalf of the Postmaster-General was therefore only excessive, and according to the ordinary rule in the exercise of powers, was valid so far as it was within the power, the excess being clearly separable. This is not the case of the postmistress being authorised to deliver one bag of money to one person, and another bag of money to another person. In that case the prisoner knowingly getting the wrong bag would get something to which he had no colour of title. The authority here is to enter into an account with the prisoner by paying him a certain amount, and making a

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corresponding alteration in the balance, and this is done; the payment is made, and the corresponding alteration in the balance, but there is a mistake in the amount paid, and so in the balance and it becomes really the ordinary case of over-payment by a banker's clerk by mistake. It appears to me quite impossible, with due attention to the facts, to regard the prisoner as a stranger intervening in a transaction between other parties. No other party was present or was named, and the prisoner entered and left the office in the same character, viz., that of payee, though he left it as payee of a larger amount than he was entitled to, and carried with him the book, which was an unanswerable proof that he was payee, and was payee of the larger amount. The prisoner was therefore entitled to be paid the 10s. out of the money handed to him, and that being so, there is a technical objection to the conviction that there are no particular chattels or pieces of money in respect of which the charge of larceny can be sustained. But, independent of this technical objection, the duty of the prisoner, if he had acted as he ought to have done, was to have taken 10s. out of the amount, and to have handed the rest to the clerk. He ought at the same time to have handed back his book, and had it corrected, because it charged him with the receipt of 8*l.* odd; but his omission to do this does not, in my opinion, involve him in a charge of larceny. There was no mistake in the person, because the prisoner handed in his order and also his deposit book, and if the clerk had known him well, it would have made no difference. He would still have paid him the wrong amount, because the same cause would have operated, viz., looking at the wrong order. There was no mistake in the amount—I mean it was not the case of the clerk handing him a hundred pound note when he intended to hand a five pound note, or unknowingly two notes instead of one. He intended paying the prisoner the particular sum; and it was a deliberate act, because he took the amount from a document, and completed the transaction by debiting the prisoner with that sum in his book. So that it was not like the case of a wrong sum being put down by mistake, and the prisoner snatching it up, and running away with it for the purpose of preventing the mistake from being set right. The mistake was in the supposed amount of the prisoner's claim. The prisoner applied for 10*s.*, and the clerk thought he was entitled to more, and paid him accordingly, and this over-payment might have been afterwards adopted by the post-mistress, so as to make the prisoner chargeable with the balance. The clerk did not the less intend to make the payment which he deliberately made, because he was at the time under the influence of a mistake. He would not have intended to make the payment but for the mistake. Mistakes are constantly occurring, and few people can say that they have not acted under their influence, but their acts remain as acts done at the time, though their effects may be afterwards corrected. No doubt there was no intention to overpay the prisoner, that is, to produce the effect of over-payment; but the intention was to do the act of paying the larger sum because it was thought to be the proper one. This is the answer to one argument addressed to us, viz., that the prisoner took up what was intended for another and not for him, and therefore there was a taking by him *invito domino*. The conclusion of law would

be quite correct if it could be correctly said that the amount was intended for another. The clerk ought to have intended that amount for another, and would have done so if he had properly informed himself of the facts, but unfortunately for the prisoner the clerk did not properly inform himself of the facts, and therefore he intended the prisoner to receive the larger amount. The clerk intended A. to receive what he ought to have intended B. to receive, but it was not the less his intention that A. should receive what he handed over to him. There was only one transaction, and only two parties to it, the clerk and the prisoner, and his fault was the work of an instant, and would to an ignorant and illiterate person be connected with some confusion of mind, though the disparity of amount in this case would make a person of any sense correct the mistake. I do not think a man ought to be exposed to a charge of felony upon a transaction of this description, which is altogether founded upon an unexpected blunder of the clerk. The prisoner was undoubtedly at the office for an honest purpose, and finds a larger sum of money than he demanded paid over to him and charged against him. A man may order and pay for certain goods, and by mistake a larger quantity than was paid for may be put in the package, and he may take them away, or he may pay in excess for that which is ordered and delivered. Is the person receiving to be put in the peril of a conviction for felony in all such cases, upon the conclusion which may be arrived at as to whether he knew, or had the means of knowing, and had the *animus furandi*? I think not. I think such cases are out of the area of felony, and therefore the *animus furandi* is inapplicable and ought not to be left to the jury. And any conclusion founded upon the finding of the jury upon a question which ought not to be left to them must be erroneous because the foundation is naught. I think the conviction was against law, and ought to be quashed.

Conviction affirmed.

COURT OF QUEEN'S BENCH.

Reported by J. SHORTT and M. W. MCKELLAR, Esqrs.
Barristers-at-Law.

Friday, May 23, 1873.

Re ELISE V. H. COUNHAYE.

Extradition Act 1870 (33 & 34 Vict. c. 52) ss. 2, 6, 10, 14, 26—Fraudulent bankruptcy—Accessories—Depositions—Requirements of treaty—Time of application of Act.

The Extradition Act 1870, which is expressed in the schedule to apply to crimes by bankrupts against bankruptcy law, does not relate to persons not being bankrupts who have been accomplices in a fraudulent bankruptcy.

Accessories before the fact to the other crimes in the list are, however, equally liable with principals.

Depositions, if duly authenticated, are admissible as evidence under sect. 14, although not taken in the presence of the accused, nor upon the investigation of the particular charge: and matters of procedure required by a treaty and not by statute need not be considered.

Quære, whether sect. 6 renders the Act applicable to crimes committed before the Act was passed.

THIS was a motion to discharge from the custody of the Governor of the Clerkenwell House of Detention Madame Elise Victorine Hortense Coun-

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haye, upon the return to a writ of *habeas corpus* which had been obtained at her instance.

It appeared that on the 8th May, in pursuance of a requisition made to the Home Secretary by the diplomatic representative of Belgium, for the surrender of the said Elise Counhaye, accused of the commission of the crime of complicity in a case of fraudulent bankruptcy within the jurisdiction of Belgium, the chief magistrate of the Metropolitan Police court in Bow-street had, after hearing evidence and reading depositions, committed the said Elise Counhaye to await the order of the Secretary of State for her surrender.

A warrant of arrest in the French language issued by a judge or magistrate in Belgium was produced before the magistrate, of which the following is a translation:—

Charged with complicity of fraudulent bankruptcy in Brussels in 1870, namely, [notamment] in having deposited on the 5th July 1870, at the Société Générale de Paris, a sum of 175,000 francs in her own name, in exchange of seven bonds to the bearer of the aforesaid society, bonds which have been abstracted from the creditors of the insolvency of her husband, declared on the 25th July 1870, by the Tribunal of Commerce of Brussels, when the money which has served to its purchase belonged evidently to the insolvent himself, or derived of his trade.

There were also produced in evidence documents which were proved to be respectively an adjudication in bankruptcy, and a judgment of the Tribunal of Commerce at Brussels, against Adolphe Counhaye, husband of the said Elise Counhaye, and against the brother of the said Adolphe Counhaye, who was his partner.

Depositions were also produced which had been taken upon the adjudication of the bankruptcy of the brothers Counhaye; and also depositions taken upon evidence of the said Elise Counhaye's complicity in the fraudulent bankruptcy of her husband; but in no instance had these depositions been made in the said Elise Counhaye's presence, nor were any of them taken before the judge or magistrate who had issued the said warrant of arrest.

From the documents and depositions, and from the evidence heard before the magistrate, it appeared that on the 1st July 1870, the said Elise Counhaye, accompanied by her husband, purchased seven bonds of the Société Générale, at their office at Paris, for 175,000 francs, which sum she then and there deposited. A few days afterwards she and her husband returned to Brussels, and on the 17th July 1870, they removed with their children and all their property to London, having stated, at their departure, their intention to return in a few days to Brussels. The husband, Adolphe Counhaye, had with his brother carried on business at Brussels: and previously to July 1870 they had retired, from accounts which they kept at various banks, sums of money amounting to 600,000 francs; these sums had been acquired by them in the course of their business.

On the 25th July 1870, in the absence of the said Adolphe Counhaye and his brother, who had both fled from Belgium, and in the absence of the said Elise Counhaye, who was then in London, the said brothers Counhaye were at Brussels adjudicated bankrupts.

When arrested in London on the 26th April last, the said Elise Counhaye was charged with complicity in her husband's fraudulent bankruptcy, by depositing 175,000 francs at the Société Générale

in Paris; she then said, "I did so, but it was my own money."

The Extradition Act 1870 (33 & 34 Vict. c. 52) was passed on the 9th August, 1870. By sect. 2, "Where an arrangement has been made with any foreign state with respect to the surrender to such state of any fugitive criminals, Her Majesty may by order in Council direct that this section shall apply in the case of such foreign state."

By sect. 6, "Where this Act applies in the case of any foreign state, every fugitive criminal of that State who is in or suspected of being in any part of Her Majesty's dominions, or that part which is specified in the order applying this Act (as the case may be), shall be liable to be apprehended and surrendered in manner provided by this Act, whether the crime in respect of which the surrender is sought was committed before or after the date of the order, and whether there is or is not any concurrent jurisdiction in any court of Her Majesty's dominions over that crime."

By sect. 10, "In the case of a fugitive criminal accused of an extradition crime, if the foreign warrant authorising the arrest of such criminal is duly authenticated, and such evidence is produced as (subject to the provisions of this Act) would, according to the law of England, justify the committal for trial of the prisoner, if the crime of which he is accused had been committed in England, the police magistrate shall commit him to prison, but otherwise shall order him to be discharged."

By sect. 14, "Depositions or statements on oath taken in a foreign State, and copies of such original depositions or statements, and foreign certificates of or judicial documents stating the fact of conviction, may, if duly authenticated, be received in evidence in proceedings under this Act."

By sect. 26, "The term 'extradition crime' means a crime which, if committed in England or within English jurisdiction, would be one of the crimes described in the first schedule to this Act," and by the first schedule, "The following list of crimes is to be construed according to the law existing in England, or in a British possession (as the case may be), at the date of the alleged crime, whether by common law or by statute made before or after the passing of this Act."

In this list of crimes are—

"Murder and attempt and conspiracy to murder."

"Manslaughter."

"Crimes by bankrupts against bankruptcy law."

"Sinking or destroying a vessel at sea, or attempting or conspiring to do so."

"Revolt or conspiracy to revolt by two or more persons on board a ship on the high seas against the authority of the master."

On the 31st July 1872, a treaty between Her Majesty and the King of the Belgians, for the mutual surrender of fugitive criminals, was signed at Brussels. By the 1st article it is agreed "that Her Britannic Majesty and His Majesty the King of the Belgians, shall, on requisition made in their name by their respective diplomatic agents, deliver up to each other reciprocally any person except, as regards Great Britain, native born and naturalised subjects of Her Britannic Majesty, and except, as regards Belgium, those who are by birth or who may have become citizens of Belgium, who being accused or convicted as principals or accessories before the fact, of any of the crimes hereinafter specified, committed within the territories of the requiring party, shall be found within the territories of the other party." Then follows a list of crimes in the words of the first schedule of the Extradition Act 1870.

By article 2 "In the case of a person accused (of a crime in Belgium), the requisition for the surrender shall be made to Her Britannic Majesty's Principal Secretary of State for Foreign Affairs by the minister or other diplomatic agent of His Majesty the King of the Belgians, accompanied by a warrant of arrest or other equivalent judicial document, issued by a judge or magistrate duly

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authorised to take cognisance of the acts charged against the accused in Belgium, together with duly authenticated depositions or statements taken on oath before such judge or magistrate, clearly setting forth the said Acts, and containing a description of the person claimed, and any particulars which may seem to identify him."

This treaty was ratified on the 29th Aug. 1872. On the 15th Oct. 1872 an order of Council was made by which, after reciting the 2nd section of the Extradition Act 1860, and the above treaty, "Her Majesty, by and with the advice of her Privy Council, and in virtue of the authority committed to her by the said recited Act, doth order, and it is hereby ordered, that from and after the 28th Oct. 1872, the said Act shall apply in the case of the said treaty with the King of the Belgians."

Sir J. B. Karslake, Q.C., Day Q.C., and R. F. Williams, supported the application on behalf of the said Elise Counhaye: Such complicity in a fraudulent bankruptcy as this is alleged to be is not an extradition crime under the statute or the Belgian treaty. Even if an accessory before the fact of any of the crimes specified in the schedule to the Act could be liable to extradition, as provided by the treaty but not by the statute, yet as Madame Counhaye has never herself been a bankrupt, what she is charged with cannot be included in the description of "crimes by bankrupts against bankruptcy law." Further, this alleged fraudulent bankruptcy was not an extradition crime, for by sec. 26 it must be what constitutes a crime in England. Misdemeanors of fraudulent debtors are enumerated in sect. 11 of the Debtors' Act 1869 (32 & 33 Vict. c. 62); and although it may be that the husband's proceedings come within clause 5 of that section, there is no evidence to connect the purchase of these bonds with the fraudulent removal of his property. Next, the 6th section of the Extradition Act cannot be interpreted to apply the Act to crimes committed before the Act was passed. The period with respect to the order in council is not material, but criminal statutes cannot be retrospective, at all events without express words to that effect. Fugitive criminals were not intended to include persons who at the time of the statute had become residents in this country. It appears also that the depositions used before the magistrate were taken upon the adjudication in bankruptcy, and neither concerning the complicity of the accused, nor in her presence. [BLACKBURN, J.—Sect. 14, merely requires depositions to be duly authenticated; it does not provide for their admissibility according to English law.] That section substitutes documents for oral evidence, but it does not make depositions valid which could not be otherwise evidence. The warrant of arrest, too, is informal, for it charges the accused with a crime in France not in Belgium; and the treaty, which must be read as part of the statute, requires the same judge to issue the warrant and take the depositions.

BLACKBURN, J.—We will relieve the Attorney-General from answering all the objections taken except two, viz., whether the accused, not being a bankrupt herself, has committed an extradition crime; and whether, having fled before the Act was passed, she can be now subject to its provisions.

The Attorney-General (Sir J. D. Coleridge, Q.C.) and Bowen showed cause against the motion.—No doubt the first of these points is at the root of the

matter, for unless the evidence establishes a crime within the statute the accused must be discharged. Although accessories before the Act are distinctly mentioned in the treaty, that cannot, of course, extend the application of the Act. But the Legislature expressly intended that the list of crimes should be construed according to law, and accessories before the fact are by law liable equally with the principals. That accessories are intended to be included is confirmed by the omission to mention anything but the crimes themselves throughout the list, except attempts and conspiracies, which are by law separate and distinct crimes. In the same way that the law implies an accessory before a murder to be within the list, so the list may be interpreted to apply to a person in complicity with a bankrupt in a fraudulent bankruptcy. It would be an unreasonable construction to limit the last crimes in the list to persons conspiring at sea or on board ship to commit them; yet that would be in accordance with the limitation of complicity in fraudulent bankruptcy to persons who are actually bankrupts. Unless this crime is within the Act, it is immaterial to argue as to the time when the Act applies.

BLACKBURN, J.—No doubt if there should be future legislation on this subject, as we have suggested on another occasion, it would be well that the Legislature should state distinctly whether it is intended to apply extradition to crimes committed before the passing of this Act, as well as before the respective Orders in Council. But I think the accused in this case should be discharged from custody on the ground which has been argued. I believe we are all agreed that the 14th section makes depositions admissible in evidence, provided they are duly authenticated, without regard to their having been taken in the manner required by our law. Whether depositions are taken upon the investigation of the particular charge made in this country, or whether taken in the presence of the accused, are matters which we need not consider as affecting the admissibility of the documents. I believe those are points which are seldom or never considered of importance in other European countries, and the section is, I think, satisfied if the authentication is established. I wish, however, to guard myself from being supposed to lay down that a magistrate should accept as indisputable all that is deposed against a person in his absence, or upon a charge against another person. Such a deposition he should take, of course, with qualification, although he cannot refuse to admit it. Nor do I think that the magistrate should concern himself with matters of procedure required by a treaty and not by the statute. Upon the real question, however, in this case I am sorry to say, the application must be granted. The Extradition Act does not include in the fugitive criminals of whom it treats those who, not bankrupts themselves, are guilty of complicity in the frauds of bankrupts. I agree with the Attorney-General that the accessories before the fact of the other crimes in the list would be as liable as the principals; but with respect to fraudulent bankruptcies, the words are "crimes by bankrupts against bankruptcy law," and they can only apply to actual bankrupts. Whether this was a mistake of the Legislature or not, I cannot say; it is conceivable that it may have been intended to make a difference between the law applicable to bankrupts themselves, and that

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concerning accomplices in their fraud; but whatever was the intention, it is impossible for us to extend the application of the Act to the accused in the present case, in the face of these words. We must, therefore, hold that there is no evidence against her of an extradition crime, and the rule for her discharge must be made absolute. I express no opinion on the other point, as to whether the Act applies to crimes committed before it was passed, beyond this—I think it so doubtful, that the law ought to be amended in order to make the intention of the Legislature clear.

QUAIN, J.—I am of the same opinion. The words in the schedule are expressly limited to crimes by bankrupts against bankruptcy law, which do not include the present case. Accessories before the fact in other crimes are, I think, provided for. I agree with my brother Blackburn on all the other points.

ARCHIBALD, J.—I am of the same opinion. The accused woman is not a bankrupt, and therefore cannot be treated as guilty of an extradition crime.

Rule absolute.

Attorneys for applicant, *Ingle, Cooper, and Holmes.*

Attorney for the Crown, *Solicitor of the Treasury.*

Monday, May 26, 1873.

REG. v. HARALD.

Municipal election—Two wards—First vote—5 & 6 Will. 4 c. 76, sect. 44.

If a burgess, rated and enrolled in respect of distinct premises in two or more wards in the same borough, vote in more wards than one at a municipal election, the vote which he gives first is valid, although his subsequent votes in other wards are not.

THIS was a writ of *quo warranto* tried at the last summer assizes at Durham before Willes, J. The defendant was the successful candidate on the return of members to the Sunderland town council for the ward of Sunderland—the borough consisting of two wards, the Sunderland Ward and the Bishop's Wearmouth Ward. The defendant was returned, according to the determination of the trial, by a majority of one over the relator, who was the other candidate. One of the votes in the defendant's favour was that of William Cockburn, who was duly rated for premises in both the said wards, and was enrolled on the registers of both wards. It appeared that on the day of election he voted in both wards, but he stated in evidence that he voted for the defendant in the Sunderland ward before he voted in the Bishop's Wearmouth ward. The judge directed the jury that this was a good vote for the defendant.

On the 11th Nov. last *Herschell, Q.C.*, obtained a rule *nisi* before Cockburn, C.J., Blackburn, Mellor, and Quain, JJ., to set aside the verdict for the defendant, and for a new trial, on account of the learned judge's misdirection with respect to this vote of William Cockburn.

By 5 & 6 Will. 4, c. 76, s. 44, "if a burgess be rated in respect of distinct premises in two or more wards, he shall be entitled to be enrolled and to vote in such one of the wards as he shall select, but not in more than one."

Crompton and Carr showed cause.—In *Reg. v. Tugwell* (L. Rep. 3 Q.B. 704, 713), a burgess was

enrolled in this way for two wards; it was held that a "burgess is not bound voluntarily to select before the election, and by voting" he made his selection. Although the second vote given in the other ward was void, this which was the first given on this day was clearly good.

Herschell, Q.C. and *Hugh Shield*, supported the rule.—Selection must be an act of the mind; and although voting for one particular ward is evidence, as was held in *Reg. v. Tugwell*, of a selection of that ward, voting for two wards is evidence that the burgess made no selection at all. [QUAIN, J.—If he knew the law, his act of voting the first time must be taken to be his selection.] There is no reason why he should be presumed to have known the law. [BLACKBURN, J.—Even if we do not presume his knowledge, we must interpret his intention by what is the law.] Judging from his acts, his intention was to vote in both wards, in which case he made no selection. [BLACKBURN, J.—"If a man, who has election to have a fee in one acre or another, makes a feoffment of one of them, this determines his election:" (Com. Dig. "Election," c. 1.) And "if a man once determines his election, it shall be determined for ever; as if an obligation delivered to the use of A. be refused when he is first informed of it, he cannot afterwards accept it." *Ib. c. 2.*]

BLACKBURN, J.—I think we must discharge this rule, and I am at a loss to understand how it came to be granted. I think the man had a right to select at the time of voting for which ward he would vote, and I think that after voting once his subsequent vote was void. But I do not think that by voting a second time in the other ward he made his first vote invalid.

QUAIN, J.—I am of the same opinion. I see no reason why the second vote should make this other bad.

Rule discharged.

V.C. WICKENS' COURT.

Reported by EDWARD WINSLOW and HENRY GODEFROI, Esqrs., Barristers-at-Law.

Thursday, June 12, 1873.

CORPORATION OF WREXHAM v. TAMPLIN.

Will—Construction—Charitable gift.

A bequest to the mayor and corporation of Wrexham of a "sum of 1000l. to be spent and applied in the discretion of the said mayor and corporation for the use or benefit of the said borough town, or the inhabitants thereof, or of the institutions in the said borough."

Held, to be a good charitable gift.

THIS was an administration suit. The facts were these:—

George Edwards, who resided and was domiciled in Australia, by his will dated 21st Nov. 1861, gave to the plaintiffs, by the description of the mayor and corporation of the borough of Wrexham, Wales, a legacy of 1000l. to be spent and applied in the discretion of the said mayor and corporation in the best way for the use and benefit of the said borough town, or of the inhabitants thereof, or of the institutions in the same borough. The testator then gave all the residue of his estate to N. Chadwick absolutely, and appointed him his sole executor.

The testator died in 1862 possessed of personal property in England, but his will was proved in Australia.

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N. Chadwick died in 1864, having appointed J. B. Bennett in Australia executor of his will.

Letters of administration with the will of George Edwards annexed were granted to the defendant Tamplin for the use and benefit of Bennett, and letters of administration of the estate of N. Chadwick in England, with his will annexed, were also granted to defendant as the attorney of Bennett, and for his use and benefit.

The case now came on for further consideration upon a question as to whether the gift to the corporation was a good charitable gift.

Greene, Q.C. and Freezing for the plaintiffs contended that according to the authorities the gift was good. They cited

Attorney-General v. Lord Lonsdale, 1 Sim. 105;

Nightingale v. Goulburn, 5 Hare, 484;

Whicker v. Hume, 7 H. L. Cas. 124; 31 L. T. Rep. 319;

Dolan v. Macdermott, L. Rep. Eq. 60; L. Rep. 3 Ch. 676;

Mitford v. Reynolds, 1 Phil. 185.

Bristowe, Q.C. and S. Dickinson for the defendant argued that the cases referred to had no application. In all of them the gift was either to a public institution or for some charitable purpose. But here there was nothing to limit the word institutions to public institutions, and it was in the power of the corporation to apply the legacy for purposes which could not be considered charitable. The case came within *Morice v. Bishop of Durham* (9 Ves. 399; 10 Ves. 522); and *James v. Allen* (3 Mer. 17), and that class of authorities.

The VICE-CHANCELLOR.—This is a gift to a corporate body, who are the trustees of the funds of the borough of Wrexham. The testator in making the bequest has directed that it should be applied in the discretion of the corporation "in the best way for the benefit of the said borough town, or of the inhabitants thereof, or of the institutions in the said borough." It has been contended that the word institutions is vague, and may include private institutions, and that the money may be applied for purposes other than charitable; but to hold so, having regard to the context, would be to do what is deprecated by Lord Cairns in *Dolan v. Macdermott* (sup.). The practical rule in these cases is to take the words and context together, and then to say whether upon the fair and natural construction all the purposes can be considered charitable or public. The word "institutions" applies not merely to clubs, co-operative stores, or similar institutions, instituted for a particular class of inhabitants, but to public institutions, and in that sense I consider it is meant in this case. Under these circumstances I hold that the gift is good.

Solicitors, *W. Raimondi*, for *J. James*, Wrexham; *Tamplin*, *Taylor*, and *Joseph*.

COURT OF QUEEN'S BENCH.

Reported by J. SHORTT and M. W. McKELLAR, Esqrs.
Barristers-at-Law.

Saturday, May 31, 1873.

REG. v. THE CHESHIRE LINES COMMITTEE.

Special constables—Order for payment of expenses—Whether order can be made ex parte.

1 & 2 Will. 4, c. 41, s. 1, enables two justices, on it being made to appear to them, upon the oath of any credible witness that any tumult, riot, or felony has taken place, or may be reasonably apprehended in any parish, township, or place situate within the division or limits for which they usually act, &c. to appoint special constables.

1 & 2 Vict. c. 80, s. 1, empowers the justices, on being satisfied on the oath of three or more credible witnesses that the appointment of special constables has been occasioned by the behaviour, or by reasonable apprehension of the behaviour of the persons employed upon any railway, canal, or public work carried on under the authority of Parliament within the district for which the justices usually act, to make orders upon the treasurer or other officer who has the control of the funds of the railway or other company, for the payment of the expenses of the special constables so appointed.

Justices having, under the provisions of the above Acts, appointed a special constable ex parte, and also, ex parte, made an order upon a railway company for the payment of the expenses of the appointment:

Held, that though the appointment of a special constable might be made by the justices ex parte, an order to pay the expenses of the appointment could not be made upon the railway company without previously giving the company an opportunity of being heard against it; and that the order to pay made ex parte was therefore bad.

In this case, *Holker*, Q.C. had obtained a rule calling upon the prosecutors to show cause why a certain order under the hands of John Higson Hayes and Edward Abbott Wright, Esquires, two of her Majesty's justices of the peace in and for the county of Chester, dated the 6th July 1872, whereby Joseph Hume was nominated and appointed a special constable for the township of Barron, in the county of Chester, should not be quashed on the ground that there was no notice of the application for such order given to the Cheshire Lines Committee, and no opportunity afforded to the committee to resist the making of such order, or to show that such order should not be made, and that the said justices had no jurisdiction to make the said order.

Another rule had also been obtained by *Holker*, Q.C. calling on the prosecutors to show cause why a certain order under the hands and seals of Samuel Woodhouse and John Higson Hayes, Esquires, two of her Majesty's justices of the peace in and for the county of Chester, dated the 29th July 1872, ordering the defendants, the Cheshire Lines Committee, to pay to Joseph Hume the sum of 3l. 9s. 1d. for serving as special constable, should not be quashed, on the ground that the said committee had no notice of the application for such order, and no opportunity of showing cause against the making thereof, and also on the ground that such order was not made on the treasurer or other officer of the committee having control of the funds of the committee, and on the grounds that the said justices had no jurisdiction to make the said order.

It appeared that on the 6th July 1872, three persons named respectively George Okell, Joseph Jackson, and Henry Beswick, all of the township of Barron, in the division of Eddisbury, in the county of Chester, made oath before two of the justices for that county, that a tumult and riot might reasonably be apprehended in the said township of Barron, and that the ordinary constables appointed for preserving the peace in the said township were not sufficient in number for the preservation of

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the peace or for the protection of the inhabitants and the security of property in the said township. Thereupon the two justices made the following order:—

Whereas, it hath been made to appear to us, the undersigned, two of Her Majesty's justices of the peace for the said county of Chester, acting in and for the division of Eddisbury in the same county, upon the respective oaths of George Okell, Joseph Jackson, and Henry Beswick, all of the township of Barron, in the said division of Eddisbury, gentlemen, credible witnesses in that behalf, that a tumult and riot may reasonably be apprehended in the said township. Now we, the said justices, being of opinion that the ordinary officers appointed for preserving the peace in the said township are not sufficient for the preservation of the peace therein, and for the protection of the inhabitants, and the security of the property in the said township, do by this precept in writing under our hands, in pursuance of the Act of the 1st and 2nd years of the reign of His late Majesty, King William IV. intituled "An Act for amending the laws relative to the appointment of special constables, and for the better preservation of the peace," nominate and appoint Joseph Hume to act as special constable for the preservation of the public peace, and for the protection of inhabitants, and the security of the property within the said township, for the period of twelve calendar months from the day of the date hereof.

Given under our hands at Frodesham, in the county of Chester, this 6th day of July, in the year of our Lord 1872.

J. H. HAYES.

E. ABBOTT WRIGHT.

Subsequently, on the 29th July 1872, the following order was made upon the Cheshire Lines Committee:—

County of Chester to wit.—Whereas, on the 6th day of July instant, John Higson Hayes and Edward Abbott Wright, Esqrs. two of Her Majesty's justices of the peace in and for the county of Chester, usually acting for the division of Eddisbury, in the same county, in which division the township of Barron, in the neighbourhood of the works of the Chester and West Cheshire Junction Railway, then and now in progress, is situate, did, in pursuance of an Act made and passed in the session of Parliament, held in the first and second years of the reign of his late Majesty William IV. intituled "An Act for amending the laws relative to the appointment of special constables, and for the better preservation of the peace," by precept in writing, under their hands, nominate and appoint Joseph Hume to act as a special constable, for the said township of Barron, in the neighbourhood of the said works, for the preservation of the public peace, and for the protection of the inhabitants, and security of the property within the same, for the period of twelve calendar months from the day of the date thereof. And whereas the oath in such case made and provided was, on the day aforesaid, duly administered by the justices aforesaid to the said Joseph Hume, and he accordingly took upon himself the execution of the said office. And whereas, it hath been made to appear to us, Samuel Woodhouse and John Higson Hayes, Esqrs. two of Her Majesty's justices of the peace, in and for the county aforesaid, usually acting for the division aforesaid, on the oath of three credible witnesses, to wit, George Okell, Joseph Jackson, and Henry Beswick, that the appointment of the said special constables as aforesaid was occasioned by the behaviour and by reasonable apprehension of the behaviour of persons employed upon the said railway works. Now we, the justices last above mentioned, having duly examined into the premises, do hereby, in pursuance of an Act made and passed in the session of Parliament held in the first and second years of the reign of her present Majesty, intituled "An Act for the payment of constables for keeping the peace near public works," order you the said Cheshire Lines Committee, having the control or custody of the funds for making and carrying on the said Cheshire and West Cheshire Junction Railway, to pay the said Joseph Hume the sum of £3 9s. 1d. for the trouble, loss of time and expenses incurred by him, in serving as such special constable from the said 6th day of July instant, to this day, the same being such reasonable allowance for the same as to us, the said justices, seems proper.

Given under our hands and seals at the Abbey Arms

Inn, in Oakmere, in the division and county aforesaid this 29th day of July 1872.

S. WOODHOUSE (L.S.)

J. H. HAYES (L.S.)

In support of the rule to quash these orders of the justices, several affidavits were filed on behalf of the Cheshire Lines Committee. The affidavit of Edward Ross, secretary of the committee, stated that by, or by the authority of "The Cheshire Lines Transfer Act 1865," the undertaking of the West Cheshire Railway Company was transferred to, or is now vested in the Manchester, Sheffield, and Lincolnshire Railway Company, the Great Northern Railway Company, and the Midland Railway Company, and the direction and management of the undertaking, and the control of the funds and revenue thereof is also by virtue of the same Act now vested in a committee appointed by the three last named companies, such committee being called the Cheshire Lines Committee; and by the same Act the West Cheshire Railway Company was dissolved. That certain works are in the course of construction by the contractors for the said committee in the division of Eddisbury, in the county of Chester. That on or about the 21st of August last, the order of the justices of Eddisbury was served upon him (the secretary); that he is not the treasurer or officer having the control or custody of the funds of the West Cheshire Railway Company, or of the said committee, and that there is no person having such custody or control, other than the bankers of the said committee, who hold funds or other moneys of the said committee to the account of the said committee; that his duties as secretary are to act upon and carry out the directions from time to time of the committee, to convene and attend their meetings, to record and enter minutes of the transactions and proceedings of the committee, to take cognizance of all facts and circumstances coming within his knowledge which affect or concern the committee and the undertakings the direction or management whereof is vested in them, and report thereon to the committee, to report to the committee from time to time when occasion or necessity requires, any matters which involve the disposition, payment, or disbursement of their funds or moneys on account of the said undertakings, and to procure cheques and orders from the committee for the payment or discharge of any moneys or accounts required to be paid or discharged by the committee in respect of the said undertakings, and to act generally as the medium of communication between the committee and third parties; that previous to the said 21st Aug. neither he (the secretary) nor the committee had any notice or knowledge, direct or indirect, that any tumult, riot, or felony of the peace had taken place or was apprehended on any part of the works in process of construction under the authority of the committee in the said division, nor of the precept in writing dated the 6th July 1872, referred to in the said order, nor of any of the proceedings relative to the application for or the obtaining of the said precept; that from enquiries which have been made since the 21st Aug. the committee have ascertained, and he is informed and believes, that no tumult, riot, or felony has taken place, or was reasonably apprehended on or before the day on which the appointment referred to in the justices' order was made, at or upon or near to the said works, or by reason of the conduct of any of the persons employed by the

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committee thereon; that it does not appear by any of the said orders of the justices that any tumult, riot, or felony has taken place in any place within the said division, or was reasonably apprehended, or that the ordinary officers were not sufficient for the preservation of the peace within the said division; that the said order and the precept therein referred to are respectively bad in that they show respectively no jurisdiction in the respective justices to make the same, and the said order is also bad, because it is not made upon the treasurer or other officer of the committee having the control or custody of the funds of the committee, and is not binding because all the proceedings taken with respect to the same were taken behind the backs of the committee.

Similar affidavits were filed by other officials of the Cheshire Lines Committee.

The prosecutor's points for argument were, that the appointment of Joseph Hume as a special constable by the order of the 6th July 1872, was made strictly according to the provisions of the statute 1 & 2 Will. 4, c. 41, and that no prior notice was necessary to be given to any person or persons whomsoever of the application to the justices for such order, as in many cases the urgency of the occasion may preclude the giving of any such notice, and there may be no certainty as to the particular person or persons to whom such notice should be given; that the statute 1 & 2 Will. 4, c. 41, is to be construed and acted upon without reference to the statute 1 & 2 Vict. c. 80; that the order of the 29th July 1872 was made strictly according to the provisions of statute 1 & 2 Vict. c. 80; that no prior notice of the application to the justices under this Act is required by the Act, and that the justices had jurisdiction to make an order under this Act without any such prior notice having been given; that it appears that there is no treasurer having the control or custody of the funds of the incorporated company, but that such control and custody are in the Cheshire Lines Committee, who are the officers having such control and custody within the meaning of the statute 1 & 2 Vict. c. 80, and that an order on the committee was rightly served upon their secretary. Defendant's points were, that the order of the 6th of July should be quashed on the ground that the parties affected by it never had any notice of this application to appoint a special constable, nor that there was any reason at all to apprehend any riot or tumult, and that in fact there never was any reasonable apprehension of a riot or tumult, and that it does not appear that the justices who made the order took any steps to test the credibility of the witnesses, and that, in fact, they did not do so; that the order of the 29th July 1872 should be quashed on the grounds that the parties against whom the said order was made, or who were affected thereby, had no notice at any time that any application for such order would or was about to be made, nor of the application to the Secretary of State with respect to the said order, nor of any of the proceedings with reference thereto, and that Edward Ross was not the proper person upon whom the order should have been made.

1 & 2 Will. 4, c. 41, s. 1, enacts "that in all cases where it shall be made to appear to any two or more justices of the peace of any county, riding or division, having a separate commission of the peace, or to any two or more justices of the peace of any liberty, franchise, city, or

town in England or Wales, upon the oath of any credible witness, that any tumult, riot or felony has taken place, or may be reasonably apprehended in any parish, township, or place situate within the division or limits for which the said respective justices usually act, and such justices shall be of opinion that the ordinary officers appointed for preserving the peace are not sufficient for the preservation of the peace, and for the protection of the inhabitants and the security of the property in any such parish, township or place as aforesaid, then and in every such case such justices, or any two or more justices acting for the same division or limits, are hereby authorised to nominate and appoint by precept in writing under their hands, so many as they shall think fit of the householders or other persons (not legally exempt from serving the office of constable) residing in such parish, township, or place as aforesaid, or in the neighbourhood thereof, to act as special constables for such time and in such manner as to the said justices respectively shall seem fit and necessary, for the preservation of the public peace, and for the protection of the inhabitants, and the security of the property in such parish, township, or place; and the justices of the peace who shall appoint any special constable by virtue of this Act, or any one of them, or any other justice of the peace acting for the same division or limits, are and is hereby authorised to administer to every person so appointed the following oath, &c.; provided always, that whenever it shall be deemed necessary to nominate and appoint such special constables as aforesaid, notice of such nomination and appointment, and of the circumstances which have rendered such nomination and appointment expedient, shall be forthwith transmitted by the justices making such nomination and appointment to one of his Majesty's principal Secretaries of State, and to the Lieutenant of the county."

As to the payment of the expenses caused by such appointment, 1 & 2 Vict. c. 80, s. 1, after reciting that "great mischiefs have arisen by the outrageous and unlawful behaviour of labourers and others employed on railroads, canals, and other public works, by reason whereof the appointment of special constables is often necessary for keeping the peace, and for the protection of the inhabitants and security of the property in the neighbourhood of such public works, whereby great expenses have been cast upon the public rates of counties and other districts chargeable with such expenses," enacts "that after the passing of this Act, whenever any special constables shall be appointed, under the authority of an Act passed in the second year of the reign of his late Majesty, &c. and it shall be made to appear to any two or more justices of the peace of any county, riding, or division having a separate commission of the peace, or of any liberty, franchise, city, town or borough, in England or Wales, on the oath of three or more credible witnesses, that the appointment of such special constables has been occasioned by the behaviour or by reasonable apprehension of the behaviour of the persons employed upon any railway, canal, or other public work, made or carried on under the authority of Parliament, within the district or division for which such justices usually act, it shall be lawful for such justices as aforesaid, at any time, not exceeding one calendar month next after such appointment, to make orders from time to time upon the treasurer or other officer who shall have the control or custody of the funds of any company making or carrying on such railroad, canal, or other public work, for the payment of such reasonable allowances for their trouble, loss of time, and expenses to such special constables who shall have so served or be then serving as to the said justices shall seem proper; and a copy of any such order shall be sent by the justices to one of her Majesty's Secretaries of State shall be binding on such company, and on every such treasurer and officer thereof; provided always, that nothing herein contained shall empower any such justices to order any allowance for any such special constables at the rate of more than five shillings daily to be paid to each special constable employed for the purposes aforesaid."

By sect. 2 of the same Act the Secretary of State may reduce excessive orders, and by sect. 3 the amount ordered and allowed may be recovered by distress levied upon the goods and chattels belonging to the company.

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McIntyre, Q.C., showed cause against the rule, and contended that the first order made by the justices, that appointing the special constable, was clearly right, there being nothing in the Act of Parliament or any principle of law prohibiting such an appointment being made *ex parte*. Wherever it is "made to appear" to two justices, "upon the oath of any credible witness," that a riot or felony has taken place or may reasonably be apprehended, the justices may make the appointment.

Holker, Q.C. in support of the rule, intimated that he would not contest the validity of the first order.

McIntyre, Q.C. in continuation.—As to the second order—made by the justices upon the Cheshire Lines Committee for payment of the expenses of the special constable, that was valid without notice of the intention to make it, or any opportunity of opposing it being given to the committee. The justices in making the order, acted in strict pursuance of the requisites of the statute, having been satisfied by "the oath of three or more credible witnesses" as recited in the order. The statute mentions no other requisite; and it is submitted there was no other which it was necessary to observe. [BLACKBURN, J.—It will be urged against you that it must necessarily be implied in such a case that the party against whom the order is made must previously be heard, it being one of the first principles of law that no one can be condemned to pay money without having an opportunity of being previously heard.] The Act of Parliament expressly mentioning one requisite, and one only, it is submitted that no other can be implied. It is quite clear that the justices may in the first instance, under the prior Act, appoint special constables without giving notice to any person. [QUAIN, J.—But the matter is very different when you come to deal with the interests of individuals and order them to pay money.] The statute would surely have contained some provision about taking out a summons or giving a notice, if such were necessary. There is nothing whatever in the Act to show that such a notice should be given. [BLACKBURN, J.—There is nothing in it to show that such a notice should not be given; and then, does not the general rule of law apply that before an order is made calling on a person to pay money, that person should have an opportunity of being heard? QUAIN, J. referred to the language of Lord Hobart (Hob. Rep. 87), that "even an Act of Parliament, made against natural equity, as to make a man judge in his own cause, is void in itself, for *jura naturæ sunt inscrutabilia*, and they are *leges legum*." BLACKBURN, J. expressed his dissent from this view of the law, and referred to the opinion given by the judges in the case of the Earl of Essex, temp. Hen. 8.] No doubt the decisions seem against my contention. In *Painter v. The Liverpool Oil Gas Light Company* (3 A. & El. 433), it was held that a warrant issued by a justice, for the levy by distress of a sum due to the Gas Company, without previously summoning and hearing the party to be distrained upon, was illegal, though a summons and hearing were not in terms required by the Act. That was the case of a warrant issued, and so unlike the present. [BLACKBURN, J.—In *Broom's Legal Maxims*, p. 113, it is said: "No proposition is more clearly established than that 'a man cannot incur the loss of liberty or

property for an offence by a judicial proceeding until he has had a fair opportunity of answering the charge against him, unless, indeed, the Legislature has expressly or impliedly given an authority to act without that necessary preliminary.' " And that I take to be very clearly the law. The question then is whether such an authority can be said to be given impliedly, because nothing is said in the Act of Parliament about hearing the party.] The maxim refers to a sentence for any act done or alleged to have been done by the party condemned; but the present is not a case of that sort. The order is here made, by authority of Parliament, merely on the ground of a reasonable apprehension, and the only test of that is the oath of three credible witnesses. [BLACKBURN, J.—It is the railway company who have brought the workmen together, ought they not to have an opportunity of contesting that fact? His Lordship referred to *Re Hammersmith Rentscharge*, (4 Ex. 87).] If the order for payment was not made on the Cheshire Lines Committee, the payment must be made by the general body of ratepayers; and how could a notice be given to the general body of ratepayers? [QUAIN, J.—The enactment in the 3rd section for the recovery of the amount by distress "in all cases where such treasurer, or other officer as aforesaid, shall refuse or neglect, during three weeks next after demand thereof, to pay such sum of money as shall have been ordered by such justices and allowed by the Secretary of State," seems to be in your favour. This looks as if three weeks were given to the party after the making of the order to appeal against it to the Secretary of State.] That it is submitted, was the object of the enactment. [BLACKBURN, J.—That would throw very great difficulty in the way of the party. The justices first decide against him *ex parte*; then the Secretary of State *ex parte* confirms the order of the justices; and then there is an appeal to the Secretary of State against his decision already made allowing the order.] Possibly the three weeks are given to enable the party against whom the order is made to come before the justices and show cause against issuing the distress warrant: *Bonaker v. Evans*, (16 Q. B. 162), will also be relied on by the other side. In that case, under 1 & 2 Vict. c. 106, a writ of sequestration issued from the Consistory Court of the diocese of W. reciting that the bishop had issued a monition ordering the vicar of the vicarage of C. within the diocese, to reside on his benefice, that the monition was served on the vicar, and he returned that he had since commenced residence in consequence of this monition; that it had been officially reported to the bishop that the vicar had so commenced residence, but had not continued to reside, and had not been present at his vicarage house four months on the whole in the year following the monition; that the bishop thereupon by a subsequent order, ordered him to proceed to and reside on the benefice within thirty days, which order had not been complied with, and the bishop had therefore directed the court to sequester the profits until the order should have been complied with or satisfactory reason shown to the bishop, whereupon the court sequestered the profits until, &c. The sequestrator having taken the profits accordingly, an action of debt for money had and received was brought against him by the vicar, and it appearing on the trial that the sequestra-

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tion had issued without notice to the vicar to show cause why it should not issue, it was held by the Court of Exchequer Chamber that such notice was essential to the right of the sequestrator, although after a proper preliminary inquiry the judgment of the bishop is final. That case would be more like the present if the justices had issued a distress warrant, which they have not done. Further there was no appeal in that case from the act of the bishop sequestrating the living, whereas there is an appeal here to the Secretary of State. [BLACKBURN, J.—Nevertheless that case is a very strong one against you, for the Act of Parliament there authorized the bishop to proceed either of his own knowledge or upon proof by affidavit. QUAIN, J.—The fixing of the number of witnesses at three is a point in your favour. BLACKBURN, J.—Certainly one does not see very clearly why the Legislature should have fixed the number three as sufficient to satisfy the justices' mind, if the matter were to be decided only on hearing the other side.]

Holker, Q.C. and Boreasford, in support of the rule.—The real question is whether the making of the order for payment by the Cheshire Lines Committee of the expenses of the special constable was a judicial proceeding on the part of the justices, or merely a ministerial act. If it were a judicial proceeding then the general rule of law applies, and the order should not have been made without giving the Cheshire Lines Committee an opportunity of being heard in opposition to it. That rule is laid down by Parke, B. in *Re Hammoremth Rentcharge* (4 Ex. 96) to be "that no one is to be punished in any judicial proceeding unless he has an opportunity of being heard." In *Capel v. Child* (2 Cr. & J. 579) Bayley, J. said, "I know of no case in which you are to have a judicial proceeding by which a man is to be deprived of any part of his property, without his having an opportunity of being heard." *Bonnacker v. Evans* (*ubi sup.*) and a number of other cases are authorities to the same effect. Then is there anything in the Act of Parliament to show that the Legislature intended that a railway company should be deprived of the privilege which the general law of the land confers on all others? It is submitted that there is nothing whatever in the statute to show any such intention on the part of the Legislature. Though the statute mentions three credible witnesses it does not confine the number to three; and they must be "credible." On determining whether they are so or not the justices must exercise a judicial function. Dr. *Bentley's case* (6 T. Rep. 196); *Ree v. Benn* (7 T. Rep. 275); and *Harper v. Carr* (7 T. Rep. 275); are all authorities in favour of the right of the railway company to be heard before the order for payment is made upon them. [QUAIN, J.—*Capel v. Child* (*ubi sup.*) seems to be the strongest case in your favour. It was there held that a requisition issued by a bishop under 57 Geo. 3, c. 99, s. 50, requiring the vicar of a parish to nominate a curate with a stipend on the ground that it appeared to the bishop, of his own knowledge, that the ecclesiastical duties of the parish were inadequately performed by reason of the vicar's negligence, was in the nature of a judgment and void, as the party had no opportunity of being heard; though the Act of Parliament authorised the issue of a requisition "whenever it shall appear to the satisfaction of any bishop, either of

his own knowledge, or upon proof by affidavit laid before him, that by reason of the number of churches or chapels belonging to any benefice locally situate within his diocese, or . . . the negligence of the spiritual person holding the same, that the ecclesiastical duties of such benefice are inadequately performed." It is quite clear that there must be some judicial proceeding before the order to pay is made, and there is nothing to show that the proceeding before the Secretary of State is any more judicial than that before the justices. There being nothing in the Act expressly or by necessary implication to deprive the railway company of the ordinary privilege enjoyed by all other persons, they should have had an opportunity of being heard before the order was made, and as they had not, the order is void, and the rule should be made absolute.

BLACKBURN, J.—When we examine the Act of Parliament we must see that there is no valid objection to the order made by the justices appointing the special constable, and the rule as to that must be discharged. But the rule as to the order made by the justices on the Cheshire Lines Committee to pay the expenses of the special constable, must be made absolute to quash it, on the ground that from the nature of the proceeding the Cheshire Lines Committee should have had an opportunity of being heard before they were ordered to pay. The general rule of law is not disputed. It is laid down in the judgment of the Exchequer Chamber in *Bonnacker v. Evans* (*ubi sup.*) and stated at greater length in the case relating to *Hammoremth Rentcharge*. And it is this—that though the Legislature may by direct enactment, not necessarily using express words to that effect, enact that something may be done which will finally fix a man with the payment of a sum of money or deprive him of his property, yet that is a thing not to be presumed, but every man is entitled to be heard before he is called on to pay, and be at liberty to show, if he can, that he ought not to pay. Such a proceeding is a judicial one. It is quite a different matter where all that is done is a mere process to bring a party before the court, such as an indictment, the old order of a judge to hold to bail on mesne process and such like. There the proceeding may be *ex parte*. But whenever the proceeding is judicial, where there is a decision, then an opportunity of being heard must be given to the party. The strongest case of all, perhaps, on the subject, is that of *Capel v. Child*, (*ubi sup.*), where from the language of the Act of Parliament it looked as if the bishop might act merely on his own knowledge and authority, the words of the Act being that "whenever it shall appear to the satisfaction of any bishop, either of his own knowledge or upon proof by affidavit, &c." The bishop having issued a requisition by virtue of which it was sought to charge the vicar with payment of the stipend of the curate appointed by the bishop, without previously giving the vicar an opportunity of being heard, the Court of Exchequer Chamber held, notwithstanding the very strong language of the Act of Parliament, that the requisition was void upon this ground. Now, let us examine the language of the present Acts. [His Lordship read s. 1 of 1 & 2 Vict. c. 80.] Now, it is noticeable that this order which the justices are authorised to make on being satisfied by the oath of three or more credible witnesses, will have the effect of causing the railway or

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canal company to pay money; therefore, *prima facie*, according to the general rule of law, it cannot be made, if final, unless the party upon whom it is made has an opportunity of being heard. Now, there is nothing in the words of the Act to show an intention on the part of the Legislature to dispense with the necessity of this opportunity being afforded. The circumstance that three witnesses are mentioned as sufficient to satisfy the minds of the justices no doubt looks somewhat that way; but it does not follow from that fact that the company are not to have an opportunity of being heard. If the rest of the Act of Parliament showed that the order made by the justices was to be merely a formal order—a mere process to bring the parties before the Secretary of State, then there would be nothing to prevent the justices making the order *ex parte*; but there is nothing in the Act to show that. The order made by the justices, if approved by the Secretary of State, is to be binding, and there is nothing to show that the Secretary of State is to give any notice to the parties before approving the order. He may allow the order, either in whole or in part, but nothing is said about his calling the company before him previously to doing so. The 3rd section of the Act provides for the recovery by distress of the amount named in the order, “in all cases where such treasurer or other officer as aforesaid shall refuse or neglect, during three weeks next after demand thereof, to pay such sum of money as shall have been ordered by such justices and allowed by the Secretary of State.” But that does not in terms say that the party upon whom the order is served shall have power to go before the Secretary of State in the interval, and be heard against it; and even if it did say that, it would still be contrary to the ordinary rules of justice that the party ordered to pay should not be heard before the original order to pay was made by the justices. Looking at the matter in this light, I cannot take it that the order made by the justices is merely in the nature of a summons, *ex parte*, to bring the party before the Secretary of State to show cause why the order should not be allowed by him. I think, therefore, that before making the order notice should be given to the party on whom the order is to be made, informing him, some way or another, of the intention to make it, and giving him an opportunity of being heard against it, and showing if he can, that the appointment of the special constable was not made on account of the behaviour, or by reasonable apprehension of the behaviour of persons employed by him. If the company had been heard by the justices and, notwithstanding that, the justices decided against them, then they would necessarily know that the order would be sent up to the Secretary of State for his approval, and they might act accordingly. To do otherwise would be going contrary to the general rule of law. It would be to decide against a party without hearing him. On this ground I think the second order made by the justices was wrong and must be quashed.

QUAIN, J.—I am entirely of the same opinion. The general rule of law is explained by Parke, B. in *Bonnaker v. Evans* (*ubi sup.*), where he says, “No proposition can be more clearly established than that a man cannot incur the loss of liberty or property for an offence by a judicial proceeding, until he has had a fair opportunity of answering

the charge against him, unless indeed the Legislature has expressly or impliedly given an authority to act without that necessary preliminary.” What we have to decide here then, is, whether this was a judicial proceeding on the part of the justices, and if so, whether the railway company's right to be heard is taken away by express enactment, or by necessary implication. I am of opinion that the proceeding is a judicial one, and that there is nothing in the Act of Parliament to take away from the company the right of being heard before an order is made on them for payment. On the construction of the first Act of Parliament we are agreed, that the justices may appoint special constables, *ex parte*, on being satisfied “on the oath of any credible witness that any tumult, riot or felony, has taken place or may be reasonably apprehended in any parish, township or place situate within the division or limits for which the said respective justices usually act, &c.” An application for the appointment of special constables under that section is one with which no individual has anything to do. But the case is very different when we come to the second proceeding, ordering certain persons to pay the expenses of the appointment. In this case, a second question comes before the justices which was not at all before them on the first occasion. The justices, in the words of the Act of Parliament, on being satisfied “on the oath of three or more credible witnesses, that the employment of such special constables has been occasioned by the behaviour, or by reasonable apprehension of the behaviour, of the persons employed upon any railway, canal, or other public work made or carried on under the authority of Parliament, within the district or division for which such justices usually act,” are entitled “at any time not exceeding one calendar month next after such appointment to make orders, from time to time, upon the treasurer or other officer who shall have the control or custody of the funds of any company making or carrying on such railroad, canal or other public work, for the payment of such reasonable allowances for their trouble, loss of time and expenses, to such special constables who shall have so served, or be then serving, as to the said justices shall seem proper.” On this second occasion a wholly new question arises before the justices, viz., whether the appointment was made on account of the behaviour of persons employed by the company. If they are satisfied that the appointment of special constables was so caused, the justices are empowered to make an order upon the company for payment. It seems to me that that is a judicial inquiry, in the largest sense of the word, a warrant of distress issuing subsequently if necessary, to compel payment of the amount ordered. The general rule of law, therefore, applies, unless there is something in the Act of Parliament to show that it is not to be applicable. Now, is there anything in the Act to show that it was the intention of the Legislature to take away from the company the ordinary right of being heard before the order to pay is made upon them? An appeal is given to the Secretary of State, but that does not show that the party is not also entitled to be heard in the court below. I see no words in the Act of Parliament to take away that right, and it would require very strong words to do so. There is nothing which either expressly or impliedly removes the application of the ordinary

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rule of law as to all judicial proceedings. For these reasons I agree with my brother Blackburn that the order for payment made by the justices must be quashed.

Judgment accordingly.

Beresford asked for costs.

BLACKBURN, J.—There is no ground for saying that the justices were guilty of any misconduct. They have only erred in construing a very difficult Act of Parliament. So there will be no costs.

Attorneys for defendants, *Ounliffe and Beaumont*.

TARLING (app.) v. FREDERICKS (resp.)

Theatre—Stage play—Portable booth—Licence—6 & 7 Vict. c. 68, s. 11.

A person who, without licence, acts stage plays for hire in a temporary booth, brings himself within the penalty imposed by 6 & 7 Vict. c. 68, s. 11, on persons performing stage plays "in any place not being a patent theatre, or duly licensed as a theatre."

CASE stated by justices under 20 & 21 Vict. c. 43.

1. This is a case stated by us the undersigned, Francis Henry Newland Glossop, James Montgomery, and Edward Harris Donnithorne, Esqs., three of Her Majesty's justices of the peace for the county of Middlesex acting in and for the division of Brentford, in the said county of Middlesex, under the stat. 20 & 21 Vict. c. 43, for the purpose of obtaining the opinion of the court on questions of law which were raised before us as hereinafter stated.

2. At a petty sessions holden at the Town Hall, New Brentford, in and for the said division of Brentford, on the 20th July last, an information, preferred by James Tarling, an inspector of the metropolitan police duly authorised by the Commissioners of the Metropolitan Police Force (hereinafter called the appellant), against Frederick Fredericks the elder, the manager of a company of strolling players (hereinafter called the respondent), under sect. 11 of the Act 6 & 7 Vict. c. 68, intituled, "An Act for regulating Theatres," for that he the said Frederick Fredericks the elder, did, on the 24th May last, at the township of New Brentford, in the said county of Middlesex, unlawfully for hire cause, permit, or suffer to be acted or presented a stage play in a certain place there, the same not being a patent theatre or duly licensed as a theatre, contrary to the statute, &c., was heard and determined by us, the said parties respectively being then present, and upon such hearing we dismissed the said information.

3. And whereas the appellant, being dissatisfied with our determination upon the hearing of the said information as being erroneous in point of law, hath, pursuant to sect. 2 of the said stat. 20 & 21 Vict. c. 43, duly applied to us in writing to state and sign a case setting forth the facts and grounds of such our determination as aforesaid for the opinion of the court, and hath duly entered into a recognisance as required by the said statute in that behalf.

4. Now, therefore, we the said justices, in compliance with the said application and the provisions of the said statute, do hereby state and sign the following case:—

5. The respondent is the manager of a company of strolling players which has been in the habit of

giving public performances of stage plays in different parts of the country in a temporary booth constructed partly of wood and partly of canvas, with a moveable proscenium, for some time past, and has usually remained in one locality from a few days to several weeks, according to the amount of patronage the performances have obtained from the public.

6. It was proved before us, and in fact admitted by the respondent, that he did, on the 24th May last, in the said booth, which was erected on the land of the Brentford Town Hall and Market House Company, in the said division, which they allowed to be used for that purpose for hire, cause, permit, or suffer to be acted or presented a stage play, and that such booth was not a patent theatre, or duly licensed as a theatre.

7. It was also proved before us that the respondent was not entitled to the benefit of the proviso mentioned and contained in the 23rd section of the Act 6 & 7 Vict. c. 68, which provided that nothing therein contained shall be considered to apply to any theatrical representation in a booth or show which, by the justices of the peace or other persons having authority in that behalf, shall be allowed in any lawful fair, feast, or customary meeting of the like kind.

8. It was contended by the respondent that such booth was not a house or place of public resort within the meaning of the 2nd section of the Act 6 & 7 Vict. c. 68, and did not require to be licensed, and that it was not a place within the meaning of the 11th section of the said Act, whereby it is illegal to cause, permit, or suffer the acting or presenting of a stage play, and that an offence would only be committed under such section if the place was one requiring a licence and capable of being licensed.

9. It was contended by the appellant that the said booth was a house or other place of public resort within the meaning of the 2nd section of the Act 6 & 7 Vict. c. 68, and should be licensed in the manner provided in the said Act, and that even if it was not a place requiring a licence it was a place within the meaning of sect. 11, and that the respondent having for hire caused, permitted, or suffered the acting or presenting of a stage play therein was liable to the penalties mentioned in the 11th section of the Act 6 & 7 Vict. c. 68.

10. And we the said justices were of opinion that the said booth being constructed partly of wood and partly of canvas, and entirely of a temporary and moveable description, and such as is usually found at fairs and similar public meetings, was not a house or other place of public resort within the meaning of the 2nd section of the Act 6 & 7 Vict. c. 68, as decided in the cases of *Davys v. Douglas* (4 H. & N. 180; 28 L. J. 193, M. C.); and *Fredericks v. Howie* (1 H. & C. 381; 31 L. J. 249, M. C.), and that the omission of the words "house or other place of public resort" in the 11th section of that Act, and the substitution of the words "in any place" in such last-mentioned section, did not bring the said booth within the meaning of the statute, but that the 11th section must be read as if the words "house or other place of public resort" had been inserted after the words "stage play," and that the respondent was not liable to the penalties mentioned and set forth in the 11th section of the said Act, as the booth was not a place requiring a licence. We therefore dismissed the said "information."

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11. The question of law for the opinion of the Court of Queen's Bench is, whether such booth is a place within the meaning of sect. 11; and whether the respondent was justified or not in causing stage plays to be acted for hire in such booth as the same was not licensed?

12. If the court is of opinion that we ought to have convicted the respondent, the case to be remitted to us in order that we may convict and impose a penalty.

13. We think it right to add that the parties were not represented by counsel or attorney, and that our attention was not called to the case of *Fredericks v. Payne* (1 H. & C. 584; 32 L. J. 78, M. C.), until some weeks after we had dismissed the information, granted the case, and the appellant had entered into recognizances under the statute.

Given under our hands this 23rd Nov. 1872, at New Brentford, in the county of Middlesex.

F. H. N. GLOSSOP.

JAMES MONTEGOMERY.

E. H. DONNITHORNE.

F. M. White, for the appellant.—The justices were wrong in dismissing this information. Sect. 2 of 6 & 7 Vict. c. 68, enacts that "except as aforesaid, it shall not be lawful for any person to have or keep any house or other place of public resort in Great Britain, for the public performance of stage plays, without authority, by virtue of letters patent from Her Majesty, her heirs and successors or predecessors, or without license from the Lord Chamberlain of Her Majesty's household for the time being, or from the justices of the peace, as hereinafter provided; and every person who shall offend against this enactment shall be liable to forfeit such sum as shall be awarded by the court in which, or the justices by whom, he shall be convicted, not exceeding 20*l.* for every day on which such house or place shall have been so kept open by him for the purpose aforesaid, without legal authority." Then, as to persons performing in unlicensed places, sect. 11 provides "that every person who for hire shall act or present, or cause, permit, or suffer to be acted or presented, any part in any stage play, in any place not being a patent theatre or duly licensed as a theatre, shall forfeit such sum as shall be awarded by the court in which, or the justices by whom, he shall be convicted, not exceeding 10*l.* for every day on which he shall so offend." The performance by the respondent clearly came within this section, and the justices were bound to convict. In the case of *Fredericks* (app.), v. *Payne* (resp.) (1 H. & C. 584), it was expressly decided that a booth theatre, which is taken to pieces and carried from place to place for theatrical representations, is a "place" within the meaning of the 11th section of 6 & 7 Vict. c. 68, and that a person causing a stage play to be acted therein for hire, is liable to the penalty imposed by that section, if it be not licensed or a patent theatre. Bramwell, B., with reference to the argument that the word "place" means "a place which requires a licence," said: "The introduction of words into an Act of Parliament is open to serious objections, and should only be resorted to for the most cogent reasons, so as to avoid a repugnancy of construction or something which is opposed to good sense. But here it would be opposed to good sense to introduce any words, since it would interfere with the very object which the Legislature had in view, viz., to prohibit unli-

censed play acting. By the 2nd section it is provided that no person 'shall have or keep any house or other place of public resort, for the public performance of stage plays,' without letters patent or a licence; and a penalty is imposed upon any one who shall keep open any such house or place for that purpose. That is an express prohibition against keeping such a place, and in addition a penalty is imposed on the person who keeps it. But that alone would not be sufficient. If the statute had stopped there, any person might act at a place not so kept, without becoming liable to any penalty. Thus a band of strolling players, acting in barns and similar places not kept for the purpose, might cause the mischief which it was the object of the Legislature to provide against. But the 11th section prohibits the acting for hire in all places except those that are licensed, whether they be kept for the public performance of stage plays or not, and so forms a necessary complement to the 2nd section. This view is also confirmed by the proviso in the 23rd section. It seems a legitimate inference that booths and shows in a fair, if not excepted by the terms of that proviso, are within the scope of the 11th section."

Edward Clarke, for the respondent, contended that the justices were right in refusing to convict in this case. It was decided in the case of *Dawys v. Douglas* (4 H. & N. 180), that a booth theatre, which is taken to pieces and carried from place to place for theatrical purposes, is not a "house or other place of public resort for the public performance of stage plays," within the meaning of sect. 2 of 6 & 7 Vict. c. 68. Now sect. 11 must be read as merely supplementary to sect. 2, and the penalty imposed by sect. 11 must be taken as intended to refer only to persons who act in a house without a licence, not to those who act in a moveable booth, as was the case in the present instance. As that case decides that the booth is not a "house or other place" within sect. 2, and sects. 3-10 contemplate only the licensing of "houses or other places," as mentioned in sect. 2, the result is that the respondent is wholly unable to get a licence for his booth; and if it is impossible for him to get a licence, it is manifestly unjust to impose a penalty upon him for acting without one. Sect. 11 was not intended to apply to any other cases than those referred to in sect. 2. [BLACKBURN, J.—I take it that if a person acts for hire in a field, he would come within sect. 11.] Can this be so, if he has no power of getting a licence? [BLACKBURN, J.—I think so.] That would be a great hardship. [BLACKBURN, J.—The hardship of the matter seems to be met by the proviso in sect. 23—"Provided always that nothing herein contained shall be construed to apply to any theatrical representation in any booth or show which by the justices of the peace, or other persons having authority in that behalf, shall be allowed in any lawful fair, feast, or customary meeting of the like kind."] The representation in the present case was not at a fair, feast, or customary meeting of the like kind. [QUAIN, J.—The proviso in sect. 23 shows that the Legislature had theatrical booths in their contemplation, and that they desired to confine performances in them to fairs, feasts, and customary meetings of the like kind.] It is submitted that *Fredericks v. Payne* (*ubi sup.*) was wrongly decided.

BLACKBURN, J.—I do not think there can be any doubt about this case; and that the justices should

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have convicted. The 2nd section of the Act provides that, "except as aforesaid, it shall not be lawful for any person to have or keep any house or other place of public resort in Great Britain, for the public performance of stage plays, without authority, by virtue of letters patent, from Her Majesty, her heirs and successors or predecessors, or without licence from the Lord Chamberlain of Her Majesty's household for the time being, or from the justices of the peace, as hereinafter provided," &c. We have not at present to consider whether the justices might or might not under that section license an open field or temporary booth for the performance of plays. That question is not now before us, or whether the decision of the Court of Exchequer in *Davys v. Douglas* (*ubi sup.*) was right or not. The enactment in the 11th section of the Act is a very different thing. That section provides "that every person who for hire shall act or present, or cause, permit, or suffer to be acted or presented, any part in any stage play, in any place not being a patent theatre, or duly licensed as a theatre, shall forfeit such sum as shall be awarded by the court in which, or by the justices by whom, he shall be convicted, not exceeding 10*l.* for every day on which he shall so offend." This applies even to an open field, if plays are acted there for hire; and the person acting them is liable to the penalty. It applies, therefore, of course, to the respondent, and the justices were not in error in convicting.

QUAIN, J.—I am of the same opinion. The proviso in sect. 23 of the Act shows conclusively to me that the Legislature intended that theatrical representations in booths, if allowed at all, should be confined to fairs, feasts, and customary meetings of the like kind, and that the authorisation of the justices should be obtained for that purpose. I think, therefore, that a conviction in the present case would have been proper, and that the justices were wrong.

Judgment for appellant.

Attorneys for appellant, *Ellis and Ellis.*

Attorney for respondent, *H. M. Ody.*

Saturday, May 31, 1873.

MILLER (app.) v. RHIND (resp.).

Metropolitan Police Act (2 & 3 Vict. c. 71), s. 44—*Limitation of time for taking proceedings—Vaccination Act* 1871 (34 & 35 Vict. c. 98) s. 11—*Implied repeal of time in former Act.*

Sect. 11 of the Vaccination Act 1871 (34 & 35 Vict. c. 98) which provides that any complaint may be made for an offence under that Act, or the Vaccination Act of 1867 at any time not exceeding twelve months from the time when the matter of complaint arose, impliedly repeals sect. 44 of the Metropolitan Police Act (2 & 3 Vict. c. 71) so far as regards the limitation of time (six calendar months) for proceedings under the Vaccination Acts, within the metropolis as well as elsewhere.

CASE stated by one of the Metropolitan Police Magistrates, under 20 & 21 Vict. c. 43.

The defendant was summoned by the clerk to the Chelsea guardians for neglecting to take his infant female child to be vaccinated, according to the provisions of the Vaccination Act, 1867.

The case came on for hearing on the 13th June 1872, and was adjourned till the 20th of the same

month, when it was dismissed on the ground of want of jurisdiction.

The complainant being dissatisfied with my determination in the case, as being erroneous in point of law, duly applied to me to state and sign a case setting forth the facts and the grounds of such determination, for the opinion thereon of the Court of Queen's Bench.

In pursuance of which application I beg to submit the following case:—

By sect. 19 of the Vaccination Act 1867 it is enacted that "the parent of every child . . . shall within three months after the birth of such child . . . cause it to be vaccinated." And by sect. 29 a penalty not exceeding twenty shillings is imposed on a parent neglecting to have the child vaccinated.

The defendant's child was born on the 10th Sept. 1871.

The period of three months within which she should have been vaccinated would expire on the 9th of Dec. in the same year.

By sect. 44 of the Police Courts Act, 2 & 3 Vict. c. 71, "all offences . . . punishable on summary conviction . . . may be heard and determined," by a metropolitan magistrate, "within six calendar months at the furthest next after the commission of such offence (*sic*) . . . and not afterwards."

Under this section the offence with which the defendant was charged should have been heard and determined within six calendar months after the 9th Dec. 1871, that is, by the 10th June at the furthest.

The summons was taken out on Thursday the 6th June 1872, and by the ordinary course and practice of this court was made returnable on the Thursday following the 13th of June, but it was then too late to be heard and determined within six calendar months after the alleged commission of the offence.

But it was pointed out by the complainant that by paragraph three of the 11th section of the Vaccination Act 1871 "any complaint may be made . . . for an offence under the Vaccination Acts 1867 and 1871 at any time not exceeding twelve months from the time when the matter of such complaint . . . arose."

And the question was, whether this enactment applies to proceedings before a metropolitan magistrate so as to extend the period from six to twelve months within which complaints may be made in a police court for an offence under the Vaccination Acts.

It was argued that the words of the Vaccination Act were very general, and being a later statute would override the provisions of the Police Act. But I was of opinion that the words of the Police Act were very strict and precise, and could not be superseded by any later statute, unless expressly referred to therein.

The case of *Wray v. Ellis*, in the Court of Queen's Bench (reported in the *Justice of the Peace* 1858, p. 800), though by no means conclusive in the present question, seems to establish that although the provisions of a later statute may be apparently incompatible with those of the Police Acts, still they do not of necessity repeal them.

I considered, therefore, that there was at least a doubt on the subject, and that it would not be prudent to exercise a doubtful jurisdiction, and on this ground I dismissed the summons.

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BOOTH (app.) v. SHADGETT (resp.).

[Q. B.]

If the Court of Queen's Bench should reverse the determination in respect of which this case has been stated, I respectfully request that the court will make such order in the matter as to the court may seem fit.

(Signed) T. J. ARNOLD.

Metcalfe, Q.C. for the appellant, contended that the extended time mentioned in the Vaccination Act 1871, s. 11, was the time within which proceedings might now be taken in the metropolis as well as elsewhere. The words of the Acts are perfectly general, "any complaint may be made and any information laid for an offence under the Vaccination Acts 1867 and 1871 at any time not exceeding twelve months from the time when the matter of such complaint or information arose, and not subsequently." This impliedly repeals sect. 44 of the Police Courts Act, 2 & 3 Vict. c. 71, so far as it is inconsistent with it. The case of *Wray v. Ellis* (1 El. & El. 276) is no authority to the contrary.

No person appeared for the respondent.

BLACKBURN, J.—I think it is quite clear that the Vaccination Act of 1871 gives a period of twelve months for taking proceedings, whether the proceedings are taken within the metropolis or elsewhere.

QUAIN, J. concurred.

Judgment for the appellant.

BOOTH (app.) v. SHADGETT (resp.)

Weights and measures—Balances "light or unjust"—Balance unjust against the seller himself—22 & 23 Vict. c. 56, s. 3.

22 & 23 Vict. c. 56 s. 3, enacts that if any beams, scales, balances, or weights or measures shall, upon inspection by any inspector of weights and measures, be found "light or unjust, or otherwise contrary to the provisions of" the Act, or "if any fraud be wilfully committed in the using thereof," they may be seized and the person using or having it shall be liable to a penalty.

Appellant, who carried about for sale in a cart, pork, bacon, and cheese, was convicted under the above section for having in his possession a spring balance, which was unjust, inasmuch as it gave 17os. to the pound avoirdupois, being 10s. against the seller, and in favour of the purchaser. The justices who convicted negatived fraud on the part of the appellant.

Held, that the conviction was wrong, the enactment being directed wholly against sellers, and not against buyers, using a "light or unjust" beam, &c., which must therefore mean unjust as against the purchaser and in favour of the seller.

CASE stated by justices under 20 & 21 Vict. c. 43.

This is a case stated by us, the undersigned, two of Her Majesty's justices of the peace, in and for the county of Kent, under the statute 20 & 21 Vict. c. 43, for the purpose of obtaining the opinion of the court on questions of law which arose before us as hereinafter stated.

At a petty sessions, holden at the sessions house at Maidstone, in and for Bearstead division, in the county of Kent, on the 4th Nov. 1872, an information preferred by William Shadgett, an inspector of weights and measures (hereinafter called the respondent), against Henry Booth, a provision dealers' assistant (hereinafter called the appellant),

under sect. 2 of the Act 22 & 23 Vict. c. 56, charging, "That the said William Shadgett, on the 7th Sept. last, at the parish of East Farleigh, in the said county, and within his jurisdiction, inspected certain beams, scales, balances, and weights, in the possession of Henry Booth, late of the said parish, labourer, who was selling, offering, and exposing for sale, certain goods, to wit, pork, bacon, and cheese, in a certain public thoroughfare there; and that upon such inspection and examination, he found that the said Henry Booth then and there had in his possession a certain weighing machine, to wit, a spring balance, which was incorrect and unjust, contrary to the form of the statute in such case made and provided," was heard and determined by us, the said justices, respectively, being there present, and upon such hearing the applicant was duly convicted before us of the said offence, and we adjudged him to pay a penalty of 6d. and 9s. 6d. costs, or in default of payment to be imprisoned in the House of Correction at Maidstone for seven days.

And whereas the appellant, being dissatisfied with our determination upon the hearing of the said information, as being erroneous in point of law, hath, pursuant to sect. 2 of the said statute 20 & 21 Vict. c. 43, duly applied to us in writing to state and sign a case, setting forth the facts and grounds of such our determination as aforesaid, for the opinion of this court, and hath duly entered into a recognizance as required by the said statute in that behalf.

Now, therefore, we, the said justices, in compliance with the said application and the provision of the said statute, do hereby state and sign the following case.

Upon the hearing of the information, it was proved, on the part of the respondent, and found as a fact that on the day named in the information, he found the appellant with a horse and cart on the highway in the parish of East Farleigh, within his jurisdiction. The cart was laden with pork, bacon, and cheese, which the appellant was selling, offering, and exposing for sale on the highway. The respondent then proceeded to examine a weighing machine called a spring balance, which the appellant had in his possession, and which was being used by him for the purpose of weighing or selling the before-mentioned articles of food; and on its being tested, the respondent found that the spring balance was incorrect and unjust, inasmuch as it gave seventeen ounces to the pound weight avoirdupois, being one ounce against the seller and in favour of the purchaser, and upon ascertaining this he at once seized the spring balance.

On the part of the appellant, it was contended that the statute being intended for the protection of the public, could apply only to the cases in which the balance was in favour of the party using it, and could not apply to cases where the only result of using the balance on a sale was a benefit to the purchaser, for whose protection the statute was framed, and that the appellant intended and committed no fraud.

We, however, finding that the balance could have been used for the purpose of buying as well as selling, and whilst it was in the possession of a person trading in the manner and under the circumstances hereinbefore stated, was, in fact incorrect and unjust, were of opinion that it was liable to be seized by the respondent, although no fraud on the public was intended to be com-

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mitted by the appellant, and that the evidence given before us brought the case within the operation of the said 2nd section of the Act 22 & 23 Vict. c. 56, and the 5 & 6 W. 4, c. 63, incorporated therewith, and we gave our determination against and convicted the appellant in the manner before stated.

The question of law arising on the above statement for the opinion of this court is, whether the spring-balance found under the circumstances before stated was liable to be seized, and the appellant liable to be convicted.

If the court should be of opinion that the said conviction was legally and properly made, and the appellant is liable as aforesaid, then the said conviction is to stand; but if the court should be of opinion otherwise, then the said information to be dismissed.

Given under our hands this 4th day of November, 1872, at Maidstone, in the County aforesaid.

ROMNEY.

WM. BALSTON.

22 & 23 Vict. c. 56, s. 3, under which the appellant was convicted, enacts that

It shall be lawful for every inspector of weights and measures, or other person or persons duly appointed to inspect weights and measures, at all reasonable times to inspect all beams, scales and balances, and weights and measures, in the possession of any person selling, offering, or exposing for sale, any goods on any open ground, or in any public street, lane, thoroughfare, or other open place; and if upon such inspection or examination, any such beams, scales, or balances, or weights, or measures, shall be found light or unjust, or otherwise contrary to the provisions of this Act, and the hereinbefore recited Act (5 & 6 Will. 4, c. 63), or if any fraud be wilfully committed in the using thereof, the same shall be liable to be seized and forfeited, and the person or persons using, or having in his or her possession, any such false or unjust beams, scales, or balances, or light or unjust weights or measures, shall be liable to any penalty not exceeding five pounds.

Gibbons, for the appellant, contended that the above enactment contemplated only frauds in favour of the seller, and that the present case was not within the mischief intended to be remedied by the Act of Parliament, and that the conviction was wrong. He cited *Carr v. Stringer* (18 L. T. Rep. N. S. 399; L. Rep. 3 Q. B. 433).

Barrow, in support of the conviction: It is clear, from the words of the section, that fraud is not necessary in order to constitute the offence. [BLACKBURN, J.—That is not contended. The question really is, whether this enactment, in which everything points to weights or measures unjust against the purchaser, can be made applicable to a balance unjust against the seller.] The section was intended to apply to all persons travelling about the country, and such persons travel about as much for the purpose of buying as selling. [BLACKBURN, J.—But the legislature says nothing about buying. Even supposing that the appellant actually uses the balance for that purpose.] The Act incorporates that of 5 & 6 Will. 4, c. 63, s. 21, of which, after providing that magistrates in England and Scotland, and grand juries in Ireland, are to procure stamps for inspectors for stamping all weights, &c., under this Act, enacts that "every person who shall use any weight or measure other than those authorised by this Act, or some aliquot parts thereof as hereinbefore described, or which has not been so stamped as aforesaid, except as hereinafter excepted, or which shall be found light or otherwise unjust, shall, on conviction, for-

feit a sum not exceeding 5*l.*, &c." Now, a weight cannot be "otherwise unjust," as distinguished from "light," except by being heavy." [BLACKBURN, J.—But that enactment applies only to weights.] The same policy should surely be applicable to the case of scales. [BLACKBURN, J.—In the construction of penal Acts we cannot go upon considerations of policy, but upon the express words of the enactment.] The 28th section of the same Act empowers justices and inspectors "at all reasonable times to enter any shop, store, warehouse, stall, yard, or place whatsoever within his jurisdiction, wherein goods shall be exposed or kept for sale, or shall be weighed for conveyance or carriage, and there to examine the weights, measures, steelyards, or other weighing machines, and to compare and try the same with the copies of the imperial standard weights and measures required or authorised to be provided under this Act; and if upon such examination it shall appear that the said weights or measures are light, or otherwise unjust, the same shall be liable to be seized and forfeited, &c.," showing that the policy of the legislature was intended to be the same in the case of steelyards or weighing machines, and in that of weights.

BLACKBURN, J.—I am of opinion that the argument in support of the conviction is untenable. All the provisions of the enactment under which the appellant was convicted, are directed against sellers using unjust weights. There is no provision in the Act against buyers doing so, probably because such a case is a very unusual one; at any rate there is no such provision, and the conviction cannot be sustained.

QUAIN, J.—If there were a provision in the Act under which the appellant was convicted, that a seller using an "incorrect" weighing machine, I should agree with the argument for the respondent; but the 3rd section contemplates only the case of a seller using an unjust or light weight. That must mean unjust as regards the buyer. The legislature not having provided for the rare case of a seller using a weighing machine unjust against himself, and the justices having negatived fraud on the part of the appellant, I am of opinion that the appellant is entitled to judgment.

Attorneys for appellant,

Attorneys for respondent, *Palmer, Bull, and Fry.**Judgment for appellant.*

Monday, June 2, 1873.

REG. v. CURZON AND OTHERS.

Beerhouse licensed on the 1st May 1869—Refusal to grant certificate after lapse of licence—Discretion of justices—32 & 33 Vict. c. 27, s. 19.

The applicant, who on the 1st May 1869, held a licence to sell beer on his premises under 11 Geo. 4 & 1 Will. 4, c. 64, s. 2, did not apply for a certificate under sect. 19 of The Wine and Beerhouse Act 1869, at the licensing meetings of 1870 or 1871; and in 1872 the justices, in the exercise of their discretion, under sect. 3 of The Intoxicating Liquors (Licenses Suspension) Act 1871, refused his application for such certificate. The Licensing Act 1872 repeals the said Act of 1871, but in 1873 the justices again refused the applicant a certificate, and upon grounds other than those limited by the Act of 1869.

Held upon mandamus to the justices to grant a cer-

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tificate, that the limitation of the justices' discretion in the Act of 1869 applied only to a licence existing at the time of the application for a certificate; that the law before the Act of 1871 was the same as declared by sect. 3 of that Act, and therefore is not affected by its repeal; and that the justices had jurisdiction to refuse this certificate upon any grounds which justified the refusal of a certificate for a new licence.

THIS was a rule for a *mandamus* to certain licensing justices of the county of Middlesex, directing them to grant or to renew to Isaac Coney a licence to sell beer by retail, to be consumed on the premises in a beerhouse called the Malvern Tavern, in Malvern-road, Kilburn, Middlesex.

It was stated upon affidavit by the said Isaac Coney that he had been the freeholder of the said house, and had carried on the trade of a beer-retailer therein for nine years. In 1868 he applied to the said licensing justices for a spirit licence, but was refused on the ground that the house was too dilapidated. In 1869 he sold the freehold and took the land on a building lease for a term of ninety years. The licence to the old house continued in force until Oct. 1869; and until the passing of the Beerhouse Act (32 & 33 Vict. c. 27), on the 12th July 1869, every holder of a beer licence was entitled, under 11 Geo. 4 & 1 Will. 4. c. 64, s. 2, and the several Acts amending it, to renew his licence as of right on paying the proper excise duties in October of each year.

By the Beerhouse Act 1869 (s. 19), it was declared that "where on the 1st May 1869, a licence under any of the said recited Acts," that is to say, the said Act of 11 Geo. 4 & 1 Will. 4, and the said amending Acts "is in force with respect to any house or shop for the sale by retail therein of beer, cider, or wine, to be consumed on the premises, it shall not be lawful for the justices to refuse an application for a certificate for the sale of beer, cider, or wine, to be consumed on the premises, in respect of such house or shop, except upon one or more of the grounds upon which an application for a certificate under this Act in respect of a licence for the sale of beer, cider, or wine, not to be consumed on the premises, may be refused in accordance with this Act."

The said Isaac Coney did not, nor did his said house, come within any of the exceptions mentioned in the said Act, which was declared to remain in force for two years from the passing thereof (July 1869), and until the end of the then next session of Parliament: and by the Beer House Amendment Act 1870 (33 & 34 Vict. c. 29, July 1870), the principal Act was continued in force for two years from July 1870, and until the end of the then next session of Parliament. The Excise Licence for this house, which was in force on the 1st May 1869, expired in Oct. 1869, and as the said Isaac Coney was then about to pull down the old building and erect a new one on the site thereof, and would for a long time have no use for a licence, he considered it unnecessary to renew it until the new house was built; and he did not renew it, but relied on his right to a licence at any time under the said Beerhouse Act 1869.

He was unable for want of funds to begin the rebuilding of the house until June 1870, but it was finished in time for an application for a licence in March 1871, when he applied for a spirit licence which was refused; and as he had not given alter-

native notices for a beer licence, he did not apply for one.

He believed he was entitled as of right to a renewal of his beer licence in March 1872 (the Beerhouse Act 1869 being then still in force). But the Intoxicating Liquors (Licences Suspension) Act 1871 (34 & 35 Vict. c. 88) was passed in the mean time (Aug. 1871), and by that Act, which was to continue in force and until the 1st Sept. 1872 only, a discretion was given (sect. 3), to the justices to grant or refuse a renewal of licences in force on the 1st May 1869, and his application for a beer licence in March 1872 was refused by the justices in the exercise of such discretion.

By the Licensing Act 1872 (35 & 36 Vict. c. 94), the Intoxicating Liquors (Licences Suspension) Act was repealed, and the Beerhouse Act 1869 was made perpetual, and believing that by such repeal the discretion of the justices to grant or refuse a certificate or licence was taken away, and his absolute right to such certificate or licence to the said tavern revived, the said Isaac Coney applied to the said Edward Cecil Curzon, Major-General Sir Charles Barnston Daubeney, and Wm. Bird, the above-named justices assembled at the adjourned general annual licensing meeting for the said division held at the Vestry-hall, Kensington, aforesaid, on the 25th March 1873, for, and demanded a renewal or grant of, a certificate or licence in respect of the said Malvern tavern as of right, but the said justices refused to grant such certificate or licence, they considering they had no power to grant it. All proper notices required by the statute in that behalf were given.

There has not during the whole of the said tenancy or ownership of the said premises, been any complaint or proceeding whatever against the said Isaac Coney, in respect of his conduct of the business carried on thereat or otherwise, but he has during the whole of the time conducted the said business in a respectable and orderly manner, and he has on the faith of his right to a renewal of the licence so in force on the 1st May 1869, as aforesaid, laid out 2000*l.* in rebuilding the said tavern, which is specially adapted for the purposes of an inn or beer-house, but is unfitted for any other purpose, and he believes himself to be aggrieved by the refusal of the above-named justices to grant him a licence or certificate to sell beer in the said tavern, to be consumed on the premises.

Bosanquet showed cause against the rule on behalf of the licensing justices:—The third section of the Act of 1871, the whole of which Act is repealed by the Act of 1872, certainly recognises the existence of doubts as to the discretion of justices in a case like this; the words are: "Whereas, under the Wine and Beerhouse Act 1869, and the Wine and Beerhouse Act Amendment Act 1870, justices are prohibited in the case of any house or shop with respect to which a licence for the sale by retail therein of beer, cider, or wine, was in force on the 1st day of May 1869, from refusing an application for a certificate in respect of such house, except upon the grounds therein mentioned, and doubts have arisen whether such prohibition extends to the case of an application for a certificate with respect to any such house or shop, if the licence which was in force on the 1st May 1869, or any certificate since granted in respect of the said house or shop, has, by forfeiture, lapse of time, or otherwise, ceased to be in force; and it is expedient to remove such doubts:

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it is therefore hereby declared, that in the case of any such application the justices may, in their discretion, refuse the application upon any ground upon which they might refuse the application, if made, for a certificate with respect to any house or shop with respect to which a licence was not in force on the 1st day of May 1869." If, however, it can be shown that the law under the Act of 1869 ought to be interpreted as it is declared in sect. 3 of the Act of 1871, without the aid of this declaratory section, the *mandamus* should be refused. Now section 19 of the Act of 1869 implies throughout that the applicant, whom the justices are prohibited from refusing a certificate, not only has a licence on the 1st May 1869, but also has a licence in existence at the time of the application. The subject of the section is the renewal of existing licences, and there can be no renewal of a licence which has been dropped for three years.

Field, Q.C. and Besley, supported the rule.—This was a case in which, except for the 3rd section of the Act of 1871, the justices had discretion to refuse a certificate only for the reasons mentioned in sect. 8; neither of those reasons exists here, and the Act of 1871 is now repealed, so the justices are bound to grant a certificate.

Bosquet called the attention of the court to *Hargreaves v. Dawson* (24 L. T. Rep. N.S. 428).

BLACKBURN, J.—That case is exactly in point; the circumstances are like these with the exception that there the licence was forfeited by the misconduct of the tenant instead of being allowed to lapse by the applicant, as in this case. The licensing justices had refused a certificate upon other grounds than those limited by sect. 8, although the house was licensed on the 1st May 1869. The licence was lost on account of the personal misconduct of the then tenant at the licensing meeting in Aug. of that year, and in the following Aug. 1870 the application for a certificate by the landlord was refused. This court, consisting of Cockburn, C.J. Mellor and Lush, JJ. held in May 1871 that the justices had a right to exercise their discretion, as at the time there was no existing licence. If the Legislature had been aware of that decision, the 3rd section might have been omitted from the Act of 1871. But without the authority of that case I was prepared to come to the same conclusion. I think that case is quite right, and if sect. 19 of the Act of 1869 stood alone, without the declaratory interpretation of sect. 3 of the Act of 1871, it should, although clumsily worded, apply only to licences in existence at the time of application, which had existed from the 1st May 1869. That being so, the justices here had power to exercise an unlimited discretion, and refuse this application for a certificate upon other grounds than those mentioned in the Act of 1869. The applicant was in the same position as if he were asking for an entirely new licence. The rule, therefore, will be discharged.

QUAIN, J.—I am of the same opinion, and I had arrived at the same conclusion as that of the judges in *Hargreaves v. Dawson* before I saw the report of the case.

ARCHIBALD, J.—I am of the same opinion. This interpretation of the 19th section of the Act of 1869 has convenience as well as simplicity on its side. If this privilege to holders of licences in May 1869 were not limited to the time of the continuance of the licences, application as of right might be made after the lapse of any number of

years. The Legislature, by the Act of 1871, provided for any doubts upon the subject, but in 1872 repealed that provision. I have, however, no doubt about the meaning of the Act of 1869, without the assistance of the Declaratory Act of 1871.

Rule discharged.

Attorneys for applicant, *Hunter, Gwathkin and Co.*

Attorneys for Justices, *O. and J. Allen and Son.*

Wednesday, June 4, 1873.

HUGGINS v. WARD.

Contagious Diseases (Animals) Act, 1869 (32 & 33 Vict. c. 70)—Order in Council—Notice to police—Proof of order—Amount of penalties.

The appellant was convicted at petty sessions under an order in council made in pursuance of the Contagious Diseases (Animals) Act 1869, for having in his possession six animals affected with a contagious or infectious disease, and neglecting with all practicable speed to give notice to a police constable of the fact of the animals being so affected, and he was fined £30. It was proved that the inspector discovered these diseased animals amongst others which were sound upon the appellant's premises, but no proof was given that the appellant had or had not given the required notice to a police constable. A copy of the said order in council purporting to be printed by the Government printers was produced in evidence, but it was not proved that the order was published in the London Gazette, as required by sect. 81. This order imposes no penalties for offences against the same, as provided by sect. 75.

Held, upon appeal, that the conviction was valid, and that the penalty was not too large under sect. 103. This was a case stated by two justices for the county of Norfolk under 20 & 21 Vict. c. 43.

At a petty sessions holden at the Sessions House in Diss, in and for the division of Diss, in the county of Norfolk, on the 25th Sept. 1872, an information preferred by John Ward (hereinafter called the respondent), against Charles Huggins (hereinafter called the appellant), under the order of Privy Council made on the 20th Dec. 1871, under the Contagious Diseases (Animals) Act, 1869, hereinafter called the Act, charging for that he the said Charles Huggins on the 8th Aug. 1872, at Shelfanger, in the said county, unlawfully was guilty of a certain offence against a certain order of Privy Council, duly made and published on the 20th Dec. 1871, under the Act, and then in force in the said parish of Shelfanger (that is to say), that he had in his possession, or in his charge, fourteen animals, to wit, eight bullocks, three tups, and three lambs, affected with a contagious or infectious disease, and that he neglected with all practicable speed, to give notice to a police constable of the fact of the animals being so affected, contrary to the order and statute, was heard and determined by the justices, the said parties respectively being then present; and upon such hearing, the case against the said Charles Huggins with reference to the said eight bullocks was not proved to the justices' satisfaction, but with reference to the said three tups and three lambs, the appellant was duly convicted before them of the said offence, and they adjudged him to pay a fine of £5 per head on the said three tups and three lambs (£30), and £1 11s. 6d. costs

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to be levied by distress, and in default to be committed to Norwich Castle for two months with hard labour unless sooner paid. And whereas the appellant being dissatisfied with the justices' determination upon the hearing of the said information as being erroneous in point of law had, pursuant to sect. 2 of the said statute, 20 & 21 Vict. c. 43, duly applied in writing to state and sign a case setting forth the facts and the grounds of their determination as aforesaid, for the opinion of this court, and had duly entered into a recognisance as required by the said statute in that behalf.

Therefore the said justices, in compliance with the said application and provisions of the said statute, did thereby state and sign the following case:

Upon the hearing of the information it was proved on the part of the respondent, and found as a fact, that the respondent was a superintendent of police for the division of Diss, in the said county. That a bill, a copy of which is annexed to this case, marked "A," was posted up in Shelfanger.

The respondent put in evidence a copy of the Order of Privy Council, dated 20th Dec. 1871, and numbered 341, purported to be printed by the Government printer. A similar copy formed part of this case.

The respondent produced a printed copy of the *Norwich Mercury* newspaper of the 11th Dec. 1869, containing an advertisement, of which the following is a copy:

Contagious Diseases (Animals) Act 1869.
County of Norfolk.

The local authority acting under the said Act has made the following regulations:

The local authority of the county of Norfolk gives power and authority to the police officers of the county constabulary, subject to such orders as may from time to time be given by the chief constable, to perform all such acts and observe all such things as may be necessary in the carrying out of the 32nd clause, and any other provision of the Contagious Diseases (Animals) Act 1869, and orders of the Privy Council consequent thereon. Animals affected with pleuro-pneumonia shall only be moved for the purpose of immediate slaughter, and to the nearest slaughter-house or other convenient place.

CHAS. B. GILMAN,

Norwich, 4th Dec. 1869. Deputy Clerk, 9923.

and the justices received the same in evidence, and as proof of the fact stated in such advertisement.

It was further proved on the part of the respondent, and found as a fact, that on the 8th Aug. 1872, Edward James King, who is a veterinary surgeon, and inspector for the Diss district under the Act, went to the appellant's premises at Shelfanger, and there found eighty-one sheep, amongst which were three tups and three lambs, which were suffering from foot and mouth disease, which was infectious.

No publication of the said order of the Privy Council in the *London Gazette*, or in any local newspaper was proved.

No proof was given that the defendant had not given the required notice to a police constable.

It was contended on the part of the appellant, that there was no proof of the publication in the *London Gazette* of the said order of the Privy Council, dated the 20th Dec. 1871; that there was no proof of the publication of the said order by the local authority in any local paper or otherwise; that the said justices had no power to inflict any penalty, inasmuch as no penalty was fixed by the said order of the 20th Dec. 1871;

that in the event of their having power to inflict a penalty it must not exceed 20*l.*, as the Privy Council could not have fixed a larger sum; that there was no proof that notice of the appearance of a contagious disease amongst the said animals had not been given to a police constable, as required by the said order.

It was further contended on the part of the appellant that evidence of the posting of the said bill marked "A." was inadmissible, as there was no proof that it came to the knowledge of the appellant, but the justices admitted such evidence.

It was further contended on the part of the appellant that evidence of the said advertisement in the *Norwich Mercury* was improperly admitted, it being of a date anterior to the said order of council, and it not being brought to the knowledge of the appellant; but the justices admitted the evidence.

The justices, however, being of opinion that by the Documentary Evidence Act 1868, sect. 2, *prima facie* the evidence of any order issued before or after the passing of that Act by the Privy Council may be given in all courts of justice by the production of a copy of such order purporting to be printed by the Government printer, held that the Act, sect. 81, requires the publication in some newspaper circulating in the district of the local authority of such orders only as are sent to the local authority by the Privy Council for publication, and that the said order of Privy Council of 20th Dec. 1871 was not sent to the local authority for such publication, nor did it appear on the face of the order that it was the intention of the Privy Council that it should be so published; that with respect to any publication of the order either in the *London Gazette*, or in a local newspaper, (if the latter should be held to be necessary), it was not necessary for the purpose of establishing their jurisdiction, to give proof of such publication, as the Act does not say that the orders of the Privy Council shall be absolutely void if not so published; and it was held by Coleridge, J., that where "the Legislature requires a thing to be done, not in itself essential to the validity of it, and does not in terms specify what shall be the consequence of non-compliance, the court will not make that consequence to be an avoidance of the whole, and for a good reason"—see *Le Feuvre v. Miller* (26 L. J., N. S., 1857, M. C. p. 175, 178)—and further the Act (sect. 42) declares that any want of or defect or irregularity in publication shall not invalidate any order. The sect. 75 permits the Privy Council to impose penalties for offences against the orders not exceeding the sum of £20 for any such offence, and so that in every such order provision be made that a penalty less than the maximum may be ordered to be paid; that every order shall have the like force and effect as if it had been enacted by this Act. Sect. 103 enacts if any person is guilty of any offence against any order or regulation made by the Privy Council in pursuance of this Act, he shall for every such offence (except as otherwise provided in this Act, and except where a less penalty is provided in any such order or regulation) be liable to a penalty not exceeding £20, where any such offence is committed; with respect to more than four animals, a penalty not exceeding 5*l.* for each animal may be imposed instead of the penalty of 20*l.* The justices considered that in sect. 75 the word "may," as to the imposition of penalties by

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the Privy Council, was permissive, and not imperative, and that the Privy Council not having thought fit to exercise the power in this respect the amount of the penalty was not otherwise provided in the Act, nor was a less penalty provided by the order, and, therefore, the case came within the limits of sect. 103. If the word "may" above referred to must be taken as imperative, the order itself, as it seemed to them, must be avoided by the omission. The Order in Council, part 2, sect. 19, sub. sect. 2, does not limit the parties to whom notice is to be given to the police constables of the county; therefore, proof of notice not having been given is simply impossible, and if it were so limited the fact that the Norfolk police force consists of 231 constables of different grades, dispersed throughout the length and breadth of the county, brought the justices to the conclusion that it was not necessary for the prosecutor to prove the negative; but the defendant might prove the affirmative in his defence if he would have the advantage of the same section (11 & 12 Vict. c. 43 s. 14).

The questions of law arising on the above statement were—First, whether the said justices had power to inflict any penalty for the offence charged in the said information; secondly, whether the said justices had any power to inflict a greater penalty than 20*l.*; thirdly, whether it was necessary there should have been proof that no notice was given to a police constable of the appearance of a contagious disease amongst the said animals.

If the court should be of opinion that the said conviction was legally and properly made, and the appellant was liable as aforesaid, then the said conviction was to stand; but if the court should be of opinion that the appellant upon the evidence given was liable to no greater penalty than 20*l.* under the Order in Council, then the penalty was to be reduced to 20*l.*; but if the court should be of opinion otherwise, then the said information was to be dismissed.

The following is a copy of the bill marked "A," referred to in the case:

CONTAGIOUS DISEASES (ANIMALS).

Important particulars in the Act of Parliament, and orders of Privy Council relating thereto.

DISEASED ANIMALS.

1. The term contagious or infectious disease includes cattle plague, pleuro-pneumonia, foot and mouth disease, sheep pox, sheep scab, and glanders in horses.

2. When any such contagious or infectious disease appears, the owner or person in charge shall, as far as practicable, separate such affected animal from other animals not affected. In the case of cattle plague, pleuro-pneumonia, sheep pox, and sheep scab, this is imperative.

3. On the appearance of any contagious disease as above, the owner or person in charge shall, with all practicable speed, give notice of the same to a police constable.

4. All sheds and places used by animals so affected are forthwith to be cleansed and disinfected.

MARKETS, FAIRS, AND SALES.

If any person exposes in a market or fair, or in any sale-yard, public or private, or places in any lair or other place adjacent thereto, an animal affected with contagious or infectious disease, such person is guilty of an offence; and the animal or horse, if affected with cattle plague, sheep pox, or glanders, may be slaughtered without compensation; if affected with any other contagious disease, it may be detained and kept in isolation at the expense of the owner, consignor, or consignee.

MOVING OF ANIMALS.

If any person places or keeps on any uninclosed lands or common, or in a field insufficiently fenced, or on the

side of the highway, or causes to be driven on a highway or thoroughfare, or transported by any conveyance or horse or animal affected with any contagious disease as above, such person is guilty of an offence against the law.

INFECTED PLACES.

1. Places declared infected because of cattle plague or sheep pox will be kept in strict isolation; and no animal dead or alive, or part or refuse &c., of any animal, shall be removed therefrom till the restriction be removed.

2. Where pleuro-pneumonia is declared to exist, the premises and lands contiguous in the same occupation shall be treated as infected on the declaration of the inspector, and no cattle so affected shall be moved from such fields or premises except for immediate slaughter, according to the regulations of the local authority. Nor shall any other cattle be moved therefrom without a licence signed by an officer of the local authority certifying that such cattle were not affected, and had not been in contact with affected cattle. This restriction will last till thirty days after the disappearance of the disease, as declared by an officer of the local authority. Where foot and mouth disease exists cattle affected and those herded with them are not to be moved from the premises or fields contiguous in the same occupation, except for immediate slaughter, according to the regulations of local authority, or under a licence signed by an officer of the local authority. This restriction will last till ten days after the disappearance of the disease, as declared by the officer of the local authority.

OFFENCES AND PENALTIES.

Whoever shall act in contravention of any of the regulations specified above shall be liable to a penalty of £20, and in the case of animals a penalty of £5 for each animal, in lieu of the general penalty. But certain offences such as doing anything without a licence for which a licence is required, or obtaining a licence under false representations or using a fictitious or expired licence, or untruthfully acting with intent to evade the Act of Parliament and orders of the Privy Council, shall be liable to three months' imprisonment with hard labour in lieu of fine.

The police have power to bring to justice persons offending against these laws, and are authorised by the local authority to take all such steps as may be necessary for executing them. This duty they have my orders to perform firmly, but with all propriety and consideration, and it is the interest of all persons, whether cattle owners or meat consumers, to render them every assistance in so doing, particularly in giving information of diseased cattle being brought to market, or into the county generally, either by cattle dealers or other persons. I invite this assistance because it is only by a little temporary sacrifice and the co-operation of all classes that those diseases can be speedily overcome, and these serious restrictions be removed.

G. BLACK, Lt.-Col.,
Chief Constable of Norfolk.

Constabulary Office, Norwich,
29th Nov. 1869.

The Order in Council may be found, although it was not so proved at the hearing before the justices, in a supplement to the *London Gazette* of 20th Dec. 1871. By sect. 19 of the said Order, "Every person having in his possession, or under his charge, an animal (including a horse) affected with a contagious or infectious disease, shall observe the following rules:—(1) He shall, as far as practicable, keep such animal separate from animals not so affected. (2) He shall, with all practicable speed, give notice to a police-constable of the fact of the animal being so affected. Such police-constable shall forthwith give notice thereof to the inspector of the local authority, who shall forthwith report the same to the local authority, and (except in the case of foot and mouth disease) to the Privy Council." The Privy Council has not in any order imposed penalties for offences against the same under sect. 75 of the Act.

Merewether argued for the appellant:—My best point is that some affirmative evidence of this penal

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offence ought to have been produced. [BLACKBURN, J.—Surely the respondent could not be expected to produce all the police of the county.] The Court of Common Pleas in a recent case, *Nicholls v. Hall* (28 L. T. Rep. 473), held that some affirmative evidence of knowledge on the part of the person charged, that his cattle were diseased, was necessary to constitute this offence. At all events the police of the immediate district might be called by the prosecution.

BLACKBURN, J.—We have no doubt that there is no ground for requiring affirmative evidence of this negative offence. The mere charge is sufficient to call upon the defendants to show to whom he gave notice.

QUAIN, J.—I quite agree, and merely add that, at all events in this case, the proof that the inspector found these diseased animals on the appellant's premises, amongst others which were sound, was quite sufficient to throw the burden of proof on the other side.

ARCHIBALD, J.—I agree.

Merewether.—My next point is that the Order of Council having made no provision for penalties for offences against the same, no penalty can be imposed for a breach of its provisions. [BLACKBURN, J.—Sect. 103 answers that objection.] Then the penalty under sect. 75 must be limited to £20. [BLACKBURN, J.—Not if there are more than four diseased animals.] Sect. 103 does not relate to offences under this Order in Council, for the Order, by omitting the penalties, is not in pursuance of the Act.

BLACKBURN, J.—This point is quite untenable. If an order under the Act omits penalties, that subject is provided for by sect. 103.

Merewether.—The next point is concerning the publication of the order. There was no proof of the publication in the *London Gazette*, as required by sect. 81, nor was there any publication in the neighbourhood that this was an offence. Here the offence was created by the Order in Council, yet the only possible notice of it was the posted bill, which he may not have seen.

BLACKBURN, J.—I think the production of the copy of the order purporting to have been printed by the Government printer, was sufficient under the Documentary Evidence Act 1868 (31 & 32 Vict. c. 37) s. 2, sub-sect. 2.

QUAIN and ARCHIBALD, JJ. concurred.

Judgment for respondent.

Attorneys for appellant, *Doyle and Edwards*, for *J. C. Chittock*, Norwich.

Wednesday, June 4, 1873.

MERSEY DOCKS AND HARBOUR BOARD (apps.) v. OVERSEERS OF BIRKENHEAD (resps.)

Poor-rate—Separate assessment of premises in one occupation—Enhanced value by proximity to a losing property.

The appellants' property on the Birkenhead side of the Mersey consists of docks and basins with warehouses, lime kilns, machinery, sheds, and other premises; it was rated by the respondents under nine separate items of premises, the ninth being the docks and their immediate premises, the other eight being the various warehouses and other premises in connection with, but not forming part of, the docks. The ninth item of these premises is worked by the appellants at so great a loss that, although each of the first eight items is capable of separate beneficial occupation, the whole property produces no profit.

Held, that the said premises, other than the docks, were rightly rated at their separate value to a tenant, although that value were enhanced by the proximity of the premises to the docks, which were a losing concern.

THIS was a special case stated by consent and order under 12 & 13 Vict. c. 45, s. 11.

In June 1871, a rate of 2s. in the pound for the relief of the poor of the township of Birkenhead, was made by the respondents, and was afterwards duly signed and allowed, and published as by law required.

The parts of the rate relating to the property of the appellants in the said township are as follows:

Rate made 8th June 1872, Township of Birkenhead.

No.	Name of occupier.	Name of owner.	Description of property.	Gross Estimated rental.	Rateable value.	Rate at 2s. in the pound.
3126	Mersey Dock and Harbour Board.	Dock Board	1. Two new warehouses, &c., on the margin of the Morpeth Dock	2000	1800	£ s. d. 180 0 0
3134	Do.	Do.	2. Workshops, offices, lime kiln, No. 1 adjoining, with the mortar mill and machinery	662	506	59 12 0
3135	Do.	Do.	3. Lime kiln and mortar mill No. 2, and machinery	200	180	18 0 0
3230	Do.	Do.	4. Graving docks, with steam engines and machinery for working same	1300	1170	117 0 0
3240	Do.	Do.	5. Chain-cable and anchor testing works, and the machinery for working same, and yard adjoining, containing 8378 yards of land	2250	2025	202 10 0
3242	Do.	Do.	6. Four new warehouses on margin of Great Float	1400	1280	128 0 0
3243	Do.	Do.	7. Warehouses, and the hydraulic cranes for working the warehouses, engine houses, accumulators, and steam-engines for working the hydraulic cranes and warehouses	4650	4455	445 10 0
3244	Do.	Do.	8. Timber and guano sheds	480	482	48 4 0
3245	Do.	Do.	9. Morpeth and Egerton Docks, and such of the Great Float and low water basin as is lying within the township, with the quays, coal tips, weighing machines, cranes, railways and land, not elsewhere charged, viz.:— 8,444 yards of timber wharf 33,330 " frontage of Great Float 12,238 " railway and tramway 30,815 " land for rails 141,738 " between Duke-street and Victoria Wharf 25,327 " coal depot 36,598 " West Duke-street Wharf			
			298,564 total yards of land	13,338	12,000	1200 0 0

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The appellants gave notice of objection to the assessment committee of the Birkenhead Union, who confirmed the assessment, and the appellants thereupon gave notice of appeal to the quarter sessions of the county of Chester, by whom judgment is to be entered in conformity with the judgment of this court at the sessions next or next but one after such judgment shall be given.

The appellants are a corporation, incorporated and regulated by, and holding docks and other property (including the subject of the said rate) under various Acts of Parliament, all or any of which might be referred to, and were to be taken as part of this case.

The docks and other property so held by the appellants are situated partly on the Lancashire and partly on the Cheshire side of the river Mersey. The property situated on the Cheshire side of the river consists of the property in the township of Birkenhead, which is the subject of the present rate, and certain other similar property in the adjoining township of Seacombe.

The working expenses and average annual cost of the repairs, insurance, and other expenses necessary to maintain the premises (the subject of the said rate) taken as a whole in a condition to produce the income derived therefrom exceed the amount of such income. The largest part of such expenses is attributable to the repairs, maintenance, and other expenses of the docks, basins, and other works mentioned in the ninth item of the said rate; but some part of such expenses is attributable to the respective premises mentioned in the other eight items.

It is admitted for the purposes of this case, but not further or otherwise, that the premises respectively comprised in the said first eight items of the said rate are respectively capable of separate beneficial occupation, apart from the proximity to, and connection with, the docks, and other premises comprised in the said ninth item of the said rate, and would be so capable if the said docks and other premises comprised in the said ninth item were not in existence. It is further admitted for the purposes of this case, but not further or otherwise, that the premises comprised in the first eight items are respectively enhanced in value by reason of their proximity to, and connection with, the docks and other premises comprised in the said ninth item.

It is admitted by the respondents that the expenses of maintaining the docks and other premises comprised in the said 9th item exceed any value derivable from them, and, therefore, that the docks and other premises mentioned in that item are not at present the subject of a profitable occupation, and that the rating thereof cannot be maintained, and that this item is to be struck out of the said rate.

For the purposes of this case, but not further or otherwise, the description of the property in the said rate, and the rateable values of the premises respectively comprised in the said first eight items, as enhanced by their proximity to and connection with the docks and other premises comprised in the said 9th item, may be taken to be correct as before stated.

The questions for the opinion of the court are—

First, whether the premises respectively mentioned in the first eight items of the said rate are properly rated, separately and apart from the

docks and other premises mentioned in the said 9th item; secondly, whether if the premises in the said first eight items are properly rated separately, and apart from the docks and other premises mentioned in the said 9th item, they are properly rated as enhanced in value by their proximity to and connection with the docks and other premises mentioned in the said 9th item; and, if not, how otherwise the said first eight items ought to be rated.

In the event of the court answering the first question in the affirmative, judgment is to be given for the respondents with costs as agreed between the parties; otherwise judgment is to be given for the appellants with costs as agreed between the parties.

Manisty, Q.C. (with him *Crompton*) argued for the appellants against the rate.—The principle upon which the appellants' docks on the other side of the Mersey should be rated, was considered in a case before this court last year, *The Mersey Docks and Harbour Board v. Overseers of Liverpool* (26 L. T. Rep. N.S. 868; L. Rep. 7 Q. B. 643). The court held that the docks on the Liverpool side were not to be treated as one system of docks with those on the Birkenhead side; but the earnings and outgoings of each set of docks must be kept distinct, and the Liverpool docks rated according to the net earnings on that side. Cockburn, C.J. said in delivering judgment, "As to what would be the proper principle to apply, if eventually the Cheshire Docks should prove to be a mere incumbrance and to be a source of no profit, and have to be maintained out of the earnings of the Liverpool docks, is a very different question. I do not see any necessity at present for saying what would be the principle applicable to such a state of things if it should arrive." That state of things has now arrived, and the principle applicable is the question in this case. By the Mersey Docks and Harbour Act 1857 (20 & 21 Vict. c. clxii. s. 50), "All docks and works belonging to the board, and all docks and works that may hereafter belong to the board, shall be bound to constitute one estate only, called the Mersey Dock Estate, and a uniform system of management shall be adopted with respect to the whole of such estate." And by the Mersey Dock Acts Consolidation Act 1858 (21 & 22 Vict. c. xcii. s. 284), "Subject to the provisions of the Mersey Docks and Harbour Act 1857, all the moneys which shall be collected, levied, borrowed, and raised, or received by the board under or by virtue of this Act, or the said Act, the application of which may not be otherwise expressly directed, shall be applied by the board on any order with respect to priority of such application as they shall deem expedient for the following purposes, some or all of them, that is to say,—in payment of all expenses and charges of collecting rates; in payment from time to time of all interest accruing due on moneys borrowed, and to be borrowed, and in payment of the Mersey Docks Annuities, hereinafter authorised to be granted according to the respective priorities of such moneys and annuities under this Act. In the construction of works authorised to be erected, established, and maintained by the board, and in supporting, maintaining, and repairing the same, and in carrying into execution all the provisions of this Act, and of the Mersey Docks and Harbour Act 1857. And in the general

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management, conducting, securing, preserving, improving, amending, maintaining, and protecting the Mersey Docks Estate." From these enactments, it appears, that the principle to be adopted is that which was applied to the rating of branch lines of railway in the case of *Reg. v. Great Western Railway Company* (6 Q. B. 179). It is stated in the judgment of Lord Denman, p. 202: "In order to ascertain the rate, the course pursued has been to take the gross receipts per mile in the respondent parish; and this sum is not in dispute. The deductions to be made from this are calculated on a mileage proportion of all the expenses and outgoings, taking the whole three lines as one entire line in all particulars in which the appellants are at all chargeable; and we do not understand this mode to be objected to. Setting the proportion of these per mile against the gross receipts per mile, the residue has been taken as the rateable value per mile. We are, then, to see whether these deductions include all such as ought to be made on an ordinary occupation exclusive of trade, and also all such matters as are distinctly referable to the trade only, and do not enhance the value of the occupation. If so, the principle of the rate is right." Similarly the appellants here contend that from the view taken by the Legislature, and from the character of the works, all the rated premises being part of one set of docks, all the nine separate heads of premises should be taken as one property, and the rates should be calculated upon the whole of it together. At all events, even if rated separately, there can be no justification for placing an enhanced value upon the first eight items, in consequence of the proximity of the ninth, which is a losing concern.

Holker, Q.C. (with him *K. Digby*), for the respondents.—Mines are a subject for rateability more analogous to these docks than railways. In *Guest v. Overseers of East Dean* (L. Rep. 7 Q. B. 334), the appellant was the owner of iron mines, and he rented two acres and a half of surface land, partly over and partly adjoining the mines. He occupied the mines and land together, using the surface for the purpose of working the mines and getting the ore, and he had erected thereon buildings, machinery, workshops, and tramways. The surface land, buildings, &c., without the mines, would be practically useless. It was held that the appellant was rateable to the poor rate in respect of the surface land, with the buildings, machinery, workshops and tramways, although they were occupied in connection with a non-rateable subject matter, viz., an iron mine. That the way to ascertain the rateable value was to assume the mines and surface to be in different hands, and then to calculate what rent the occupier of the mine would have to pay for the surface with the buildings, &c., erected thereon. So also with respect to a canal and the wharves, engine house, and reservoirs connected with it, the principle of assessment adopted in *The Birmingham Canal Navigation Company v. Overseers of Birmingham* (19 L.T. Rep. N.S. 311) was the distinct rating of separate premises. And even with respect to railways it has been held that, where the gross receipts and the expenditure are not at a uniform rate throughout the line, nor in a uniform ratio to each other, the mode of estimating the rateable value adopted in the case cited on the other side was faulty: (*Reg. v. The Great Western Railway Company* (15 Q. B. 379, 1085).

Further authorities for the principle adopted by the respondents may be found in

Reg. v. West Middlesex Water Works, 1 & E. 716:

Rea v. Lower Milton, 9 B. & C. 810.

Manisty in reply.

BLACKBURN, J.—This matter seems clear enough. It may chance that a rateable property is of such a nature that, although parts of it may be in the possession of different people, or be situated in different rating districts, yet it can only be valued as one property. When it is so, we can but consider what the whole is worth when taken together, and charge the owners or the parts in different districts in proportion to the land covered. Here, however, there is nothing of that sort. These premises consist partly of a dock upon which the board lose money, and partly of warehouses, sheds, and workshops, which are by themselves profitable, but not sufficiently so to make the dock and other premises if taken as one property a beneficial occupation. Although the Legislature has constituted the whole of the property of the Board one estate for the purposes of management, it does not follow that it should be rated as one estate. The Acts nowhere provide that all these buildings shall be occupied or assessed together, and the admission in the case that the first eight items of premises in the rate are capable of separate beneficial occupation apart from the dock is sufficient reason for rating those premises separately. It certainly seems to me upon that statement that the first question ought to be answered in the affirmative, or in favour of the respondents. Then comes the question whether these premises in the first eight items are properly considered of enhanced value in consequence of their proximity to the docks in the ninth item. Any tenant of either of these premises would certainly take into account in fixing the rent he would pay, the advantage to be obtained by the proximity of such docks, even although they might be a losing concern if occupied separately. Similarly, shops, if situated in a good street, may well be rated higher in consequence, although some of the neighbouring shops may be doing badly. It is enough to say, that if this proximity to the docks enhances the separate value of the other premises, that is a matter which should be estimated in the rate.

QUAIN, J.—I am of the same opinion. I can find no authority that because these docks are a losing concern, the neighbouring premises should not be estimated at their separate value. The question always is, what would a tenant give? I think the proximity of the docks would be considered, and I do not think it would be a good answer to a claim for a higher assessment in consequence, that the docks were worked at a loss. Both points are to my mind the same, and must be answered in favour of the respondents.

ARCHIBALD, J.—I am of the same opinion.

Judgment for respondents.

Attorneys for appellants, *Venn and Son*, for *A. T. Squarey*, Liverpool.

Attorneys for respondents, *Chester, Urquhart, Bushby, and Mayhew*, for *J. Townsend*, Liverpool.

Q. B.]

THE AERATED BREAD COMPANY (LIMITED) (apps.) v. GREGG (resp.).

[Q. B.]

Tuesday, July 13, 1873.

THE AERATED BREAD COMPANY (LIMITED) (apps.)
v. GREGG (resp.).*French or fancy bread—Sale of bread otherwise than by weight—6 & 7 Will. 4, c. 37, s. 4.**6 & 7 Will. 4, c. 37, s. 4, provides, under a penalty, that all bread should be sold by weight, but nothing in the Act contained is to prevent any baker or seller of bread from selling "bread usually sold under the denomination of French or Fancy bread or rolls, without previously weighing the same."**The exemption from the necessity of selling by weight applies only to that which was known as French or fancy bread at the time of the passing of the Act (1836) and to bread of a like kind with it.**Bread made in separate loaves, and so baked as to be crusty all over, and now known in the trade as French or fancy bread, but differing from ordinary bread only in the manner of baking, is not French or fancy bread within the meaning of the exemption.*

Case stated by justices under 20 & 21 Vict. c. 43.

1. The appellant was convicted under the 7th section of 6 & 7 Will. 4, c. 37, of the offence of selling bread from a van or carriage without having a correct beam and scales with proper weights or other sufficient balance, under the following circumstances:—

2. The Aerated Bread Company (Limited), is incorporated for the manufacture of bread by a new process, in which carbonic acid gas is by pressure forced into the dough instead of the dough being mixed with a ferment as in the usual method of bread making. The kneading also is effected by machinery, and not by hand.

3. The material of which this bread is made is in all other respects the same as ordinary bread. Two qualities of bread only are manufactured by the company, viz. the best and the seconds, or household bread; the only difference in this respect being, as with other bakers, that the best bread is made of more perfectly sifted flour, and the household bread of flour called "Seconds," which is the same flour with less of the bran sifted out.

4. The bread manufactured by the company is not made and baked in batches as by other bakers. The best bread is made in separate loaves, which are separate in the oven, so as to be crusty all over. The seconds or household bread is baked in tins. The dough for the loaves issues from a spout of a measured size, and the proper quantity for a loaf is cut off by a knife, which descends at measured intervals, and the tins, as they are filled, are sent down a slide into the oven. The best bread for the separate loaves is carried to the oven by hand, and in the oven is, of course, more exposed to evaporation than those enclosed in tins.

5. The company call the loaves baked in tins "Seconds or household bread," and these are sold by the company and their agents by weight, but the best flour loaves, baked separately and not in tins, are not sold by weight, nor are weights and scales sent out with the delivery carts. The company call these "French or fancy bread," and it is under that denomination that they are advertised and sold, and it was contended that being such they came within the exception of the 4th section of the above statute, as follows: "Provided that

nothing in this Act contained shall extend or be construed to extend to prevent or hinder any such baker or seller of bread from selling bread usually sold under the denomination of French or fancy bread or rolls without previously weighing the same."

6. It was proved that such loaves are in the trade known as "French or fancy bread."

7. It was our opinion that these loaves are not French or fancy bread within the meaning of the statute, for the reasons following:

1st. The material of which the bread in question is made in no way differs from the ordinary loaves sold by bakers generally.

2ndly. The material of these loaves is the same, except in the quality of the flour, with that of the seconds or household bread, which the company sells by weight.

3rdly. The manner of making differs only from that of ordinary bread in that the gas is pressed into the pores of the dough by force instead of being produced in the substance of the dough by a ferment.

4thly. That this bread in no way, except the manner of baking in separate loaves, resembles what was called French or fancy bread at the time of the passing of the Act, and is in fact only English bread baked so as to have an outside of crust.

5thly. That no advantage accrues to the consumer from this form of baking, but that it is necessary to the proper baking of the best bread made by the company's process.

6thly. That the tin baked loaf is more troublesome than baking loaves in batches, as is the manner with loaves of ordinary bakers; nevertheless the company treats these tin baked loaves as ordinary and not as fancy bread, and always sells them by weight.

7thly. That the loaves in question do not differ from ordinary loaves more than do the tin baked loaves, except as above appears.

8thly. That if the loaves in question are fancy bread, the tin baked loaves are equally so, but the company do not claim the tin loaves as being either French or fancy bread, but sell them by weight.

For these reasons we were of opinion that the loaves in question were neither "French nor fancy bread," within the exception in the statute, and we convicted the appellant in a single penalty, and agreed to state a case for the opinion of your honourable court.

The question for the consideration of the court is, whether the said loaves are French or fancy bread within the exception in the statute above cited.

If the court shall be of opinion that these loaves are not within the exception, the conviction is to be affirmed; if otherwise, the conviction will be quashed.

Given under our hands this 17th day of February, 1873.

EDWARD WILLIAM CXC.

I. E. B. COX.

Day, Q.C. (with him Finlay) for the appellants, contended that the justices were wrong in convicting. It is found as a fact in the case that the loaves sold by the appellants were known in the trade as fancy bread, which is tantamount to a finding that they were usually bought and sold as fancy bread. If that is so the case

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comes within the exemption contained in the proviso to sect. 4 of 6 & 7 Will. 4, c. 37(a); for the intention of the Legislature was not to confine the exemption, from the necessity of weighing, to what was known as fancy bread at the time of the passing of the Act. *Reg. v. Wood* (L. Rep. 4 Q. B. 559; 20 L. T. Rep. N. S. 654) is an authority to the effect that by fancy bread is meant what is sold and usually known as such at the time of the prosecution, not what was deemed such at the time the Act was passed. Lush, J. delivering the judgment of the majority of the court in that case said: "If the Act had been passed for a limited period only, there might have been reason for supposing that the Legislature thought there would be no change in the staple article during that period, and in that case the proviso might well have been read as if the words had been 'now usually sold under the denomination of fancy bread.' But the Act is a perpetual one, intended to regulate the sale of bread for all time. A similar Act had been in operation in London and within the Bills of Mortality since 1822 (3 Geo. 3, c. 106), and in 1838 an Act was passed for Ireland in terms precisely similar as regards the present question (1 & 2 Vict. c. 28). The same construction must, of course, be put upon the same words in each Act, and what is the proper reading of them now must be the reading a hundred years hence. We cannot suppose that the Legislature meant to stereotype a particular article, or to say, that because it was then an article of luxury it should be so regarded in all time, no matter what changes or improvements may take place in the common food of the country. So to hold would be in course of time to neutralise the Act, instead of making it one of perpetual obligation." "The customer is to be supplied with so many pounds of bread unless he chooses to have an article of exceptional quality—something that is not ordinary bread, and if he buys that the baker is to be at liberty to sell it without reference to its weight. But unless it is of an exceptional character, if it is the common article of consumption, the baker must sell it as such." According to this reasoning, the bread sold by the appellants is within the exemption contained in the proviso, and the conviction was therefore wrong.

J. Thompson, for the respondent, contended that the bread sold by the appellants did not come within the exemption contained in the proviso, and that the conviction was therefore right. Merely calling this bread fancy bread does not make it such; and the justices have expressly found that the materials of which the bread is made are the same as those of which ordinary

bread is made; the only difference between the two kinds of bread sold by the appellants consists in the manner of baking, and such a difference will not make ordinary bread into fancy bread. What is fancy bread is to be determined by seeing what was fancy bread at the time of the passing of the Act; only such, or bread of a like kind with it, comes within the application of the proviso. Whether the bread sold by the appellants was or was not fancy bread was a question of fact for the determination of the justices, and they have determined it against the appellants.

BLACKBURN, J.—I am of opinion that the justices were right in convicting in this case, and that the conviction must be affirmed. The question turns upon the construction of sect. 4 of the 6 & 7 Will. 4, c. 37, and I will first state what is my view as to that enactment. When that Act was passed in the year 1836 there were two kinds of bread in existence, (1) household bread which consisted of ordinary loaves which a buyer would expect to be of full weight, and (2) fancy bread which, according to my recollection was made of a finer quality of flour than the household bread, and was in the shape of a roll, and which a person buying it would hardly expect to be accurately weighed like the other. Then the Legislature intervened, and by the Act of 6 & 7 Will. 4, c. 37, s. 4, provided: [reads the section.] The intention of the Legislature in this was, in my opinion, to allow such bread as was considered fancy bread in the year 1836 to be sold without being previously weighed. When a new kind of bread has been introduced, such as Italian bread or crescents, the point arises whether such bread can be considered as of a like kind to fancy bread as fancy bread was understood in the year 1836. If it is not of the like kind with that, then, no matter by what name it may be called, it must be weighed before it is sold. Taking this view of the matter, the conviction of the appellants was right, because the bread sold by them is found, as a fact, by the justices not to be like what was called and known as fancy bread at the time of the passing of the Act of 6 & 7 Will. 4, c. 37, but to be merely English bread so baked as to have an outside of crust. A change of the name by which the bread is called is unimportant. English bread though baked so as to have an outside of crust is not, in my opinion, fancy bread within the meaning of 6 & 7 Will. 4, c. 37, s. 4, because at the time that Act was passed the question whether bread was or was not fancy bread did not depend upon the fact of there being an outside crust upon it or not. The learned counsel who have argued for the appellants has relied upon the case of *Reg. v. Wood* (L. Rep. 4 Q. B. 559; 20 L. T. Rep. N. S. 654). In that case there was a difference of opinion amongst the members of the court; but the conclusion at which the majority of the court arrived is at variance with that at which I have arrived in the present case. They seem to have thought that the reason why fancy bread was not required by the Legislature to be weighed, as household bread was, was because fancy bread was an article of luxury, and that the term fancy bread was to be applied to such bread as might from time to time be considered as an article of luxury. I am unable to concur in that view of the matter, and if the case of *Reg. v. Wood* (*ubi sup.*) had been precisely in point, we should take time to consider whether we should dissent from the decision of the majority of the court in that case. I am inclined

(a) 6 & 7 Will. 4, 37, s. 4, enacts: "That from and after the commencement of this Act, all bread sold beyond the limits aforesaid, shall be sold by the several bakers or sellers of bread respectively beyond the said limits by weight; and in case any baker or seller of bread, beyond the limits aforesaid, shall sell or cause to be sold bread in any other manner than by weight, then and in such case every such baker or seller of bread, shall for every such offence forfeit and pay any sum not exceeding forty shillings, which the magistrate or magistrates, justice or justices before whom such offender or offenders shall be convicted shall order and direct; provided always that nothing in this Act contained shall extend or be construed to extend, to prevent or hinder any such baker or seller of bread from selling bread usually sold under the denomination of French or fancy bread, or rolls, without previously weighing the same."

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to think that the view which my brother Hannen took in that case was the correct one; and I desire to state that I do not agree in the reasoning of the majority of the court, although I do not think our judgment in the present case conflicts with that pronounced in *Reg. v. Wood*. For the reasons which I have given, I think that the conviction of the appellants was right, and that the conviction should be affirmed.

QUAIN, J.—I am of the same opinion. The question which we have to determine in this case resolves itself into this, whether a common quartern loaf is to be considered French or fancy bread within the meaning of sect. 4 of 6 & 7 Will. 4, c. 37, simply because it happens to be baked separately, and is therefore crusty all round. I am clearly of opinion that it cannot, on that ground, be considered to be French or fancy bread within the meaning of the Act, and that what the Act refers to by the terms French or fancy bread is bread which was usually sold as fancy bread at the time the Act was passed in 1836. By this I do not mean to lay it down that the term fancy bread must be restricted solely to that bread which was sold as fancy bread at the date of the passing of the Act, but that it must be restricted to bread of a like kind with what was then sold as French or fancy bread. The only kind of bread which the Legislature, by that Act, rendered it unnecessary to weigh, was bread which was made in small quantities and in pieces of a small size. The crescents which have been recently introduced are of a like kind with that which the Legislature intended to exempt from the necessity of being weighed, but it was not the intention of the Legislature to take ordinary loaves, like those in the present case, out of the operation of the Act. On these grounds I agree with my brother Blackburn that the conviction was right and ought to be affirmed.

ARCHIBALD, J.—I also am of opinion that the justices were right in convicting the appellants, and that the conviction must be affirmed. I do not think that the proviso which is contained in the end of sect. 4 of 6 & 7 Will. 4, c. 67, can be extended to every kind of bread which at any time may be called fancy bread. I am of opinion that the term fancy bread was intended by the Legislature to refer to that kind of bread which was known and described as fancy bread at the time of the passing of the Act, and to bread of a like kind with it. In my view it is not possible to bring common English bread within the exception contained in the proviso by merely altering the mode in which it is baked, and by baking it in detached pieces so as to make the loaf crusty all round. But I consider that the proviso at the end of the section would include bread of a like kind with what was understood as fancy bread at the time of the passing of the Act, although it may not have been known at that time. In the present case the justices have found as a fact that the bread baked by the appellants does not in any way resemble what was called or known as French or fancy bread; and the conviction must therefore be affirmed. We do not over-rule the case of *Reg. v. Wood* (*ubi sup.*); but I agree with my brother Blackburn in not adopting the reasons given by the majority of the court for their decision in that case.

Conviction affirmed.

Attorneys: for appellants, *Wilson, Bristow, and Carpmals*; for respondent, *A. Haynes*.

COURT OF COMMON PLEAS.

Reported by H. F. POOLEY and JOHN ROSE, Esqrs.,
Barristers-at-Law.

Friday, May 2, 1873.

WEBSTER (app.) v. THE OVERSEERS OF ASHTON-UNDER-LYNE (resps.) (HADFIELD'S CASE).

Right to vote—"Actual possession" of rentcharge—2 Will. 4, c. 45, s. 26—Statute of Uses (27 Hen. 8, cap. 10)—Power of court to overrule its own decisions—6 Vict. c. 18, s. 66.

By indenture, dated the 29th Jan. 1872, which operated under the Statute of Uses, a perpetual yearly rentcharge was granted to the use of H. and sixteen other persons as tenants in common in fee, to be payable by equal half-yearly payments on the 29th July and the 29th Jan. in each year. The first payment, payable on the 29th July, was paid on the 30th July 1872.

Held, that as the conveyance operated under the Statute of Uses, the case was governed by Heelis v. Blain (34 L. J. 88, C.P.; 18 C.B., N.S. 90.), and, therefore, the grantees must be taken to have been in "actual possession" of the rentcharge within the meaning of 2 Will. 4, c. 45, s. 26, from the date of the conveyance, and were entitled to be registered as voters.

Semble, the court will overrule its previous decisions if they are clearly shown to be wrong.

The application of sect. 66 of 6 Vict. c. 18, which enacts that a decision shall be final and conclusive, is limited to the case in which the decision is given.

APPEAL from the revising barrister for the south-eastern division of the county of Lancaster.

The following case was stated by the revising barrister:

At a court held at Ashton-under-Lyne, for the purpose of revising the list of voters for the Ashton-under-Lyne polling district, before me, John Hargrave Hodson, Esq., the barrister appointed to revise the list of voters for the south-eastern division of the county of Lancaster, Thomas Webster duly objected to the name of Joseph Hadfield being inserted in the list of voters for the said division of the said county of Lancaster.

The claim of the said Joseph Hadfield was as follows:

Hadfield, Joseph.	36, Boockport-street, Ashton-under-Lyne.	One seven-teenth share of rentcharge issuing from freehold lands and houses.	Cotton-street, Bentinck-street, and Moss-street, Hugh Mason, owner.
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The following facts were established by the evidence.

By an indenture made and dated the 29th Jan. 1872, and made between Hugh Mason of the first part, the said Joseph Hadfield, Robert Taylor Weild, and others of the second part, and the said Joseph Hadfield and Robert Taylor Weild of the third part, the said Hugh Mason being seised in fee simple in possession of certain lands and messuages in Ashton-under-Lyne aforesaid, granted unto the said Joseph Hadfield and Robert Weild, being parties thereto of the third part and their heirs, one perpetual yearly rentcharge of 35l. 14s., to be payable clear of all deductions whatsoever (except property or income tax), by

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equal half-yearly payments, on the 29th July and the 29th Jan. in each year, and the first payment to be due on the 29th July then next, and to be issuing from and out of and charged and chargeable upon the said lands and messuages; to hold the said rentcharge unto the said Joseph Hadfield and Robert Taylor Weild and their heirs for ever.

In the said deed is contained a declaration that the said rentcharge, and the power of distress therein expressed to be granted to Hadfield and Weild, is so granted, and they thereby agreed that they should hold and stand entitled to the same: "To the use of the said parties thereto of the second part, and their respective heirs and assigns, as tenants in common, and not as joint tenants."

The moiety of the said rentcharge of 35l. 14s. (less property tax), due on the 29th July, was paid on the 30th July 1872, by the said Hugh Mason to Hadfield and Weild, pursuant to the deed, and divided equally by them amongst the said persons, except Alderson Thomas, parties to the said deed, of the second part, and John Richardson, who stands in the stead of the said Alderson Thomas.

It was contended by the objector, that the said Joseph Hadfield was not in the actual possession of the said rentcharge for six calendar months previous to the 31st July 1872, as required by 2 Will. 4, c. 45, s. 26.

It was contended by the party objected to, upon the authority of *Heelis v. Blain* (34 L. J. 83, C. P.; 18 C. B., N. S., 90), that the Statute of Uses (27 Hen. 8, c. 10), operated to give to the said party objected to, and the said other persons parties to the said indenture of the second part, the actual possession of the said rentcharge on the execution of the said indenture.

I held, upon the authority of that case, that the claim was good.

If the court be of opinion that my decision was wrong, the register is to be amended by erasing the name of the said Joseph Hadfield from the said list.

Herschell, Q.C., for the appellant.—I admit that this case falls within the decision in *Heelis v. Blain* (34 L. J. 83, C. P.; 18 C. B., N. S. 90), and contend that that case was wrongly decided, and should be overruled. All the authorities were not brought before the court in that case. "Actual possession" in sect. 26 of 2 Will. 4, c. 45, means physical possession, i.e., in the case of a rentcharge, the receipt of the rent. This view is confirmed by looking at the exceptions in the Act. [*BOVILL, C.J.*—There is a distinction between the possession of an estate or interest in land, and possession of the land itself; and so, in the case of a rentcharge, between possession of the rentcharge as an estate, and possession of it by the receipt of money. *DENMAN, J.*—*Anelay v. Lewis* (17 C. B. 316) is important.] I submit that the Statute of Uses was only intended to deal with the possession of estates, and not with the physical possession of lands or rents. The object was to transfer the legal estate from the feoffee to uses to the person having the use: (Bacon's Reading on the Statute of Uses, pp. 38, 40, 56; Littleton's Tenures, 366, on the distinction between seisin and possession.) The authorities are in favour of this contention. The question has arisen with regard to the action of trespass, whether a person taking under the Statute of Uses gets a

possession which entitles him to maintain trespass. The balance of opinion is that trespass will not lie. In *Green v. Wallwin* (Noy. 73) there is a dictum that the *cestui que use* may have assize, but not trespass:

Geary v. Bearcroft, Carter, 57, 66;
Comyn's Dig. tit. "Trespass" (b. 8);
Fonblanque on Equity, vol. 2, p. 12;
Gilbert on Uses, 3rd edit., p. 185;
Roscoe's Real Property, vol. 2, p. 662;
Williams on Real Property, 8th edit., p. 176.

The only authority that I know to the contrary is an anonymous case in Cro. Eliz. p. 46. "*Nota*. That *cestui que use* at this day is immediately and actually seised and in possession of the land; so as he may have an assize or trespass before entry against any stranger," &c. Perhaps the words "or trespass," may have been introduced by mistake. If the contention of the opposite side is right, the effect would be, with reference to cases under the Statute of Limitations (3 & 4 Will. 4, c. 27), that the statute would never run against a person taking under a conveyance operating under the Statute of Uses, unless he were dispossessed. Coming to *Heelis v. Blain*, I contend that your Lordship should not hesitate to overrule it. No mischievous consequences would arise from your so acting, and such a decision would interfere with no vested rights. If you do not overrule it you will have to carry it out to its logical extent, farther than the actual decision went. The case involves this absurdity, if I take under a common law conveyance, I get no vote without six months' possession; but if I take under a grant to A., to the use of myself, I at once have a vote under the Reform Act. That decision, again, has not met with uniform approval from conveyancers.

J. W. Mellor (Kenelm Digby with him) for the respondents.—*Heelis v. Blain* has been acted upon for eleven years, and has not been shown to conflict with any decision of this court, and Parliament after full inquiry has subsequently passed an Act relating to the franchise which has left *Heelis v. Blain* untouched. I contend that *Heelis v. Blain* was rightly decided, and that by virtue of the Statute of Uses the claimant was in actual possession of the rentcharge immediately on the execution of the grant. My learned friend says that possession of a rentcharge is the same as possession of land, but a rentcharge is incorporeal, and therefore physical possession of it is in one sense impossible. He says possession must be by receipt of rent, but this is really only a constructive possession. The nature of this possession is explained in *Murray v. Thorniley* (2 C. B. 223), where Tindal, C.J. said, "The question undoubtedly turns upon the meaning of the words 'actual possession;' and we think those words mean a possession in fact as contradistinguished from a possession in law; and that as the possession in fact of a rentcharge must be the actual manual receipt of the rent itself or of some part of it, or of something in lieu of it." In order to acquire manual possession it is not necessary to receive rent, but something may be handed over in the name of rent, and that although no rent is due: (*Hayden v. Twerton*, 4 C. B. 1; 16 L. J. 83, C. P.) The possession necessary to maintain an action of trespass is no test, because that action does not lie in the case of a rentcharge. I say that the operation of the Statute of Uses is equivalent to an actual entry, and that one of its effects is to dispense with the necessity for actual entry:

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Barker v. Keats, 1 Mod. 263; 2 Mod. 249;
Lutwich v. Mitton, Cro. Jac. 604;
 2 Sanders on Uses, 55;
 Com. Dig. (Attornment) A;
 Cruise Dig. i. 386.

Upon the question of the power of a court of ultimate appeal to modify or overrule its previous decisions, the following cases were cited:

Attorney-General v. Dean and Canons of Windsor,
 8 H. of L. Cas. 369;
Beamish v. Beamish, 9 H. of L. Cas. 274, 338;
Mersey Docks and Harbour Board v. Gibbs, 14 L. T.
 Rep. N. S. 677; L. Rep. 1 H. of L. Cas. 93, 125;
Wiltes Claim of Peerage, L. Rep. 4 H. of L. Cas. 126.

BOVILL, C.J.—This was a case stated by the revising barrister for the south-eastern division of the county of Lancaster, who allowed the vote of the claimant, the grantee of a rentcharge, according to the authority of *Heelis v. Blain*, on the ground that by the operation of the Statute of Uses he was put into "actual possession" of the rentcharge at the date of the grant, within the meaning of sect. 26 of 2 Will. 4, c. 45. That section enacts that "no person shall be entitled to vote in the election of a knight or knights of the shire to serve in any future Parliament unless he shall have been duly registered . . . and that no person shall be registered in any year in respect of his estate or interest in any lands or tenements . . . unless he shall have been in the actual possession thereof, or in receipt of the rents and profits thereof for his own use for six calendar months next previous to the last day of July in such year." A rentcharge is a "tenement" within the meaning of this section, and the question is whether by the operation of the Statute of Uses the grant of the rentcharge gave the claimant the "actual possession" at once. Where, as in *Orme's case* (27 L. T. Rep. N. S. 652; L. Rep. 8 C. P. 281), the conveyance of the rentcharge operates at common law and not under the Statute of Uses, no difficulty arises. In such a case there must be an actual perception of the fruits of the rentcharge. But it was decided in the case of *Heelis v. Blain* that when the grant operates under the Statute of Uses such actual perception is not necessary. We have been pressed by Mr. Herschell in his able argument to hold that the decision in that case was not warranted in point of law; and if the matter had been *res nova* there would have been some probability of his success. But the question is whether this court will now lay down a different rule. It has been argued that this being the court of ultimate appeal in cases of this class, it cannot and will not reverse its own decisions. It must happen in the case of almost all Acts of Parliament that difficulties arise with regard to their construction; and acting on general principles I should be sorry to lay down a rule preventing this court from reconsidering its judgment even on precisely the same point. At the same time I should not consider that we are bound to adhere to every decision upon the principles that are applicable to cases in the House of Lords. That is the highest tribunal—the ultimate court of appeal—and its decisions are authoritative declarations of the law. They are made by the whole House of Peers, and it is only in modern times that these questions have been discussed by a small committee. It is clearly settled that the House of Lords declares the law, and that the law so declared is binding, but that principle has not been extended to the Superior Courts. In these courts the decision is final in certain cases where

there exists a peculiar jurisdiction, as in the Queen's Bench in sessions cases, in the Exchequer in revenue cases, and in this court in cases relating to the franchise, and in matters under the Railway and Canal Traffic Act. In the exercise of their jurisdiction in such cases, great mischief might occur if the courts held themselves conclusively bound by prior decisions; and therefore upon general principles I hold that we are at liberty to reconsider any former decision, and are not conclusively bound by it. In this particular case, then, I think that we must act upon the decision in *Heelis v. Blain*, unless we are clear that it cannot be supported. Mr. Herschell's contention went to that length, and he also urged that great inconvenience would flow from adhering to that decision. If it were a case of general application affecting the practice of conveyancers it would be a matter of great importance, but fortunately the effect of the Statute of Uses as applicable to the interpretation of the Reform Act of 1832, is all we need now consider. Can it be said that a person who is the grantee of a rentcharge under the Statute of Uses, is in actual possession as soon as the grant is executed? In the case of *Heelis v. Blain*, this question was answered in the affirmative. Several authorities were referred to in the judgment of the court, but unfortunately several other cases existed which were not presented to the court then, but which Mr. Herschell has now brought before our notice. I must say that Mr. Herschell's argument, so ably presented to us, shook me in my opinion of *Heelis v. Blain*. But to warrant us in overthrowing that decision there must be more than a doubt; we must be satisfied that the decision was wrong. Now the Statute of Uses has always been considered to give a possession which for some purposes was actual possession. The most ordinary case where it was treated as conferring the actual possession, was that of a lease and release. There was a bargain and sale for one year, executed at a distance from the land; the land often being in the occupation of other persons. It was doubted in early times whether the statute transferred the possession where there was no entry. This form of conveyance was invented shortly after the passing of the statute, in order to evade its operation. Mr. Preston (2 Preston's Conveyancing, 219) observes: "By the common law, and till the Statute for the Amendment of the Law (4 Anne, c. 16, s. 9), attornment of the particular tenant was essential to the validity of the grant, and the tenant might in many cases withhold attornment, or the grantor or grantee might die before attornment had taken place. Each of these events would defeat the grant; for unless attornment was obtained in the lifetime of the grantor, and also of the grantee, the grant became inoperative, and failed of effect. Besides, there was a notoriety attending livery, or attornment, which must have been distressing in transactions of delicacy which required secrecy; and in giving the history of this assurance, it is said, this conveyance was at first only purposely contrived by Serjeant Francis Moore, at the request of the Lord Norris, to the end that some of his kindred or near relations should not take notice, by any search of public records, what conveyance or settlement he should make of his estate. In *Barker v. Keate* also, it is stated by Lord Chief Justice North, that Mr. Serjeant Moore was the inventor

of this mode of assurance. The inconveniences thus experienced naturally led men of extensive practice to contrive some mode of conveyance by which the estate might be transferred immediately, and without any interval, from one man to another, although both parties were at a distance from the lands, and without even the necessity of their meeting for the purpose or their giving any written authority to deliver or receive the seisin." In *Barker v. Keat* (2 Mod. 249) in 29 Car. 2., the question was whether there was a good tenant to the præcipe or not, which was made by a bargain and sale, but no money paid, nor any rent reserved but a peppercorn, to be paid at the end of six months, upon demand, and the release and grant of the reversion thereupon was only "for divers good considerations." The question was "if this lease, upon which no rent was reserved but that of a peppercorn be executed by the Statute of Uses or not. If it be thus there is no need of the entry of the lessee, for the statute will put him in actual possession, and then the inheritance by the release or grant of the reversion will pass. But if this lease be not within the statute, because no use can be raised for want of a consideration, then it must be a conveyance at common law, and so the lessee ought to make an actual entry, as was always usual before the making of the statute." It was held "that the word 'grant' in the lease will make the land pass by way of use; that the reservation of a peppercorn was a good consideration to raise an use to support a common recovery; that this lease being within the Statute of Uses there was no need of an actual entry to make the lessee capable of the release, for by virtue of the statute, he shall be adjudged to be in actual possession, and so a good tenant to the præcipe." In all the ordinary forms of lease and release since the case of *Barker v. Keate*, the bargainee has been treated as being in actual possession. Here, therefore, were two purposes for which during three centuries the statute was considered to give possession. It has been held also that the statute did not give such a possession as to enable the grantee to maintain trespass at common law, but that he might maintain assize. If we attempted to go through all the cases upon this branch of the law, we should, I think, embark on an utterly hopeless task. For some purposes it has been held that the statute gives possession, and for others that it does not, and it is impossible to steer or to find road or rule between them. Then comes the question whether we can see clearly that this court was wrong in the decision arrived at in *Heelis v. Blain*. If the matter were *res nova* I should be disposed to adhere to the plain words of the statute. But I cannot think the authorities are so clear that we should be justified in saying that that case was wrongly decided. It has been acted upon ever since 1864, and has been the rule with regard to the matters decided in it, and Parliament has not thought fit to interfere, although there has been legislation upon the subject of the franchise. Upon the whole, therefore, I am not prepared to dissent from that decision, and I think that this appeal should be dismissed, but without costs.

BRETT, J.—The question is, whether the claimant had been in "actual possession" of the rentcharge for six months before the 31st July. It is said that he had, because the conveyance operated under the Statute of Uses,

so as to give him the actual possession at the date of its execution, and unless we overrule *Heelis v. Blain* we must take this view to be correct. It has, therefore, been urged that we ought to overrule that case. On the other side it has been contended that this court cannot overrule one of its former decisions, and that for two reasons, first because it is a court of ultimate appeal, and, secondly, because of the words of the statute (6 Vict. c. 18, s. 66), that every decision of the court "shall be final and conclusive in the case upon the point of law adjudicated upon, and shall be binding upon every committee of the House of Commons appointed for the trial of any petition complaining of an undue election or return of any member to serve in Parliament." As to the first reason cases have been quoted to show that the House of Lords will not overrule its own decisions. I doubt whether it is so; whether the House of Lords if shown that a former decision was wrong in point of law would act upon such a rule. But I think this court is bound to administer the law as it exists at the time of the particular judgment delivered. I abide by what I said in *Orme's case* (27 L. T. Rep. N. S. 652; L. Rep. 8 C. P. 281), that this court should loyally abide by its former decisions unless they are clearly shown to be wrong. But if they are clearly shown to be wrong, I do not think the words of sect. 66 prevent us from overruling them. The judgment is to be final "in the case" in which it was given. The decision in *Heelis v. Blain* was that the word "possession" was to be read as if it were "actual possession," and it followed that the words "actual possession" in the Reform Act must have the same meaning as the word "possession" in the Statute of Uses. It has, I think, been shown that among conveyancers where a conveyance operated under the Statute of Uses, it was deemed to confer the actual possession. That must continue until it is got rid of. In land, a visible thing, it is easy to see when it is got rid of. There is no great difficulty in regard to land either in the case of an actual trespass or of a conveyance under the registration Acts, because in an action of trespass there must be actual possession at the time the trespass was committed, and it is easy to show that actual possession has been got rid of; and so in the case of a conveyance of land under the registration Acts. In the case of a rentcharge, however, it is more difficult to see whether the actual possession has been got rid of. It might be got rid of by assignment, and if that took place within six months the claimant would not be registered. If the payment became due and was not collected, that might be evidence that the grantee had ceased to hold possession. But I am not quite clear upon this point. Actual possession once deemed to be in a claimant remains in him until it is got rid of. I cannot see that this is wrong or unreasonable; it was the ground of the decision in *Heelis v. Blain*, and I cannot say that that case was clearly wrong. I admit it was an anomalous decision, but it must so remain until the Legislature alter the rule if they think fit. I think the decision of the revising barrister was right.

GROVE, J.—If this question had come before me for the first time I think I should have decided that the words "actual possession" in the Reform Act meant something capable of plain demonstration, to enable the public to ascertain that the

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person was the real owner in possession, and not a mere secret bailee receiving something which might afterwards be handed over. In *Murray v. Thorniley, Tindall, C.J.*, said: "The question turns upon the meaning of the words 'actual possession,' and we think those words mean a possession in fact as contradistinguished from a possession in law; and that as the possession in fact of a rent-charge must be the actual manual receipt of the rent itself, or some part of it, or of something in lieu of it, so there could be no such possession in fact in this case where the first payment of the rent did not become due until after the expiration of the month of July, and where nothing whatever took place but the mere execution of the deed." And further on, "The actual possession of rent being, therefore, a well-known legal phrase or expression, the Legislature cannot be taken to have used it in any other than such well-known sense, that is, as contradistinguished from such possession in law, or right to the rent-charge, as the bare delivery of the deed of grant would confer." Tindal, C.J. had not all the cases before him which we have had presented to us in the argument on the present occasion, or probably he would not have used the expression "well-known sense." If the Statute of Uses had been construed according to its original simple intention the matter would have been free from difficulty. In many cases the words "actual possession" have received a construction consistent with *Heelis v. Blain*, and therefore I cannot say that that case was wrong. Moreover, that would be to overrule a decision recognised by the Legislature, and left untouched by subsequent Acts of Parliament, and to shake confidence in the stability and certainty of law. I do not consider that the words of 6 Vict. c. 18, s. 66, mean that the decision of the court shall be final and conclusive to all intents and purposes, but merely in the particular case. I, therefore, concur with the rest of my learned brethren.

DENMAN, J.—I am of the same opinion. The great question is what is the meaning of the phrase "actual possession" when applied to a rent charge operating by deed under the Statute of Uses. I agree that "actual" means "in fact" in some sense. Yet there are many cases where, although the word "actual" is used, it must be construed constructively and not literally, as in *Gladstone v. Padwick* (L. Rep. 6 Ex. 203), where a seizure of the goods of a debtor in a mansion-house was held to be an actual seizure of goods at a farmhouse in his occupation a mile distant. Where we are dealing with a rentcharge, "actual" can hardly mean "in fact," because this is a case of a corporeal hereditament. That being so we have a case decided upon this very statute—viz., *Heelis v. Blain*, and decided before the last legislation upon the subject of the franchise, and untouched by subsequent legislation. And we must take it that the Legislature knew of this decision, and hold it to be binding unless it can be conclusively shown that it is wrong. Now I am by no means clear that if I had to decide this case for the first time I should not decide it as in *Heelis v. Blain*. I think, therefore, that that is not a case which this court should overrule.

Decision affirmed.

Attorneys: for appellant, *J. Elliott Fox*, for *Robert Evans*, *Ashton-under-Lyne*; for respondents, *Richards and Walker*, for *W. J. Mellor*, *Oldham*.

MAG. CAS.—VOL. VIII.

COURT OF EXCHEQUER.

Reported by T. W. SAUNDERS and H. LUGER, Esqrs.,
Barristers-at-Law.

June 7 and 8, 1873.

Ex parte HUGUET.

Extradition Act—33 & 34 Vict. c. 52—Duty of police magistrate—His decision not reviewable—Deposition of a witness examined at a former hearing before a different police magistrate.

By the 33 & 34 Vict. c. 52 (The Extradition Act) when a fugitive criminal is brought before a police magistrate, the latter is to hear the case in the same manner and to have the same jurisdiction and powers, as near as may be, as if the prisoner were brought before him charged with an indictable offence committed in England.

Held, upon a rule for a habeas corpus, upon a committal by a police magistrate, that as this is not a court of appeal in such a case it will not question the judgment of the magistrates if the case was within his jurisdiction and there was any evidence to support his decision.

Upon such a hearing, a witness gave his evidence before a police magistrate in the presence of the accused and signed his deposition. The further hearing of the case was then adjourned, and on the adjournment day the further hearing was resumed before B., another police magistrate, but as the witness before examined before A. refused to attend and had gone abroad, his deposition made before A. was proved to have been duly taken and was read as part of the case against the accused, whereupon additional evidence having been taken, the prisoner was committed to the Middlesex House of Detention pursuant to the Act.

Held, per Martin and Pollock, BB. (Kelly, C.B., dubitante), that the deposition so taken at the former hearing by A. was properly receivable by B. upon the subsequent hearing.

UPON a former day Besley obtained a rule nisi for a writ of *habeas corpus* to bring up Ernest Etienne Huguet, a Frenchman in custody of the Governor of the House of Detention, upon a warrant of Sir Thomas Henry under the provisions of the 33 & 34 Vict. c. 52 (an Act to amend the law relating to the extradition of criminals), in order that he may be discharged from custody.

It appeared from the affidavits that the applicant, who is a French subject, left France and came to England in April 1872, having in his possession the sum of 27,000*l.*, being at that time a banker in Paris and the editor and proprietor of a newspaper called *L'Avenir Liberal*; that whilst in England he was adjudged by the French Courts to be a fraudulent bankrupt and was ordered to be put upon his trial for fraudulent bankruptcy. A requisition was accordingly made by the French authorities to the Foreign Secretary (Lord Granville) of this country, and thereupon he made an order requiring a police magistrate to issue his warrant for the apprehension of the applicant. A warrant was accordingly issued, and he was brought before Mr. Vaughan, one of the police magistrates at Bow-street. Evidence was then taken, and Mons. de Monchairville, the official assignee in France under the bankruptcy, gave evidence of all the facts connected with such bankruptcy of an official nature. He was cross-examined by the counsel of the applicant, and he signed his deposition in due form. The further

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hearing of the case was then adjourned, and upon the adjourned meeting Sir Thomas Henry presided. Upon that occasion a quantity of French documentary evidence was produced, and a Mons. Adolphe Moreau, counsel to the French Embassy in London, gave evidence of the French law upon the subject, and thereby established the fact that the applicant had, according to the evidence, made himself amenable to the charge of being a fraudulent bankrupt. Mons. de Monchairville was not required to give evidence before Sir Thomas Henry as he had before given it before Mr. Vaughan, for it appeared that at the adjournment of the former hearing he announced that he would not again attend, and would go to Paris, and he did not in fact again attend. Upon this, Mr. Humphries, the second clerk at Bow-street, deposed to the due taking of the deposition of Mons. de Monchairville before Mr. Vaughan, and to his cross-examination on behalf of the applicant. Upon this proof Sir Thomas Henry received in evidence the deposition so made, and the case being complete he committed the applicant to the Middlesex House of Detention to await the warrant of the Secretary of State for his surrender^(a). The rule was moved upon the grounds—First, that there was not sufficient evidence of the commission of any offence justifying the application of the Extradition Act 1870; secondly, that Sir Thomas Henry had no jurisdiction to act upon any deposition not taken before himself.

The Attorney-General (Sir J. D. Coleridge,

(a) By sect. 7 of the 33 & 34 Vict. c. 52 it is enacted that "a requisition for the surrender of a fugitive criminal of any foreign state who is in, or suspected of being in the United Kingdom, shall be made to a Secretary of State by some person recognised by the Secretary of State as a diplomatic representative of that foreign state. A Secretary of State may, by order under his hand and seal, signify to a police magistrate that such requisition has been made, and require him to issue his warrant for the apprehension of the fugitive criminal," &c.

Sect. 9. "When a fugitive criminal is brought before the police magistrate, the police magistrate shall hear the case in the same manner, and have the same jurisdiction and power, as near as may be, as if the prisoner were brought before him charged with an indictable offence committed in England," &c.

Sect. 10. "In the case of a fugitive criminal accused of an extradition crime, if the foreign warrant authorising the arrest of such criminal is duly authenticated, and such evidence is produced as (subject to the provisions of this Act) would, according to the law of England, justify the committal for trial of the prisoner if the crime of which he is accused had been committed in England, the police magistrate shall commit him to prison, but otherwise shall order him to be discharged. . . . If he commits such criminal to prison, he shall commit him to the Middlesex House of Detention, or to some other prison in Middlesex, there to await the warrant of a Secretary of State for his surrender, and shall forthwith send to a Secretary of State a certificate of committal, and such report upon the case as he may think fit."

Sect. 11. If a police magistrate commits a fugitive criminal to prison, he shall inform such criminal that he will not be surrendered until after the expiration of fifteen days, and that he has a right to apply for a writ of *habeas corpus*. Upon the expiration of the said fifteen days, or if a writ of *habeas corpus* is issued, after the decision of the court upon the return of the writ as the case may be, or after such further period as may be allowed in either case by a Secretary of State, it shall be lawful for a Secretary of State by warrant under his hand and seal to order the fugitive criminal (if not delivered on the decision of the court) to be surrendered to such person as may in his opinion be duly authorised to receive the fugitive criminal by the foreign State from which the requisition for his surrender proceeded; and such fugitive criminal shall be surrendered accordingly.

Q.C.) and *Bowen* showed cause.—If the magistrate had jurisdiction to inquire into the case, this court will not interfere with the result at which he has arrived. It is clear that he had such jurisdiction to inquire, and it was for him alone to form an opinion, precisely as it would have been if the charge had been of an offence committed in this country, and the inquiry had been one with a view to a committal to trial. The question of whether or not there is a *prima facie* case is one intrusted entirely to the magistrate: (*Reg. v. Bolton*, 1 Q. B. 66). As regards the second objection, that Sir Thomas Henry did not hear the whole of the evidence, and that he acted upon the evidence of Mons. de Monchairville, who was examined on a previous day before another magistrate, there is nothing objectionable in his having done so, and the case of *Reg. v. De Vidil* (9 Cox's Crim. Cas. 4) is in point. There the prisoner was indicted for unlawfully, maliciously and feloniously cutting and wounding Alfred John de Vidil, with intent to murder him. A witness being too ill to travel, it was proposed to read his deposition, and the magistrates' clerk being examined, he said that he was the chief clerk at Bow-street, and that on the 16th July he went down to Twickenham, in consequence of the illness of the witness Rivers. That the prisoner was then in custody; that the charge against him was for unlawfully, maliciously, and feloniously cutting and wounding one Alfred John de Vidil, with intent to murder him; that the charge was made at Bow-street, before the magistrate there, and that in consequence of the illness of the witness, the prisoner was taken down to Twickenham and the witness's deposition was taken before two county magistrates, in the presence and hearing of the prisoner, and signed by them; and that subsequently, upon a further investigation at Bow-street, the prisoner was committed by the magistrate there. Upon this it was objected by Serjt. Balantine that the deposition could not be read, the 11 & 12 Vict. c. 42, enacting that in all cases where any person shall appear or be brought before any justice or justices of the peace, charged with any indictable offence, &c., before he or they shall commit such accused person to prison for trial he shall in the presence, &c., take the statement on oath, &c., and shall put the same into writing, and such deposition, &c., shall be signed by the justice or justices taking the same; and he contended that the meaning of this was, that the deposition should be taken by the magistrate before whom the charge is made and by whom the prisoner is committed, and that in that case there was the intervention of other magistrates for the purpose of taking that single deposition, those magistrates not being the magistrates before whom the charge was made or by whom the prisoner was committed. Mr. Justice Blackburn, however, said, "I am of opinion that it was not intended by the two sections referred to (17 and 18) to confine the admissibility of a deposition to the case of a person examined before the magistrate before whom the charge is made, and who commits the prisoner for trial. The meaning of the provision in the Act is this, that when a witness may be in a distant part and too ill to travel, the magistrate or magistrates acting for that locality may take the examination, of course in the presence of the accused, and with the formalities enjoined, and return it to the proper quarter. Here the deposition was read over to

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and signed by the witness, and also signed by the justices taking the same. It was taken in the presence of the prisoner, and he had full opportunity of cross-examining. It seems to me that all that is necessary has been complied with, and I shall allow the deposition to be read." That case quite disposes of this objection. The case of *Reg. v. Watts* (33 L. J. 63, M. C.) is not in point, for in that case the court held that the depositions had not really been taken in the presence of a magistrate.

Chambers, Q.C. and Besley for the applicant.—This court will examine the decision, of the committing magistrate, and if it finds that the magistrate has acted upon insufficient materials, and has come to a wrong decision it will interfere, otherwise the right to a writ of *habeas corpus* is illusory. They argued that the materials before the magistrate were insufficient to prove any crime for which in this country the applicant might be committed for trial. As regards the second point, that Sir Thomas Henry had no jurisdiction to act upon a deposition not taken by him—the case of *Reg. v. De Vidil* is no authority because it was decided upon wholly different materials. It cannot be that one magistrate may take a deposition, and another may judge of its relevancy and importance; if this were so, a case may be heard at a dozen different adjournments by a dozen different magistrates.

KELLY, C.B.—I am of opinion that this rule should be discharged. It has been said by the Attorney-General that as there was evidence before the magistrate of a fraudulent bankruptcy, his jurisdiction to make his warrant of commitment cannot be impeached. No arguments have been addressed to us with regard to our jurisdiction to deal with a case like this, but it is said that if the magistrate had jurisdiction to hear, we have no power to interfere. This, however, is stated in terms rather too wide. Suppose, for instance, a charge be made against a foreigner residing in this country for a murder committed by him in France, and that when it came before the magistrate it should appear that the party survived more than a twelvemonth; I am of opinion that that would not be a subject of extradition, and that if the magistrate were to make his warrant for his detention, we could interfere. Where, however, there is evidence of experts in French law which shows a crime committed in France, which if committed here would be punishable by our law, we have no right to question the truth of the testimony. In such a case it is for the magistrate to decide, and although we may think that the case is very inconclusive, we cannot interfere. He is the only party authorised to decide upon the facts. Such being the law, what are the objections? It appears that the applicant was charged with fraudulent bankruptcy, and the first question is, Had he been guilty according to law? Now upon that I cannot bring myself to entertain a doubt. (His Lordship then reviewed the evidence upon this point.) Then there is another objection. It appears that in the course of the proceedings the evidence of a gentleman named Monchairville was taken before another magistrate than the one who ultimately decided the case. Now the receiving of such evidence is certainly almost entirely contrary to practice. If evidence is to be acted upon, it should be heard by the committing magistrate, and he ought not to act upon any deposition

taken before another magistrate; and except in the case of *Reg. v. De Vidil*, before my Brother Blackburn, I know of no other case of a similar description; and notwithstanding the opinion of my Brother Martin, I entertain great doubt whether the deposition of M. de Monchairville was admissible in evidence before Sir Thomas Henry. But I accede to the Attorney-General's argument, that if there was sufficient evidence before Sir Thomas Henry without that deposition, then it becomes immaterial, and I think that there was sufficient evidence without it. Under these circumstances the objection fails.

MARTIN, B.—I am of opinion that the law has been correctly laid down in the cases cited. The question is, was this a proceeding within the jurisdiction of Sir Thomas Henry? I don't say that if there had been no evidence before him, or he had acted contrary to law, we would not have discharged the prisoner; but it appears to me that all the proceedings have been properly taken. This is not a court of appeal from his decision, and it is for him to decide whether or not the evidence is sufficient. It has, however, been strongly insisted that the evidence taken before Mr. Vaughan was not admissible before Sir Thomas Henry so as to enable him to act upon it. Now, I don't mean to express any positive opinion, but I think that such evidence was admissible at common law. The witness who has made a deposition upon oath will not appear, but goes abroad. Here is an inquiry in the same matter between the same parties, and the witness's deposition is admissible at common law. The argument as to the provisions of the criminal statutes is not applicable; their provisions were intended merely for the convenience of proof. This certainly is my own impression.

POLLOCK, B.—I also think that this rule should be discharged. The statute points out the mode of proceeding, and it directs that the case is to be treated by the magistrate in the same way as though it were a hearing of an ordinary case with a view to a committal to trial. As regards the evidence taken before Mr. Vaughan:—this was taken in the presence of the prisoner, and I should have thought that it was receivable. But whether it was so or not, if there were other sufficient evidence, it may be disregarded. This is not like the case of the admission upon a trial of improper evidence upon which a jury may have acted. This was only a preliminary inquiry, and if the magistrate had sufficient materials we cannot question his decision.

Rule discharged.

Attorney for the applicant, *H. C. L. Bebb.*

Attorney for the Crown, *The Solicitor to the Treasury.*

CROWN CASES RESERVED.

Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

Saturday, May 31, 1873.

(Before BOVILL, C.J., BRAMWELL and CLEASBY, BB., GROVE and ARCHIBALD, JJ.)

REG. v. REBECCA GOLDSMITH.

Indictment—Falses pretences—Receiving—Aider by verdict—24 & 25 Vict. c. 96, ss. 88, 95—7 & 8 Geo. 4, c. 64, s. 21.

An indictment under 24 & 25 Vict. c. 96, s. 95, for "unlawfully receiving goods which have been un-

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lawfully and knowingly, and fraudulently obtained by false pretences with intent to defraud, well knowing that the goods had been obtained by false pretences with intent to defraud, as in this count before mentioned," omitted to set out what the particular false pretences were.

Held, that the objection, not having been taken before plea, was cured by the verdict of guilty.

CASE reserved for the opinion of this Court by the Deputy Recorder of the City of London.

At a session of the Central Criminal Court, held on Monday the 5th May 1873, Rebecca Goldsmith was tried before me upon an indictment containing fourteen counts for various misdemeanors.

The thirteenth count was as follows :

"And the jurors aforesaid upon their oath aforesaid, do further present that the said Rebecca Goldsmith, afterwards to wit in the year of our Lord 1872, in the county of Middlesex, and within the jurisdiction of the said Central Criminal Court unlawfully did receive and have divers articles of jewellery, to wit (here followed a list of the goods alleged to have been unlawfully received) of the goods and chattels of the said Charles Drayson and others, which said goods and chattels in this count aforesaid had lately before then been unlawfully and knowingly and fraudulently obtained of and from the said Charles Drayson and others, by means of certain false pretences with intent to defraud. She the said Rebecca Goldsmith at the time she so as aforesaid unlawfully received and had the same goods and chattels then and there, well knowing that the same goods and chattels had been obtained by means of certain false and fraudulent pretences with intent to defraud as in this count before mentioned. Against the peace of our said lady the Queen, her crown, and dignity."

The fourteenth count was in the same form for receiving goods belonging to another owner.

At the close of the case for the prosecution, Mr. Giffard, Q.C. and Mr. Poland on behalf of the prisoner objected that the thirteenth and fourteenth counts were bad because they did not set forth the false pretences by means of which the goods had been obtained and that, consequently, it did not appear that those false pretences were within the statute 24 & 25 Vict. c. 96, s. 88.

Mr. Metcalfe, Q.C., for the prosecution contended, first, that it was unnecessary in a substantive charge of receiving goods obtained by false pretences, to set forth the specific false pretences by which they had been obtained; secondly, that the allegation in the indictment that they had been unlawfully, knowingly, and fraudulently obtained by false pretences with intent to defraud must be taken to mean that they had been obtained by false pretences, which were unlawful and fraudulent within the statute; and, thirdly, that even if it were necessary as matter of form to set out the false pretences, yet the objection was too late and ought to have been taken before plea by virtue of 14 & 15 Vict. c. 100, s. 25.

The prisoner was found guilty on the thirteenth and fourteenth counts only, and, doubting whether those two counts were good in form, and also doubting whether, if they were not good, the objection was taken in proper time, I reserved for the decision of the Court for Consideration of Crown Cases, the two questions: First, whether the two counts are good in form, and, secondly, if they are not good whether the objection was too late.

If the counts are bad and the objection was in time the conviction is to be annulled, but if the counts are good or the objection was too late the conviction will be affirmed.

The prisoner is in gaol awaiting judgment.

(Signed) THOMAS CHAMBERS,

Deputy Recorder.

Giffard, Q.C. (Poland with him), for the prisoner. —The conviction cannot be sustained. The offence of obtaining goods by false pretences is governed by the 24 & 25 Vict. c. 96, s. 88, which enacts that "Whosoever shall by any false pretence obtain from any other person any chattel, money, or valuable security shall be guilty of a misdemeanor." Then the charge in the counts of the indictment upon which the prisoner has been convicted is dealt with in the sect. 95 in these terms "Whosoever shall receive any chattel, money, valuable security, or other property whatsoever, the stealing taking, obtaining, converting, or disposing whereof is made a misdemeanor by this Act, knowing the same to have been unlawfully stolen, taken, obtained, converted, or disposed of, shall be guilty of a misdemeanor." It has long been settled law that in an indictment for obtaining goods, &c., by false pretences the particular false pretences must be charged in the indictment (*Res v. Mason*, 2 T. B. 581), in order to show that they come within the statute—the crime of obtaining goods, &c., by false pretences not being an offence at common law. Then the question arises whether the same rule is applicable to the offence of receiving goods knowing them to have been obtained by false pretences. [BOVILL, C.J.—There is this material difference, the receiver may know that the goods have been obtained by false pretences and fraudulently, but he may not know the particular false pretences.] Nevertheless it must be proved what the false pretences are by which the goods have been obtained, and they should be stated in the indictment to show that as against the principal offender the case falls within the statute. It is consistent with the present indictment that the goods were obtained by a false pretence, that is not within the statute. The words of sect. 95 are "the stealing, taking, obtaining, converting, or disposing whereof is made a misdemeanor by this Act." This point appears to have been decided in *Reg. v. Hill*, Gloucester Spring Assizes 1851, 2 Russ. on Crimes, 554, 4th edit., in a note (a), where it was held that an indictment like this was bad. If the receiver were indicted along with the principal offender it is clear that the particular false pretences must be set out, and there is no reason why, when the receiver is indicted alone they should not also be set out. [ARCHBOLD, J.—Is it necessary to do more in an indictment than to set out the offence in the words of the statute, and would not an indictment following the words of the statute mean the same thing as the statute means?] As a general proposition that may be correct; but every allegation in this indictment may be fulfilled without showing any criminal offence. The words "unlawfully obtained," are not words of art, and have no technical meaning, and may be satisfied by a great many things which, though unlawful, are not indictable. The present indictment is really only an enlargement of the allegation, "contrary to the form of the statute." Then, secondly, as to the time when the objection was taken. I was taken before verdict. [BRANWELL, B.—It was

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taken after the prisoner was given in charge to the jury, who were sworn to try the issue joined between the parties. No injustice has been done, as the judge would tell the jury you must not find the prisoner guilty upon this evidence, because it is not a statutory offence, if the facts warranted him in so doing. It strikes me you should have demurred to the indictment, or moved in arrest of judgment.] The object in taking the objection at the close of the case for the prosecution is that the prisoner has a right to know how the evidence applies to the offence charged. The 14 & 15 Vict. c. 100, s. 25, enacts that "Every objection to any indictment for any formal defect apparent on the face thereof shall be taken by demurrer or motion to quash such indictments before the jury shall be sworn, and not afterwards; and every court before which any such objection shall be taken for any formal defect may, if it be thought necessary, cause the indictment to be forthwith amended in such particulars; and thereupon the trial shall proceed as if no such defect had appeared." This objection is not a formal one; it is that the very offence itself is not described; and the indictment could only be amended under the statute by inserting words to set out the substantive offence. Even if the words "against the form of the statute" had been in the indictment, that would not have cured the want of allegations to bring the offence within the statute: (2 Hale P. C. 192.) The case of *Sill v. The Queen* (1 Dears 132) shows that a substantial omission in an indictment is not cured by verdict. [BOVILL, C.J.—If there had been a demurrer to this count, what would it have admitted? BRAMWELL, B.—How can the court tell whether the grand jury have not returned a true bill on proof of a false pretence which is not within the statute? CLEASBY, B.—What do you say as to the effect of the 7 Geo. 4 c. 29?] Upon that statute *Reg. v. Wilson* (2 Mood. c. 52) is an important case, and decides that the indictment is bad after verdict if it does not allege that the goods have been obtained by false pretences, and that the receiver knew them to have been so unlawfully obtained. And in *Reg. v. Martin* (8 A. & E. 481), if an indictment for obtaining goods by false pretences does not show to whom they belonged it will be bad on error, and is not cured by the 7 Geo. 4, c. 64, s. 21. Further, sect. 95 of 24 & 25 Vict. c. 96, says that "whosoever shall receive any chattel, money, or valuable security, knowing the same to have been unlawfully obtained." Now this indictment omits the word "unlawfully," and says "knowing the same had been obtained by means of certain false pretences." Is that cured by verdict? The indictment does not follow the words of the statute in this respect. *Reg. v. Turner* (1 Mood. 239) shows that where a statute makes it criminal to do an act unlawfully and maliciously, and the indictment does not state that it was done unlawfully, it is bad. See also

Reg. v. Ryan, 2 Mood. 15;

Reg. v. Davis, 2 Leach 556;

Reg. v. Gray, L. & C. 365.

Metcalf, Q.C. (*Straight* with him), for the prosecution.—The objection to the counts may be stated thus: the counts it is said must set out the false pretences, or must show by proper averments that it was such an obtaining as is within the statute. Now, it is submitted that the latter has been done. This is a substantive offence of receiving goods which had been unlawfully obtained by false pre-

tences. All that the statute requires to be proved is that the defendant knew that the goods were obtained by some false pretence, not that he knew the particular false pretence by which they were obtained. The precedents in Archbold and Saunders merely aver "knowing the goods to have been unlawfully obtained by false pretences" without setting out the false pretences. The case of *Reg. v. Rassen* was before the 7 Geo. 4, c. 64, and the 14 & 15 Vict. c. 100, and would not now be followed. A count for conspiracy to evade payment of the customs duties on goods imported need not specify what the goods were or the means of effecting the objects of the conspiracy (*Reg. v. Blake*, 6 Q. B. 126). So in an indictment against a bankrupt for not disclosing all his property, the want of particularity in description of the goods was held to be cured by the verdict under 7 & 8 Geo. 4 c. 64, s. 21, *Nash v. The Queen* (4 B. & S. 953). It has also been held sufficient to follow the words of the Debtors Act (32 & 33 Vict. c. 62) in an indictment for obtaining goods within four months of the bankruptcy by false representations, and to allege generally that the defendant did "by certain false representations" obtain goods on credit without specifying the false representations on the goods. *Reg. v. Watkinson* (12 Cox C. C. 271) and the 7 & 8 Geo. 4 (c. 64, s. 21) was held to apply. *Heyman v. The Queen* (L. Rep. 8 Q. B. 102; 12 Cox C. C. 383) was also cited.

Giffard, Q.C., in reply.

BOVILL, C.J.—In an indictment for obtaining property by false pretences, there is no doubt that the false pretences ought to be set out. That was long ago decided. I am not aware whether the question has been raised, after verdict, since the passing of the statute of 7 & 8 Geo. 4; nor is it necessary to go minutely into the question as to how far a general allegation in an indictment for obtaining goods by false pretences would be sufficient after verdict. This is an indictment for receiving goods obtained by false pretences, the prisoner being charged with so receiving them, knowing them to have been so obtained. No objection was taken at the trial before plea: the issue was joined, the prisoner was given in charge to the jury, and in the course of the trial, before the verdict, the objection was raised as to the form of the indictment, and that objection resolves itself into an objection to the two counts, the thirteenth and fourteenth counts, which are brought before us in this case. The objection being so raised, the judge trying the case as between the Crown and the prisoner, was not bound at that stage of the proceedings to give any effect to the objection. If he had thought that the objection was clearly a good one, and that no conviction, if it took place, could be supported in point of law, he might have quashed the indictment; but the effect of quashing the indictment, under such circumstances, would simply have been to have left the prisoner open to another indictment. The judge, on an application of this sort, is clearly not bound to quash an indictment however bad he may think it; but if it is bad, and not supported, he may generally do so, but if doubtful he may leave the party, after the old practice, to his writ of error; or as now, leave the point for the decision of this court. The prisoner, being in charge of the jury, the judge, if he did not quash the indictment, would be bound to direct the jury and to take their decision and verdict on the facts and evidence

that were proved before him. In this particular case, the deputy recorder did not quash the indictment. He determined to reserve the point for the opinion of this court, but not to reserve the point as to whether this court would quash a conviction or not, but to reserve the point for us as to whether the count was a good count, which is a totally different matter. It is true that the objection was taken before the verdict was given; but the only mode in which it seems to me we can give effect to the objection is by treating it as an objection raised after verdict. It was raised before verdict, but in order to give the prisoner the benefit of it, no effect must be given to its having been raised at that stage, because the judge could not then give effect to it. We will deal with it, and are prepared to do so, as if the objection had been taken immediately after the verdict, as a motion in arrest of judgment. Dealing with it in that way, we must treat it as an objection raised in arrest of judgment, and as an objection raised after the verdict had been given. The reason of my stating this very distinctly is, that it seems to me that this is clearly not a case for annulling the conviction. The conviction by the jury must stand. The question had been left to them, and after the attention of the deputy recorder had been drawn to this point, we cannot assume as a matter of fact that he would not direct the jury properly and take care that the matter was laid before them, and that they should find that an offence was committed of receiving goods obtained by false pretences according to law. But, independently of this, as a matter of fact and evidence, we must assume that the judge has properly directed the jury, and that the jury correctly found their verdict. The deputy recorder was not at liberty to withdraw the case from the jury, except by quashing the indictment; neither can we deal with this matter as if it was withdrawn from the jury. Here we have the verdict of the jury, and the verdict must stand. Then the question arises as to the validity of these counts, that being the only mode in which, after verdict, the point can be properly raised, or brought before us for consideration. What is the objection that has been raised? It is, in distinct terms, that in this indictment the prosecution have not set forth the false pretences by means of which the goods had been obtained. That is the only objection, and although we are disposed to allow this objection to the indictment, and to entertain it as a motion in arrest of judgment, yet it is manifest that in doing so we ought strictly to confine the question to that which was raised at the trial, and which was the only question intended to be reserved; otherwise parties raising a specific question at the trial, there being other points that might be fatal to the indictment, if not amended, might bring the case up to this court, and then rely upon the other objections which they had not referred to before as grounds for arresting the judgment, when if they had been mentioned before to the presiding judge they would have been amended. That is one inconvenience. The practice of this court has invariably been to confine the question argued to the points that were raised, and the question intended to be submitted to it. I therefore deal with the question of the sufficiency of the validity of these counts, with reference to the objection raised, that objection being simply this—that the false pretences by means of which the

goods were obtained were not set forth. There may be various false pretences, and it does not appear from the count that any offence was committed, because the false pretences might be of one description or another, and it ought to be shown, it is contended, that the false pretences were such as the law considers false pretences within the meaning of the present statute. It seems to me, however, that the utmost that can be said is that the count is uncertain, that the false pretence alleged may be a false pretence within the meaning of the statute, or may not be a false pretence within the meaning of the statute. But the indictment being in general terms, in this form, the judge would take care that the substance was submitted to the jury, and he would be bound to direct the jury what false pretences would be necessary to be proved in order to sustain the indictment, and the jury must be presumed to find in accordance with the direction of the judge. The statute under which the prisoner is indicted is the Larceny Act of the Consolidation Statutes, and sect. 95 enacts that "whoever shall receive any chattel or other property, the obtaining thereof is made a misdemeanour by this Act, knowing the same to have been unlawfully stolen, taken, obtained, converted, or disposed of, shall be guilty of a misdemeanour, and may be indicted and convicted thereof." Sect. 88 says, that "Whoever shall by any false pretence obtain from any person any chattel and so forth shall be guilty of a misdemeanour." Those are the words of the Act, which is substantially a re-enactment of the previous consolidation statute of 7 & 8 Geo. 4. According to the books, there is an uniform course of pleading, and precedents are to be found in the books; and according to them in an indictment for receiving goods which have been obtained by false pretences it has not been the practice to set forth those false pretences. These indictments have been so framed, not setting out what the false pretences were. Before we come to a conclusion that so long and uniform a course of precedent is wrong, we ought to be very clearly satisfied on the point. But it is not necessary, as it seems to me, to determine whether in strictness it is necessary before verdict to set forth the false pretences in this form of indictment. The question here arises after verdict; and, as I have said before, it is important to distinguish how it is that this point can be raised, and the only way it can be raised is that to which I have already adverted, namely, treating it as a motion in arrest of judgment. The language of the Act of Parliament, so far as this point as raised on the trial is concerned, has been followed because the allegation distinctly here is that the goods had been obtained by means of certain false pretences with intent to defraud; and that raises the question as to what is the effect of the statute of the 7 & 8 Geo. 4, c. 64, s. 21. That section enacts that where the offence charged has been created by any statute, the indictment shall, after verdict, be held sufficient if it describe the offence in the words of the statute. Here is a case in which, so far as the objection taken at the trial is concerned, the offence is described in the terms of the statute. This court is confined to that objection. It seems to me, therefore, that by the express enactment of 7 Geo. 4, c. 64, in the section I have just read, the offence being described in the language of the statute so far as this point is con-

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cerned, the objection, if taken, must be cured after verdict. Independently of this statute, there would be strong grounds for contending that the objection was cured after the decision of this court in *Heyman v. The Queen* (L. Rep. 8 Q. B.; 12 Cox C. C. 383). A further question was raised and argued before us. It was contended that the objection was cured as a formal defect under 14 & 15 Vict. c. 100, s. 25. In the view which I take of this case, I think it unnecessary to consider that matter, because if, as I think is the case, the objection is cured after verdict by the statute of 7 Geo. 4, this conviction ought to stand. It is not necessary to determine what is the effect of the other statute; it is sufficient to say that the objection is cured by the 7 Geo. 4, and that therefore the judgment cannot be arrested, and that the conviction must stand.

BRAMWELL, B.—The objection taken in this case is that for a particular reason assigned, the indictment is bad—that it shows no offence. When one bears in mind that that is the real objection, it is manifest that it was taken at the wrong time. The prisoner was then in charge to the jury, and the question then to be determined was whether or no she was guilty of this charge, as laid in the indictment. The objection to be taken was by a motion to quash the indictment as by a demurrer to it, or by a motion in arrest of judgment; and I mention this for the same reason as the Lord Chief Justice did, in order that it may be seen what is the principle of the decision. If the objection had been taken on a motion to quash or on a demurrer, I do not for my own part say that this would have been a good count; and if I might recommend the very able gentlemen who draws these indictments at the Central Criminal Court, I think it would be just as well that they should preclude such an objection being taken by demurrer or motion to quash on a future occasion. But I cannot help thinking that on principle this defect must be cured by the verdict. Let us see what the rule is. It is mentioned in the note to *Stennel v. Hogg* (1 Wm. Saun. 261). It is this: "Where there is any defect, imperfection, or omission in any pleading, whether in substance or form, which would have been a fatal objection on demurrer; yet if the issue be joined be such as necessarily required on the trial, proof of the facts so defectively or imperfectly stated or omitted, and without which it is not to be presumed that either the judge would direct the jury to give or the jury would have given the verdict such defect, imperfection, or omission is cured by the verdict by the common law." Is not that strictly applicable here? Is it supposable that if a false pretence of what we may call the primary offender, which must have been proved at the trial if that false pretence has been what I think Mr. Giffard called a prospective false pretence—not an existing fact, but only a future matter—is it to be supposed that the judge would allow that to go to the jury? It certainly is not. Therefore, on reason and principle one would think this objection was cured by the verdict. Then Mr. Giffard has cited to us the case of *Rees v. Mason*; and upon that I really think I ought to make an observation, because no doubt if the argument I am using now is a good one, one would think it might have been used on that occasion. But it was not used, for I don't find that the counsel for the Crown referred at all to the fact that the verdict had been given, nor did either of

the learned judges notice that matter. I cannot say, therefore, that that is a satisfactory authority; and I very much concur in the remark of my brother, Mellor, J., that that case is not strengthened by other decisions. That is the ground of my judgment in this case. I wish for my own part to say, when I say that the objection was not taken at the proper time, that I dare say the learned counsel took it as early as they possibly could; that, as I said before, it was a continuation and must be taken as having been repeated after the verdict was given; otherwise, in my opinion, we should have no jurisdiction at all. I am not sure, but I think the objection taken would comprehend the objection relied on, because, although the objection taken was that the indictment did not set forth the false pretences on which the goods had been obtained, yet in reality if the indictment did not and ought to have done so, then the offence of the prisoner was not properly set forth; nor am I at all sure that the objection could have been got over in any other way than that which I have adverted to. But I think the legal defect, if any, is cured by the verdict. I might venture to make this remark; it would be as well if in future when objections of this kind are taken, that their nature should be ascertained; that the question should be reserved if at all for us, whether we should arrest the judgment. It is possible if objections were taken in that form, the judge would say, "No; I won't reserve a point of that sort, take your writ of error." Be that as it may, I am of opinion, for the reasons I have given, that this conviction should stand.

CLEASBY, B.—I am of the same opinion. My brother Bramwell has alluded to a note in Saunders' Reports; I adopt the application of the same principle to a criminal case in the way laid down by Mr. Justice Blackburn in *Hayman v. The Queen*, the propriety of which decision I don't see the slightest reason for doubting. He says: "I think it is a general rule of pleading at common law, and I think necessary to say that where there is a question of pleading at common law, there is no distinction between the pleadings in civil cases and criminal cases. Where an averment, which is necessary for the support of the pleading, is imperfectly stated, and the verdict on an issue involving that averment is found, if it appears to the court after verdict that the verdict could not have been found on this issue, without proof of this averment, then, after verdict, the defective averment, which might have been bad on demurrer, is cured by the verdict." Is this or is it not a case of defective averment? And is it or not a case of an averment which must have been proved in the sense in which it ought to have been averred in order to justify the verdict of guilty in the case. As I read it, it is this: "Unlawfully, and knowingly, and fraudulently obtaining by means of certain false pretences." That is said to be a defective and imperfect averment, because it does not show sufficiently what is alleged. I don't say it is an objection; but supposing it to be one now, it is not alleged that the false pretences were of such a nature as to make the obtaining of the goods by them a criminal offence. The case having gone to the jury, it is manifest that the receiving the goods could not be made an offence unless they were obtained by criminal false pretences. It appears to me, therefore, that, as far as regards this objection, which is the only one with

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which I shall deal, that this is a case of imperfect averment, because the verdict could not have been given unless the averment had been proved in the sense in which it ought to have been averred.

GROVE, J.—I am of the same opinion. It seems to me to come within the rule of *Jackson v. Pecked* (1 M. & S. 234). And the argument in that case was this: "Where a matter is so essentially necessary to be proved, that had it not been given in evidence, the jury could not have given such a verdict, the want of stating that matter in express terms in a declaration, provided it contains terms sufficiently general to comprehend it in fair and reasonable intentment, will be cured by the verdict." I think these words accurately apply to the present indictment.

ARCHIBALD, J.—I am of the same opinion.

Conviction affirmed.

V.C. MALINS' COURT.

Reported by T. H. CARSON, and F. GOULD, Esqrs.,
Barristers-at-Law.

Thursday, June 5, 1873.

GREENWOOD v. WADSWORTH.

Interment Acts (15 & 16 Vict. c. 85, sects. 9-25)—
16 & 17 Vict. c. 134, sects. 1-7—17 & 18 Vict.
c. 87, s. 12—18 & 19 Vict. c. 128, s. 9—*Public and
private burial grounds.*

The provisions of the Interment Acts as to the consent of the owners of dwelling houses being obtained before opening a new burial ground within 100 yards of such dwelling houses apply to private as well as public burial grounds.

THE bill in this suit was filed to obtain a declaration that according to the construction of certain Acts, the material parts of which are stated below, the defendants were not entitled to use for burials a proposed new burial ground, or any part thereof being within the distance of 100 yards of the plaintiffs' dwelling houses, without the consent of the plaintiffs, and for an injunction restraining such user.

The plaintiffs, as trustees of a will, were the owners in fee of a piece of land with two dwelling houses upon it at Rawden, in the county of York, and the defendants, as trustees of the Rawden Baptist Chapel, were the owners of a neighbouring piece of ground, on the upper part of which stood the chapel with an old burial ground attached to it, and the whole of the lower part of such piece of ground which had never been used or appropriated for a cemetery lay within 100 yards of the plaintiffs' dwelling houses.

By 15 & 16 Vict. c. 85, s. 9, it is enacted that

No new burial ground or cemetery (parochial or non-parochial) shall be provided and used in the Metropolis, or within two miles of any part thereof, without the previous approval of one of Her Majesty's principal Secretaries of State.

Sect. 25:

No ground not already used as, or appropriated for, a cemetery, shall be appropriated as a burial ground, or as an addition to a burial ground, under this Act nearer than 200 yards to any dwelling house without the consent in writing of the owner, lessee, or occupier of such dwelling house.

By 16 & 17 Vict. c. 134, s. 1, it is enacted that

In case it appears to Her Majesty in Council upon the representation of one of Her Majesty's Principal Sec-

retaries of State that for the protection of the public health the opening of any new burial ground in any city or town, or within any other limits, save with the previous approval of one of such Secretaries of State, should be prohibited, or that burials in any city or town, or within any other limits, or in any burial ground or places of burial, should be wholly discontinued, or should be discontinued subject to any exception or qualification, it shall be lawful for Her Majesty by and with the advice of her Privy Council to order that no new burial ground shall be opened in such city or town, or within such limits without such previous approval.

By sect. 7 of the same Act it is enacted that the provisions contained in sects. 10 to 42 (both inclusive) of 15 & 16 Vict. c. 85, and also in sects. 44, 50, 51, and 52 of the said Act, shall extend to any parish not in the Metropolis.

Sect. 12 of 17 & 18 Vict. c. 87, enacts that

No ground not already used as, or appropriated for, a cemetery shall be appropriated under the said Act of the last session and this Act, or either of them, as a burial ground, or as an addition to a burial ground nearer than 100 yards to any dwelling house without such consent as aforesaid [i.e. the consent of the owner, lessee, and occupier].

By 18 & 19 Vict. c. 128, s. 9, it is enacted that

No ground not already used as, or appropriated for, a cemetery shall be used for burials under the said Act or this Act, or either of them, within the distance of 100 yards from any dwelling house without such consent as aforesaid.

By sect. 21 of the same Act it is enacted that "the said Acts of the 15th and 16th, 16th and 17th, and 17th and 18th years of Her Majesty and this Act shall be read and construed together as one Act."

In April 1872 the plaintiffs ascertained that the Home Secretary had signified his approval of the site of the proposed new burial ground, and having communicated with him on the subject, their solicitors received the following reply:—

Whitehall, 15th May 1872.

Gentlemen,—I am directed by Mr. Secretary Bruce to acknowledge the receipt of your letter of the 13th instant, and to inform you in reply that the fact of the site of the proposed burial ground at Rawden being approved amounts only to the removal of the prohibition to establish a new burial ground in the parish without the sanction of the Secretary of State, and does not interfere with the right of your clients to take such steps as they may be advised to take with a view to prevent the site being used for burial.—I am, Gentlemen, your obedient servant,

A. F. O. LIDDELL.

Messrs. J. and J. E. W. Thompson,
Bradford, Yorks.

The bill was filed on the 7th April 1873, at which time the proposed burial ground had been fenced in, but no burials had as yet taken place within it.

The case now came on on motion for injunction.

Pearson, Q.C. and Graham Hastings, in support of the motion.

Cotton, Q.C. and W. Barber, for the defendants, submitted that the proposed new burial ground was a private ground, and that therefore the Acts in question did not apply.

The VICE-CHANCELLOR said that the general policy of the Acts was to prevent burials in towns. The Legislature could not have intended that the restriction should apply to a public and not to a private ground. If these Acts had not applied to this ground, there would have been no need for the application which had been made to the Secretary of State. As it appeared that the burial ground would be within 100 yards of the plaintiffs' houses, the injunction must be granted.

Plaintiffs' solicitors, Evans, Foster, and Rutter, for J. and J. E. W. Thompson, Bradford.

PRIV. Co.]

REG. v. COOTE.

[PRIV. Co.]

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Reported by DOUGLAS KINGSFORD, Esq., Barrister-at-Law.

Tuesday, March 18, 1873.

(Present: The Right Hons. Sir JAMES W. COLVILLE, Sir BARNES PEACOCK, Lord Justice MELLISH, Sir MONTAGUE E. SMITH, and Sir ROBERT P. COLLIER.)

REG. v. COOTE.

Depositions on oath of a prisoner—Admissibility in evidence—Criminating questions—Ignorantia juris—Caution to witness—11 & 12 Vict. c. 42, s. 18.

By an Act of the Quebec Legislature, certain officers called "Fire Marshalls" are appointed with power to inquire into the origin of fires in Quebec and Montreal and for that purpose to examine persons on oath. Upon an inquiry, held in pursuance of this statute, as to the origin of a fire in a warehouse occupied by the prisoner, he was examined on oath as a witness. No caution was given to him that his evidence might be used against him. At the time of such examination there was no charge against the prisoner or any other person. Subsequently the prisoner was tried for arson of the said warehouse and his depositions made at the inquiry before the Fire Marshalls were admitted as evidence against him. Held (reversing the judgment of the Court of Queen's Bench for the Province of Quebec, Canada), that the depositions were properly admitted.

The depositions on oath of a witness legally taken are evidence against him, should he be subsequently tried on a criminal charge, except so much of them as consists of answers to questions to which he has objected as tending to criminate him, but which he has been improperly compelled to answer. The exception depends upon the principle "*Nemo tenetur seipsum accusare*," but does not apply to answers given without objection, which are to be deemed voluntary.

The witness's knowledge of the law enabling him to decline to answer criminating questions must be presumed ("*Ignorantia juris non excusat*").

The statute (11 & 12 Vict. c. 42, s. 18), requiring magistrates to caution the accused with respect to statements he may make in answer to the charge, is not applicable to witnesses asked questions tending to criminate them.

By the Consolidated Statutes of Lower Canada, c. 77, s. 57, it is provided that when any person has been convicted of any felony at any criminal term of the Court of Queen's Bench, the court before which the case has been tried may, in its discretion, reserve any question of law which has arisen on the trial for the consideration of the Court of Queen's Bench on the appeal side thereof, and may thereupon postpone the judgment until such question has been considered and decided by the said Court of Queen's Bench. By s. 58, the said court shall thereupon state in a case, to be signed by the presiding judge, the question or questions of law, with the special circumstances upon which the same have arisen.

The said Court of Queen's Bench shall have full power and authority at any sitting thereof on the appeal side, after the receipt of such case, to hear and finally determine any question therein; and thereupon to reverse, amend, or affirm any judgment which has been given on the indictment on the trial of which such question arose, or to avoid

such judgment and order an entry to be made on the record, that in the judgment of the said Court of Queen's Bench the party convicted ought not to have been convicted, or to arrest the judgment, or to order the judgment to be given thereon at some other criminal term of the said court, if no judgment has before that term been given, as the said Court of Queen's Bench is advised, or make such other order as justice requires.

The present appeal was from a judgment of the appeal side of the Court of Queen's Bench, for the Province of Quebec, Canada, on a case reserved for that court by Badgely, J., under the powers of the above statute, on the trial of the respondent for arson.

The case so reserved was as follows:—

"The prisoner, Edward Coote, was indicted for arson of a warehouse in his occupation, and belonging to Alexander Roy.

"The indictment contained four counts,—The first with intent to defraud the Scottish Provincial Insurance Company; second, to defraud the Royal Insurance Company; the third to defraud generally; and the fourth to injure generally; upon his plea of not guilty, he was tried before the Court of Queen's Bench, at the criminal term of the said court, holden by me at Montreal, in this present month, before a competent jury, empanelled in the usual manner and, after evidence adduced by the Crown and by the prisoner, was found guilty, the jury returning a general verdict of guilty.

"In the course of the adduction of the evidence for the Crown, two depositions made and sworn to by the prisoner, with his signature subscribed to each, taken by the Fire Commissioners at their investigation into the cause and origin of the fire at his warehouse, before any charge or accusation against him or any other person had been made, were produced in evidence against him, and which, after having been duly proved, were submitted to the jury as evidence against him, after the objection previously made by the prisoner to their production in evidence, and after his said objection had been overruled by me—after the conviction of the prisoner, and before sentence was pronounced by me thereon, he moved the court by two motions filed in court in the terms following:—

The case then set out the two motions, of which the first is immaterial, as Badgely, J., rejected it, and reserved no question respecting it; the second was in the following terms:—

"Motion on behalf of the said Edward Coote, that judgment upon the said indictment, and upon a verdict of guilty thereon, rendered against him, be arrested, and that the said verdict be quashed and set aside, and the said defendant, to wit the said Edward Coote, be relieved therefrom, for, among others, the following reasons:—

Twenty-one reasons were then set out, the only ones material to the present appeal being in effect that the two depositions were inadmissible in evidence, because the said Fire Commissioners, before whom they were taken, had no authority to administer an oath, or take such depositions, and such depositions were not admissible as statements made by the prisoner, because they were not made freely and voluntarily and without compulsion or fear, and without the obligation of an oath.

The case then stated the rejection of the first motion, and that he, the said judge, though himself considering the reasons given insufficient to

support the second motion, yet as doubts might be held by the Court of Queen's Bench as to the legal production of the said depositions, reserved it, and held it over for decision with reference to the admission of the said depositions by the Court of Queen's Bench, appeal side.

The Fire Commissioners, before whom the depositions were taken, are appointed under the provisions of two statutes of the provincial legislature of Quebec (81 Vict. c. 32, and 92 Vict. c. 29), under which Acts they are empowered to investigate the origin of any fires occurring in the cities of Quebec and Montreal, to compel the attendance of witnesses and examine them on oath, and to commit to prison any witnesses refusing to answer without just cause.

The criminal law of England was introduced into Lower Canada at the time of the cession to the English, A.D. 1763, and the criminal law of England of that date still continues in force in the province of Quebec, Canada, except as it has been altered by Canadian statutes or imperial statutes applicable to Canada.

Previous to the year 1869 a statutable provision (Consolidated Statutes of Lower Canada, c. 77, s. 63) was in force, by which a power was vested in the Court of Queen's Bench, appeal side, if at the hearing of a case reserved they were of opinion that the conviction was bad, for some cause not depending on the merits of the case, to declare the same by its judgment, and direct that the party convicted should be tried again as if no trial had been had in such case; but by a subsequent statute (32 & 33 Vict. c. 29 s. 80), passed by the Legislature of the Dominion of Canada shortly after the establishment of that confederation, for the purpose of assimilating the criminal procedure throughout the various provinces of the dominion, that section was expressly repealed, and there were at the time of the respondent's trial statutable provisions giving right to a new trial in criminal matters, or regulating motions in arrest of judgment in criminal proceedings in force in the Province of Quebec, Canada.

On the 15th Dec. 1871, the reserved case came on for argument in the Court of Queen's Bench, appeal side, before Duval, C.J., and Caron, Drummond, Badgley, and Monk, JJ., and on the 15th March 1872, the court gave judgment in the following terms: "After hearing counsel as well on behalf of the prisoner as for the Crown, and due deliberation had, on the case transmitted to this court from the Court of Queen's Bench, sitting on the Crown side at Montreal, it is considered, adjudged, and finally determined by the court now here, pursuant to the statute in that behalf, that an entry be made on the record to the effect that in the opinion of this court the production of the depositions made by the prisoner before the Fire Commissioners at Montreal was illegal, and, therefore, that the evidence adduced on the part of our Sovereign Lady the Queen does not justify the verdict, which is hereby quashed and set aside.

"But this court, considering that the conviction is declared to be bad from a cause not depending upon the merits of the case, does hereby order that the said prisoner, Edward Coote, be tried anew on the indictment found and now pending against him, as if no trial had been had in the case, and that for the purpose of standing such new trial, he be bound over in sufficient recognizance to appear on the first day of the next ensuing

term of the Court of Queen's Bench, sitting on the Crown side, at Montreal, and thereafter from day to day until duly discharged."

From this judgment Badgley and Monk, JJ., dissented.

On the 15th March 1872, an application was made by the Attorney-General for the Province of Quebec, Canada, on behalf of the Crown, to the said Court of Queen's Bench, for leave to appeal to Her Majesty in Her Privy Council, and such leave was refused.

On the 10th May 1872, special leave was granted by Her Majesty in Council to appeal from the said judgment of the said Court of Queen's Bench of the 15th March 1872.

Sir John B. Karslake, Q.C. and Bompas for the appellant.—The depositions were properly received in evidence by the judge before whom the indictment was tried. They were admissible although made on oath, and although made by the prisoner as a witness whose attendance might have been compelled. At the time the depositions were taken no charge had been made against the prisoner, and he had the right of refusing to answer questions tending to criminate him. The prisoner answered voluntarily, and Badgley J. states that he "frequently exercised his privilege of refusing to answer certain questions." It was not necessary that the Fire Commissioners should caution the prisoner that statements made by him on the inquiry might be used in evidence against him. The statute (11 & 12 Vict. c. 42, s. 19) relates only to proceedings before magistrates, and caution given to accused persons. There was no ground for moving in arrest of judgment; nor had the court power to grant a new trial, for the statute empowering the court to grant a new trial (Consolidated Statutes of Lower Canada, c. 77, s. 57) was repealed by 32 & 33 Vict. c. 29, s. 80, which gives no such power. They cited the authorities given in the judgment *post*, and further,

1 Taylor on Evidence, 743;
Rosc. Crim. Evidence, 62;
Joy on Confessions, 63, 68;
Reg v. Gillis, 17 Ir. C. L. Rep. 512.

Judgment was delivered by Sir ROBERT P. COLLIER.—Edward Coote, the respondent, was convicted of arson, subject to a question of law reserved by Badgley, J. (the judge who presided at the trial), for the consideration of the appeal side of the Court of Queen's Bench, in pursuance of c. 87, sect. 57 of the Consolidated Statutes of Lower Canada. The question reserved was, whether or not the prosecutor was entitled to read as evidence against the prisoner depositions made by him under the following circumstances:—An Act of the Quebec Legislature appointed officers named "Fire Marshalls" for Quebec and Montreal respectively, with power to inquire into the cause and origin of fires occurring in those cities, and conferred upon each of them "all the powers of any judge of session, recorder, or coroner, to summon before him and examine upon oath all persons whom he deems capable of giving information or evidence touching or concerning such fire." These officers had also power, if the evidence adduced afforded reasonable ground for believing that the fire was kindled by design, to arrest any suspected person, and to proceed to an examination of the case and committal of the accused for trial in the same manner as a justice of the peace. Upon an inquiry held in pursuance of this statute as to the

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origin of a fire in a warehouse, of which Coote was the occupier, he was examined on oath as a witness. No copy of his depositions accompanies the record, but their Lordships accept the following statement of Badgley, J., as to the circumstances under which they were taken: "Among the several persons examined respecting that fire was Coote himself, upon two occasions at an interval of three or four days between his two appearances, on each of which he signed his deposition taken in the usual manner of such proceedings, and which was attested by the commissioners. Upon both occasions he acted voluntarily and without constraint; there was no charge or accusation against him or any other person; he was free to answer or not the questions put to him, and frequently exercised his privilege of refusing to answer such questions. Some days after the date of the latter deposition, and after the final close of the inquiry, Coote was arrested upon the charge of arson of his premises and duly committed for trial." At his trial the above-mentioned depositions were duly proved, and admitted in evidence after being objected to by the counsel for the prisoner. The objection taken at the trial appears to have been that to constitute such a court as that of the Fire Marshall was beyond the power of the provincial legislature, and that consequently the depositions were illegally taken. Subsequently other objections were taken in arrest of judgment, and the question of the admissibility of the depositions was reserved. It was held by the whole court (in their Lordships' opinion rightly), that the constitution of the court of the Fire Marshall, with the powers given to it, was within the competency of the provincial legislature; but it was further held by a majority of the court that the depositions of the prisoner were not admissible against him, because they were taken upon oath, and because he was not cautioned that whatever he said might be given in evidence against him, after the manner in which justices of the peace are required to caution accused persons, by an Act of the British Parliament adopted in this respect by the Colonial Legislature. The court held the conviction to be bad, but inasmuch as the objection to it was not founded on the merits of the case, made an order directing a new trial. Their Lordships are unable to concur in what appears to be the view of one of the judges of the Court of Queen's Bench, that the law on the subject of the reception in evidence against a prisoner of statements made by him upon oath is so unsettled that every judge is at liberty in every case to act upon his own individual opinion. It is true that doubts have from time to time arisen on this subject, and that conflicting dicta, and indeed decisions, may be found upon it; but, in their Lordships' opinion, all such doubts have been set at rest by a series of recent decisions, not indeed promulgating any new law, but declaring what the law has always been if properly understood. In the case of *Res v. Haworth* (4 C. & P. 254), a deposition on oath made by the prisoner as a witness against a person named Sheard, on a charge of forgery, was received in evidence by Park, J., against the prisoner, on an indictment of forgery. In *Reg. v. Goldshede and another* (1 C. & K. 657), Denman, J., admitted against the defendants, on a charge of conspiracy, answers which they had made on oath in a suit in Chancery. In *Reg. v. Sloggett* (Dearl. C. C. 656), the prisoner was examined in the Court of Bankruptcy, under an adjudication

against him, and answered questions tending to criminate himself without objection. At a certain stage of his examination he was told by the commissioner to consider himself in custody. On a case reserved, it was held by the Court of Criminal Appeal that so much of his examination as was taken before his committal to custody was evidence against him. In that case Jervis, C.J., observes: "The test is whether he may object to answer. If he may, and does not do so, he voluntarily submits to the examination to which he is subjected, and such examination is admissible as evidence against him." In *Reg. v. Chidley and Cummins* (8 Cox C. C. 365), Cockburn, C.J., admitted a deposition made by Cummins, when Chidley alone was accused of the offence for which they were afterwards both tried. The learned editor of the 4th edition of Russell on Crimes (vol. 3, p. 418), thus reports a case of *Reg. v. Sarah Chesham*: "Where the prisoner was indicted for administering poison with intent to murder her husband, the coroner stated that he had held an inquest on his body, which was adjourned, and that the prisoner was present as a witness on the second occasion. No charge had at that time been made against her. She made a statement on oath, which the coroner took down in writing. Campbell, C.J., after consulting Parke, B., admitted the statement, and the prisoner was convicted and executed." The case of *Reg. v. Garbett* (Den. C. C. 236), accords with the foregoing. There the prisoner objected to answer certain questions on the ground that his answers might criminate him. His objections, which were based on reasonable grounds, were overruled, and he was compelled to answer. It was held by a majority of the judges on a Crown case reserved that the particular answers so given were inadmissible against him, but it does not appear to have been suggested that the rest of his deposition was not admissible. The case of *Reg. v. Scott* (D. & B. C. C. 47), seems to go somewhat further. It was there held by the Court of Criminal Appeal (Coleridge, J., dissenting), that although, under the Bankruptcy Act then in force (12 & 13 Vict. c. 106), the bankrupt was bound to answer certain questions, notwithstanding that they might tend to criminate him, nevertheless such answers were admissible against him, the compulsion under which he acted being one of law, and not the improper exercise of judicial authority. From these cases, to which others might be added, it results, in their Lordships' opinion, that the depositions on oath of a witness legally taken are evidence against him should he be subsequently tried on a criminal charge, except so much of them as consists of answers to questions to which he has objected as tending to criminate him, but which he has been improperly compelled to answer. The exception depends upon the principle *Nemo tenetur seipsum accusare*, but does not apply to answers given without objection, which are to be deemed voluntary. The Chief Justice indeed suggests that Coote may have been ignorant of the law enabling him to decline to answer criminal questions, and that if he had been acquainted with it he might have withheld some of the answers which he gave. As a matter of fact, it would appear that Coote was acquainted with so much of the law; but be this as it may, it is obvious that to institute an inquiry in each case as to the extent of the prisoner's knowledge of law, and to speculate whether, if he had known

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more, he would or would not have refused to answer certain questions, would be to involve a plain rule in endless confusion. Their Lordships see no reason to introduce, with reference to this subject, an exception to the rule recognised as essential to the administration of the criminal law, *Ignorantia juris non excusat*. With respect to the objection that Coote when a witness should have been cautioned in the manner in which it is directed by statute that persons accused before magistrates are to be cautioned (a question said by Badgley, J., not to have been reserved, but which is treated as reserved by the court), it is enough to say that the caution is by the terms of the statutes applicable to accused persons only, and has no application whatever to witnesses. If, indeed, the Fire Marshall had exercised the power which he possessed of arresting Coote on a criminal charge (but which he did not exercise), then it would have been proper to caution him before any further statement from him had been received. A question has been raised on the part of the Crown whether or not the court had the power of ordering a new trial, inasmuch as c. 77, s. 63, of the Consolidated Statutes of Canada, giving the court power to direct a new trial, has been repealed by the subsequent statute 32 & 33 Vict. c. 29, s. 80, which does not itself in terms confer any such power, but in the view which their Lordships take of the case it becomes unnecessary to determine this question. For the reasons above given their Lordships will humbly advise Her Majesty that the order made by the Court of Queen's Bench be reversed, that the conviction be affirmed, and that the said Court of Queen's Bench be directed to cause the proper sentence to be passed thereon.

Judgment reversed.

Attorneys for the appellant, *Bischoff, Bompas, and Co.*

COURT OF QUEEN'S BENCH.

Reported by J. SHORTT and M. W. M'KELLAR, Esqrs.,
Barristers-at-Law.

Wednesday, May 28, 1873.

BELL (app.) v. CRANE (resp.)

Industrial Home—Liability to rating—Discretion of rating authorities—Sunday and ragged schools—32 & 33 Vict. c. 40, ss. 1, 2.

Sect. 1 of 32 & 33 Vict. c. 40, provides that "every authority having power to impose or levy any rate upon the occupier of any building or part of a building used exclusively as a Sunday school or ragged school, may exempt such building from any rate for any purpose whatever, which such authority has power to impose or levy."

The word "may" has not the sense of "must" in this enactment; and the rating authorities may exercise a discretion in exempting or not exempting Sunday schools or ragged schools from rateability.

CASE stated under 20 & 21 Vict. c. 43.

This was a complaint for non-payment of 29l. 13s. 9d. rates for the Boys' Home, in Regent's Park-road, St. Pancras, of which the appellant was honorary secretary and treasurer. The premises consisted of three houses, and 120 boys were lodged and lived from day to day, the matron living on the premises. The master and his family resided in a fourth house at a little distance. The home was supported entirely by voluntary subscriptions. It was not a reformatory. The home re-

ceived boys sent there by the police magistrates of London, and in respect of these received allowances from the Secretary of State as a capitation grant.

The boys are employed as tailors, shoemakers, carpenters, brush makers, and firewood choppers; the produce of their labour is sold to the public, and the money is received and applied towards their maintenance. A copy of the account for 1871 accompanies this case, and is to be taken as part thereof.

The lecture rooms are occasionally used for penny readings, to which the public are admitted on payment, and the proceeds are applied in aid of the general fund.

No appeal was made to the assessment committee of the parish against the valuation list, nor were any other steps taken by the appellant under the Valuation (Metropolis) Act 1869. After the making of the rate, however, he applied to the general purposes committee of the vestry for relief from it. That committee, on the 29th Feb. 1872, recommended to the vestry that three-fourths of the rate should not be enforced, provided the remainder were paid forthwith, and so reported to the vestry. When that report was presented on 6th March 1872, it was moved that the recommendation be adopted; but an amendment was moved, and it was resolved that the whole of the rates should be enforced.

The appellant contended before the magistrate that the Boys' Home is exempted from payment of the rates claimed by the respondent by virtue of the provisions of the statute 32 & 33 Vict. c. 40, and called witnesses to prove that the "Boys' Home" is a Sunday school and also a ragged school within the meanings of those terms as interpreted by the said Act. He further contended that, though the word "may" is used in the first paragraph of the enacting part of the statute, yet it is to be construed as being imperative, in accordance with what the appellant argued was the rule of construction applicable to Acts of Parliament in all cases where a power is intrusted which is to be exercised for the public benefit; and there is nothing but the word itself to show that the Legislature intended to make the exercise of the power discretionary.

On the part of the respondent it was contended that this was not a Sunday school or ragged school within the meaning of the Act 32 & 33 Vict. c. 40; that, even if it were, the vestry were not compellable to exempt it from rating, and had decided to enforce the whole rate; that if the buildings were exempt from rating under that Act, the appellant ought to have claimed the exemption under the Valuation (Metropolis) Act 1869 (32 & 33 Vict. c. 67), and that the magistrate must now enforce the payment of the rate.

The magistrate, being of opinion that the appellant was liable for the payment of the rates, gave his determination against him.

The question of law upon which the case is stated for the opinion of the court, therefore, is, under the circumstances before stated, whether the Boys' Home, as represented by the appellant, is exempted from payment of the several aforesaid rates, amounting in the whole to the sum of 29l. 13s. 9d.

The preamble to 32 & 33 Vict. 40 (The Sunday and Ragged Schools Exemption from Rating Act) recites as follows: "Whereas for many years, and until lately, buildings used as Sunday and ragged schools for gratuitous education enjoyed an exemp-

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tion from poor and other rates, and it is expedient that they should be exempted from such liability."

The 1st section enacts that "from and after the 30th Sept. 1869, every authority having power to impose or levy any rate upon the occupier of any building or part of a building used exclusively as a Sunday school or ragged school, may exempt such building from any rate for any purpose whatever which such authority has power to impose or levy; provided that nothing in this Act contained shall prejudice or affect the right of exemption from rating of Sunday or infant schools," &c., by virtue of 3 & 4 Will. 4, c. 30.

Benjamin, Q.C. (with him *Lumley*), for the appellant, contended that the school was one which came within the meaning and operation of the Act, being merely a charitable institution, and designed and actually employed as a home for destitute boys. [*BLACKBURN, J.*—It certainly does not come within the popular conception of a ragged school; but it is an industrial school, according to 29 & 30 Vict. c. 113, sect. 5.] The preamble to 32 & 33 Vict. c. 40 shows that it was the intention of the Legislature that such institutions should be exempt from liability to rating. The word "may" in sect. 1 must be read as "must." *Orator v. Powell* (2 El. & Bl. 210) was referred to,

Poland, for the respondent, was not called upon.

BLACKBURN, J.—We are all agreed that the word "may" in Acts of Parliament must, by force of the context, sometimes be read as "must;" but we think that in the particular Act before us that is not so, and that the word "may" has its ordinary meaning. Whether wisely or not, the Legislature has, we think, left it in the discretion of the rating authorities to exempt or not to exempt those schools which come within the meaning of the Act. This being in our opinion the true construction of sect. 1 of this Act, it is unnecessary for us to determine, in the present case, whether this particular school is or is not a ragged school within other parts of the Act. Our judgment must therefore be for the respondent.

QUAIN, J.—I am of the same opinion. That the Legislature intended to give the rating authorities a discretion is, in my opinion, shown by the proviso to the 1st section of the Act, which provides that this discretion, which may be exercised in the cases referred to, is not to affect the right to exemption which is conferred on Sunday and infant schools by 3 & 4 Will. 4, c. 30.

ARCHIBALD, J., concurred.

Judgment for the respondent.

Solicitor for the appellant, *Leefts*.

Solicitor for the respondent, *W. D. Cooper*.

Friday, June 6, 1873.

MILLS v. SCOTT.

Contagious Diseases (Animals) Act 1869 (32 & 33 Vict. c. 70). s. 57—*Local authority—How to sue—Liability of innocent owner of affected animals—Power of County Court judge to amend plaintiff's description.*

The defendant was owner of affected animals which had been exposed in contravention of sect. 57 of the Contagious Diseases (Animals) Act 1869, but he satisfied the justices before whom he was charged of his want of knowledge of their affected state, and the complaint against him was dismissed. The local authority incurred expenses

in respect of these affected animals, for which the defendant as owner was sued in a County Court. The inspector of the local authority took out the summons in his own name, with a description as such inspector, but the particulars of claim stated that the defendant was indebted to the local authority.

Held, that the County Court judge had power to amend by substituting the local authority as plaintiffs; that the local authority being empowered to recover these expenses, must be impliedly authorised to sue as a quasi corporation; and that the defendant was liable, although he had not been convicted of an offence against the Act.

THIS was an appeal from the County Court of Hertfordshire, holden at Hitchin.

The summons was taken out in the name of James Mills, the inspector appointed by the local authority for the county of Hertford, under the Contagious Diseases (Animals) Act 1869, as plaintiff, against Nathan Scott, Ashwell, dealer, defendant.

The action was brought in the above-mentioned court for a claim, the particulars of which were to the summons served upon the said defendant annexed, and of which particulars the following is a copy:

Mr. Nathan Scott, Ashwell, Herts.

To the local authority for the county of Hertford, under the Contagious Diseases (Animals) Act.

1872.		£	s.	d.
Nov. 5.	Hire of meadow 26 days for 7 calves			
to	at 1s. 9d. per day	2	5	6
Dec. 11.	19 trusses of hay	1	18	0
	Attendance, man for water, &c.	0	6	6
		4	10	0

The cause came on for hearing in the said County Court, holden at Hitchin, before the judge of the said court on the 1st Feb. 1873.

Graham, of counsel, appeared for the plaintiff.

H. Barker, solicitor, Biggleswade, appeared as advocate for the defendant.

It was an action brought by the plaintiff to recover from the defendant the expenses of the keep of certain animals seized by the said James Mills, in execution of the Contagious Diseases (Animals) Act 1869, s. 57.

Barker, for the defendant, directed the attention of the judge to the discrepancy between the summons and the particulars, namely, that by the summons the plaintiff, James Mills, sued in his own name, but that by the particulars annexed to the summons, the amount sued for was claimed to be due "To the local authority for the county of Hertford, under the Contagious Diseases (Animals) Act."

Evidence was given to show that the plaintiff had inadvertently applied for the summons to be issued in his own name, contrary to the instructions he had received from the clerk of the peace.

The judge, with the consent of the plaintiff's counsel, but without the consent, and against the contention, of the defendant's advocate, amended the summons and proceedings, by striking out the said James Mills, as plaintiff, and substituting as plaintiffs "The local authority for the county of Hertford, under the Contagious Diseases (Animals) Act 1869," assuming that he could do so by virtue of the powers given him by s. 57, 19 & 20 Vict.

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c. 108, and No. 121 of the rules, orders and forms for regulating the practice of the County Courts 1867.

It was further contended by defendant's advocate, that, assuming the judge had power to amend the summons and proceedings as aforesaid, the proper names of the persons constituting the local authority must be given, they not being a corporation.

It was admitted on the part of the defendant that some of the cattle mentioned in the particulars were affected with foot and mouth disease at the time the same were seized by the said James Mills.

It was admitted on the part of the plaintiff that the defendant had been summoned to appear before the justices sitting in petty sessions for the division of Hitchin, in the county of Hertford, for exposing the animals mentioned in the particulars in alleged contravention of the Contagious Diseases (Animals) Act 1867, sect. 57, and that the said defendant had shown to the satisfaction of the justices before whom he was charged, that he did not know of the same being so affected, and that he could not, with reasonable diligence, have obtained such knowledge, and that thereupon such summons and complaint were dismissed.

It was admitted by the said James Mills that he had been paid by the local authority before action brought the amount for which the defendant had sued.

It was contended by the advocate for the defendant, that, the justices having dismissed the summons and complaint against the defendant, there was no such contravention by him of the Contagious Diseases (Animals) Act 1869 as would render him liable for the care and keep of the animals during the time of their detention.

Judgment was given for the substituted plaintiffs, leave being granted to state this case.

Grantham argued for the defendant, the appellant.—First, the power of amendment is limited by sect. 57 of 19 & 20 Vict. c. 108, and does not include the alteration of parties to the suit; the words are, "The judge of a County Court may at all times amend all defects and errors in any proceeding in such court, whether there is anything in writing to amend by or not, and whether the defect or error be that of the party applying to amend or not; and all such amendments may be made with or without costs, and upon such terms as to the judge may seem fit; and all such amendments as may be necessary for the purpose of determining in the existing suit the real question in controversy between the parties, shall be so made, if duly applied for." Such a misdescription of a party too is beyond the application of sect. 59 of 9 & 10 Vict. c. 95, which provides that "no misnomer or inaccurate description of any person or place in any such plaint or summons shall vitiate the same, so that the person or place be therein described so as to be properly known." Moreover, the rules, orders, and forms of 1867, relating to amendment, Nos. 119 to 128, do not touch the substitution of one plaintiff for another. In the case of *Clay v. Oxford* (L. T. Rep. 2 Ex. 54), an application was made to substitute for the name of the plaintiff, who had died before the writ was issued, the names of his representatives, but the court refused. Kelly, C.B. said that since the Common Law Procedure Act 1852, gives certain powers of amendment, "but contains no provisions in any part of it

for substituting one plaintiff for another, one suing in a representative capacity for a deceased man who never was a party, I cannot but think that no such power was meant to be given." [BLACKBURN, J.—The fact found here is that by mistake the summons was taken out in the name of a representative of the local authority instead of in the name of the local authority. QUAIN, J.—Is it not within the decision of *La Banca Nazionale v. Hamburger* (2 H. & C. 330)? There a foreign bank sued in a corporate name by which it was known, and the defendant pleaded that it was not a body corporate; the court allowed the writ, declaration and subsequent proceedings to be amended by inserting the name of a director of the bank as nominal plaintiff, it appearing that by the law of the country the bank was entitled to sue in his name.] But even if this amendment was within the judge's jurisdiction, the Contagious Diseases (Animals) Act 1869 does not make the local authority a corporation to sue or be sued; and although sect. 57 provides that the local authority may recover expenses, that provision, by reason of the omission to direct how the local authority is to sue, can be of no avail. This is confirmed by sect. 123 which enacts with respect to Scotland that the procurator-fiscal of the county or burgh may apply for a warrant to carry an order into effect. As to England no person is authorised to sue or take proceedings. The local authorities in England are defined in the second schedule to the Act. [BLACKBURN, J.—When a fluctuating body has power to sue by statute, it must by implication be a quasi corporation for the purpose of suing in the same way as churchwardens and overseers.] The last point is whether the defendant, not having been guilty of an offence against the Act, can be liable for the expenses of the execution of sect. 57. That section relates only to animals belonging to convicted persons; and it is found in the case that the complaint against the defendant had been dismissed.

Graham appeared for the respondents, but was not heard.

BLACKBURN, J.—We need not trouble counsel for the respondents. This does not seem to be the substitution of one plaintiff for another, but rather the misdescription of the plaintiff as a representative of the real plaintiffs instead of the real plaintiffs themselves, who by the 2nd schedule must be the justices in general or quarter sessions assembled. This being so, the amendment was within the jurisdiction of the County Court judge. Certainly, the 57th section of the Contagious Diseases (Animals) Act 1869, might have been better framed, and it would have been well if the person to sue had been expressly pointed out; but the local authority is empowered to recover certain expenses, and I think the necessary implication is that the same body may sue for them. The last objection taken on behalf of the defendant is that, having been acquitted of the complaint made against him under the first clause of the 57th section, he cannot be liable for expenses incurred under the second clause. The section provides that a person exposing for sale or driving an animal affected with disease, shall be deemed guilty of an offence against this Act, unless he shows to the satisfaction of the justices before whom he is charged that he did not know of the same being so affected, and that he could not with reasonable diligence have obtained such knowledge. The

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section proceeds, "Where any horse or animal so affected is exposed or otherwise dealt with in contravention of this section, an inspector of the local authority" may do certain things; "and the local authority may recover the expenses of the execution by them of this section from the owner of the horse or animal." Here the case finds that the defendant's animals were exposed in an affected state in contravention of this section, but that the defendant satisfied the justices of his want of knowledge of their affected state. The local authority incurred these expenses with respect to the defendant's affected animals, and I do not see why under this section he should not be liable to pay for them.

QUAIN and ARCHIBALD, JJ., concurred.

Judgment for plaintiffs.

Attorneys for plaintiffs, Nicholson and Herbert, for Hawkins and Co., Hitchin.

Attorney for defendant, W. Maynard.

Saturday, June 7, 1873.

REG. v. THE ABNEY PARK CEMETERY COMPANY.

Bating—Cemetery—Legal fee conveyed to purchaser of grave—Occupation—Test of annual value.

A cemetery company sold plots of ground for graves, conveying to the purchasers the legal fee simple in trust that the purchasers might use the plots for a burying place according to the rules of the company, and subject to that in trust for the Company.

Held, that the company was liable to be rated as occupiers of the cemetery, and that the profits rateable from the sales ought to be included in the arising value of the cemetery.

On an appeal on behalf of the Abney Park Cemetery Company, in the parish of Stoke Newington, in the county of Middlesex, against a decision of the assessment committee of the said union, altering an assessment in the new valuation list for the said parish, made under and in pursuance of the Valuation Metropolis Act 1869, whereby the lands and properties of the said appellant company are assessed at 2579*l.* gross and 2448*l.* rateable value,

The Court of General Assessment Sessions for the metropolis, holden on the 28th Feb. 1871, confirmed the assessment without costs, and subject to the opinion of the Court of Queen's Bench on the following

CASE.

The Abney Park Cemetery Company is a copartnership duly formed and constituted by and under a deed of settlement, bearing date the 11th Sept. 1839, which deed was executed by all the partners of the said copartnership. Under the provisions of the said deed the company has purchased lands and laid them out as a cemetery, and has erected buildings and catacombs and vaults therein, for cemetery purposes, and has inclosed the same. The company carries on there the business of a burial company for profit in connection with the said cemetery.

The company charges and receives fees or sums of money for the interment of bodies in graves and the deposit of bodies in vaults and catacombs, for the reopening of the same for the proprietors thereof and making further interments therein, and for the performance of Divine worship.

The company, also, from time to time sells plots

of ground for family graves. A copy of the conveyance of one of such plots of ground accompanies and forms part of this case; and it is to be taken that all the other conveyances are in the same form, *mutatis mutandis*.

For the year 1869, 2333*l.* was received by the company as purchase money for divers plots so disposed of and conveyed.

The company was rated as the occupier of the said lands, buildings, catacombs, and vaults, and upon the principle that the company was liable to be rated for, *inter alia*, the receipts derived by them from the sale of the plots of ground so disposed of and conveyed; and the said sum of 2333*l.* so received as purchase money for the sale of the said plots of land was treated by the respondents as part of the annual value of the occupation of the cemetery by the company in the year 1869.

The company are bound to keep in good order the said plots of ground for the purchasers thereof, the doing of which entails upon the company various outlays which form part of its working expenses. A duty is, moreover, cast upon the company to keep in order in perpetuity all the ground of the cemetery, not only during the period in which the company shall continue to realise a revenue from the burials taking place, and shall receive the sums of money from time to time as payments for the fee simple of the plots of land sold as aforesaid, but after they shall by selling and using the ground for burials have exhausted the land for the above purposes.

The gates of the cemetery are closed at 4.30 p.m. and opened at 7 a.m. during the winter months, and closed at 6 p.m., and opened at 6 a.m. during the summer months, and during the intervals, according to the regulations of the company, no admission is allowed even to a purchaser of a vault or catacomb.

The appellants contended that the company was entitled, in calculating the rateable value which a hypothetical tenant would give, to exclude the sums received from the purchase of the said plots of ground sold and conveyed in fee simple during the year from the gross receipts of the company.

If the court should be of opinion that the respondents were right in calculating the rateable value of the company's property as being that set forth in the rate without deducting therefrom the sums received as purchase money of the said plots, then the rate to be confirmed. But if the court should be of opinion that the appellants were entitled to deduct the said sum of 2333*l.*, then the valuation list to be sent back to the sessions to fix the amount.

The following is a copy of the conveyance of a plot of ground by the company to a purchaser.

This indenture, made the day of in the year of our Lord 18 between the trustees and directors of the Abney Park Cemetery Company, of the first part, of the second part, and the said the chairman of the board of directors of the said Abney Park Cemetery Company, and one of the officers to sue and be sued on behalf of the said company of the third part, witnesseth that, in consideration of to the said (trustees and directors), paid by the said they, the said (trustees and directors), do by these presents (made in pursuance of the Act for rendering a release as effectual for the conveyance of freehold estates as a lease and release by the same parties), release and confirm unto the said and his heirs all that plot of ground numbered in Square No. in the Abney Park Cemetery, in the parish of St. Mary, Stoke

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Newington, in the county of Middlesex, containing feet in length and feet in width, to hold the same plot of ground unto the said , his heirs and assigns for ever. But, nevertheless, upon trust and to the intent that he the said , his heirs and assigns, may (subject nevertheless to the rules and orders for the time being of the said company for the management and regulation of the said cemetery and the catacombs and vaults therein), erect or construct a vault or mausoleum in or upon the same, and may use the said plot of ground, vault, or mausoleum, as and for a place of burial for the body or bodies of such person or persons only as he or they shall for the time being think proper to permit or suffer to be buried there, and for no other purpose whatsoever, and, subject to the intent aforesaid, in trust for the said (trustees and directors), their heirs and assigns for ever, as part of the property of the said company. And the said doth hereby, for himself, his heirs, executors, administrators, and assigns, covenant with the said (trustees and directors), their heirs and assigns; and also (as a separate covenant) with the said (chairman), his heirs, executors, administrators, and assigns, that he the said , his heirs and assigns, shall and will from time to time, and at all times hereafter, at his and their own costs and charges, as often as occasion shall require, well and sufficiently repair the grave, gravestones, mausoleum, or vault, to be erected or made in or on the said plot of ground hereby released or intended so to be, and observe, perform, and abide by all and singular the rules and orders which have been or shall from time to time hereafter be made by the company for the management and regulation of the said company, and the catacombs and vaults therein. Provided always, and it is hereby agreed and declared that in case the said , his heirs or assigns, shall at any time or times hereafter, without the consent of the said company, make any erection or erections other than a mausoleum, grave, stone, or vault (as the case may be) on the said plot of ground, or any part or parts thereof, or use or permit to be used the said plot of ground, or any part or parts thereof, or any erection or erections thereon, otherwise than as a place of burial, or in case default shall be made in performance of all or any or either of the covenants or stipulations hereinbefore contained, then and in such case it shall be lawful for the said (trustees and directors), their heirs and assigns, at any time thereafter, into the said plot of ground, or any part thereof, in the name of the whole, to re-enter, and the same to have again, hold, possess, and enjoy, as in their first or former estate. In witness, &c.

H. Lloyd, Q.C. and *Castle* showed cause against the rule, and contended that the assessment committee were right in considering the cemetery company liable to be rated in respect of the receipts derived from the sale of plots of ground for graves, the case of *Reg. v. St. Mary Abbot's, Kensington* (12 Ad. & El. 824), being directly in point. There a company incorporated by statute (2 & 3 Will. 4, c. cx.) had power to purchase land for the purpose of a cemetery, to make vaults and catacombs in it, and to sell in perpetuity for a term the exclusive right of burial therein, subject to the rules and regulations of the company, and to payment of burial fees to them; the company being bound to keep the buildings, external walls, and every part of the cemetery in repair. This court held that the company were liable to be rated to the relief of the poor as occupiers of the whole cemetery, though they had in fact sold in perpetuity the exclusive right of burial in the vaults, catacombs, &c., made by them, had ceased to exercise any act of ownership over them after the sale, and had delivered the keys to the purchasers. The court held also that the profits arising from these sales ought to be included in the rateable value of the cemetery. *Little Dale, J.*, said: "The Act gives the company power to construct vaults and catacombs, which they may afterwards convey in perpetuity or otherwise. This power of disposing of the right of burial in perpetuity makes

no difference in principle; they are still the occupiers of the whole cemetery. It does not appear that the owners of the vaults have the keys of the outer inclosure, though the company deliver them the keys of the vaults. The purchasers have nothing but a right to a certain mode of enjoying portions of the land, from which the company derive a profit." This is strictly applicable to the present case notwithstanding that in the present case the form of conveyance vests the legal fee in the purchasers; for this is subject to such restrictions, limitations, and trusts in favour of the company as to leave the company the sole occupiers of the cemetery. The occupation is a thing quite distinct from the possession of the legal fee; it matters not to the occupation by a mortgagor that the legal fee is in the mortgagee. The application of *Reg. v. St. Mary Abbot's, Kensington*, cannot be avoided by the contrivance of conveying the legal fee to the purchasers, the whole beneficial enjoyment and occupation being still in the company, and the conveyance to the purchaser in reality amounting to nothing more than a perpetual and exclusive right of burial. Somebody must be the occupier, and it is manifest that a person who has in fact only an exclusive right of burial is not the occupier. The company have sole control over the cemetery, they inclose it and keep it in repair, and the purchaser of a plot of ground has not even the right of entering the cemetery at all times.

Poland, in support of the rule.—In the case of *Reg. v. St. Mary Abbot's, Kensington*, there was no parting with the occupation by the company, as there is in the present case; there was only a grant of an easement. It is pointed out in the judgments in that case that the company had no power to part with the land. Thus *Coleridge, J.*, "Some facts stated in the case look like an occupation by the purchasers; but they are explained by reference to the statutes. Sect. 4 gives the company a limited power of sale, and sect. 7 must be construed in conformity with that provision. The land appropriated for interment cannot be sold. The sales, therefore, made under sect. 43 convey only a peculiar easement, and do not deprive the company of the general occupation of the whole." So *Williams, J.*, "It is a fallacy to treat the conveyance here as a sale of the land. The company have no power to sell any but the surplus land not used for the cemetery. By the grant they only part with the exclusive right of sepulture." What the company were prevented by their Act of Parliament from doing in that case, the company in the present case, not being constituted or limited by an Act of Parliament, but being a voluntary partnership, have in fact done. So that the present case is clearly distinguishable from that case. [*BLACKBURN, J.*—The conveyance in the present case is, amongst other things, in trust that the company shall continue in occupation of the cemetery just as before, except as to the exclusive right of burial in the particular plot sold.] A further ground of objection to the assessment of the assessment committee is this: Assuming that the cemetery company are the occupiers of the whole cemetery, the assessment committee should not take into consideration, as a portion of the annual earnings of the company, the amount received in any particular year for the sale in perpetuity of any plot of ground for a burial place. [*BLACKBURN, J.*—If this is the mode in which the company get

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their annual income, I do not see why the assessment committee should not take it into account.] The money is not paid for the use of the burial ground for one year, but for its sale for ever. The premium paid for a lease of a plot of ground would not be taken into account in estimating the annual value of the plot; no more should the amount paid for the purchase in perpetuity of the plots of ground in the present case. Such cannot be taken as part of the annual profits of a particular year. [QUAIN, J.—What difference does that make, if there is a calculable succession of profits from year to year?] The money is not earned by the occupation of the cemetery or part of it for the particular year. [ARCHIBALD, J.—On what principle would you propose to distribute it over a number of years?] In proportion to the number of burials. [BLACKBURN, J.—If they sold all their graves this year, could they or their successors next year be rated as for a valuable tenement? The argument comes to that.]

BLACKBURN, J.—I think we can have no doubt that this rule must be discharged, for the reason that the order which we are asked to quash ought to stand as the assessment committee made it. Two points have to be considered. The first is this: This particular cemetery company in parting with their graves have pursued the following course. They make a conveyance of the fee simple of the grave to the purchaser, upon trusts that the purchaser shall have the enjoyment or use of the place for the purposes of burial, subject to the company's rules and regulations, and subject to this use in trust for the trustees and directors of the company, who are to occupy the cemetery. The effect of this is that the legal fee is outstanding in the purchaser, but the occupation, subject to the use of the grave by the purchaser, is in the cemetery company. Now, the first question is, does it make any difference that the legal fee is not in them, but is outstanding in the purchaser? It must be admitted that it does not. The rate is made upon the occupier. It could never be said by a person who had mortgaged his land, of which he still continued in occupation, that not he, but the mortgagee, should be rated, because the legal fee was in the mortgagee, who is not in possession. Such a contention would not be tenable for a moment. The matter depends upon actual occupation; it is immaterial whether the title of the occupier is legal or equitable. The next question is: assuming that the cemetery company are the actual occupiers of the whole of the cemetery—as to which the case of *Reg. v. St. Mary Abbott's, Kensington*, which seems to me to be quite correct, is precisely in point—the next question is, how are we to get at the quantum of the rateable value? The Parochial Assessment Act (6 & 7 Will. 4, c. 96) enacts (sect. 1) that “no rate for the relief of the poor in England and Wales shall be allowed by any justices, or be of any force, which shall not be made upon an estimate of the net annual value of the several lands rated thereunto; that is to say, of the rent at which the same might reasonably be expected to let from year to year free of all usual tenant's rates and taxes and tithe commutation rentcharge, if any, and deducting therefrom the probable annual cost of the repairs, insurance, and other expenses, if any, necessary to maintain them in a state to command such rent.” In some cases, perhaps, it might be a fairer mode of assessment to estimate the rent

at which the land might reasonably be expected to let, not from year to year, but for some definite period. For example, in the case of a coal pit, as to which there is nothing but expenditure for the first year or so, though great profits are afterwards derived from the working; so that in the early years the parish derives no benefit from the pit, though in subsequent years it derives very great benefit: it might be fairer, perhaps, in such a case, in determining the rateable value, to see at what annual rent the pit might reasonably be expected to let for a term of years. But the Legislature has enacted that this is not to be the mode of determining the rateable value, but that that is to be got at by estimating the rent at which it would let from year to year. The assessment sessions take as a test the rent which is actually got for the land to be rated—the sum at which it was let the preceding year: the presumption being that what was got for the letting last year will also be got this year, unless there is something to show the contrary. In getting at this in the present case, are they to take into consideration the sums of money received in the year for the sale of graves? It has been argued that because a lump sum is paid down for a period of years it cannot be reckoned as part of the annual income of the company, as occupiers of the cemetery. I think there is a fallacy in this. It would lead to the conclusion that the company is never to be rated in respect of these sums of money at all; for it is obvious that if the sums received in 1873 are not to be reckoned in estimating the rateable value for that year, *a multo fortiori*, they cannot be taken into account in the following or any subsequent year. There are cases in which, in this way, a valuable profit might escape being rated altogether. Take the case of a plot of land in the vicinity of a town, which is an exhausted brickfield, without a blade of grass growing upon it, and valueless. In some years the town will probably creep out in that direction, and this plot, now valueless, will become very valuable. And this is not merely a supposititious case; it is one that actually occurred in reference to certain land belonging to Lord Sefton, in a case which came before the Court of Exchequer. This is a rare case, however. The rate is made in respect of the profit derived from the occupation; and it was decided in the case of *Reg. v. St. Mary Abbott's, Kensington (ubi sup.)*, that the profits arising from the sales of burying places ought to be included in the rateable value of the cemetery—a conclusion to which I should have come independently of that case. Sir William Follett, who argued the case, did not raise any objection on that ground. Even if I disagreed with the decision in that case, which I don't, I should be very loth to depart from it. Mr. Poland's argument goes this length, that the cemetery should be exempt from rateability altogether in respect of the plots sold. He tried to argue, indeed, that, as the profits from this source might be very much in one year and very little in another, that they should be spread over a number of years and an average taken. That would be to amend the Parochial Assessment Act, and to take as a test the rent which would be paid for the occupation for a reasonable number of years, instead of for one year. That we are not at liberty to do. In *Reg. v. Everist* (10 Q. B. 178, 204) the court, in delivering judgment, say: “The rate is always im-

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posed with reference to the existing value; whether temporary or enduring is immaterial. A case was supposed of a brickfield worked out in less than a year to meet the demand of some enormous contract for a public work; the consequence would be that the land would have a very much increased value for the year, and it would be only reasonable that it should bear an increased rate for that year; in the following year its value might sink almost to nothing, and the rate ought to fall proportionately, even to nothing, if the brick earth being exhausted, the land, like an exhausted coal mine, should become entirely unproductive. If this were not so, an obvious injustice would be done to the other ratepayers. Suppose two brickfields of the same size, which, if worked so as to be consumed in ten years, and, by equal working in each year, would produce 1000*l.* each, on which the rate should be 10*l.*, in ten years each will contribute 100*l.* to the parochial burthens; let one be exhausted in the first year, the produce will have been 10,000*l.*, but the rate only 10*l.* for that year, according to the appellant's argument, and it may be nothing afterwards; but, whatever it be afterwards, it is clear that there will have been a valuable occupation in one year, escaping, as to nine-tenths, the rate entirely. But no injustice would be done if, in every year the occupier could be assessed according to the actual value in that year; and it is the duty of the overseers to arrive at this as nearly as they can." In *Reg. v. Mirfield* (10 East 219), a case as to the rateability of saleable underwoods, Lord Ellenborough admitted at once the great difficulty of the subject. He said (p. 223): "In general the owners of this kind of property are in the habit of cutting certain proportions of it every year; but when the extent of it is too small to adopt this course, there may be a difficulty in rating it annually. There is great difficulty, however, on the other hand, in attaining anything like equality by adopting a different mode of rating; for if the property is only to be rated when it is cut, once in twenty-one years, instead of its quota of the rate contributing equally through the whole period, it throws a glut into the fund in that one year, and is barren all the rest of the period; and if the owner has other property in the parish, he will pay so much less for that in the same year when his ability is increased." At the end of his judgment, after expressing the opinion of the court that it was not necessary that any of the profits should have been actually reaped or taken from the property during the period for which the rate was made, but that the property was at all times rateable according to the improvement in its value, or in the rent which might fairly be expected from it, Lord Ellenborough said: "Instances continually occur in which the occupier is rated, though he has derived no profit during the period for which the rate is made. A new tenant upon an arable farm reaps none of the produce till the autumn after his tenancy commenced, and yet he must pay up to that autumn according to the rent or value of the estate. He must pay beforehand for the future probable produce. His farm is constantly in a progressive state towards producing profit; and he pays for that progress. So underwoods are annually improving in value, and the rates the occupier pays are for that improvement." I do not think this reasoning very good. Lord Ellenborough's conscience seems to have smitten him, for he adds: "This may possibly

be hard upon tenants for life; but if the law have thrown this burthen upon the property, they take it with that burthen. We think, for the reasons we have mentioned, that the law has so thrown it; that, the property is at all times liable to be rated wherever rates are made." He says in substance that however hard this might be, it would be harder still if the parish got no benefit. But this case, as I have before said, is an exceptional one. The duty of the overseers is to get at the probable annual value for the following year, and there is no better way of doing this than by seeing what was the annual value during the past year. In the present case the overseers cannot do better than see what the cemetery company got for their occupation of the cemetery during the past year. If there are any peculiar circumstances which affect the case, and should cause an alteration in the ordinary mode of assessment, it is for the other side to show the existence of such peculiar circumstances, and none such have been shown to exist here. The rule must therefore be discharged.

QUAIN, J.—I am of the same opinion. I think we might almost content ourselves with saying that the case of *Reg. v. St. Mary Abbot's, Kensington* decides the present case. There is really no practical difference between the two. The only distinction is that in that case the cemetery company had not parted with the land, whereas they have done so here by conveying the legal fee to the purchasers of the burying plots. In that case the company were legal owners of the soil as well as the occupiers, whilst here the legal owner is the purchaser. It was pointed out by the judges who delivered their opinion to the House of Lords in the case of *The Mersey Docks and Harbour Board v. Cameron* (11 H. of L. Cas. 443) that the question of rateability has nothing to do with the legal or equitable ownership, but only with the fact of actual occupation. The cemetery company are undoubtedly the occupiers. The only other question is, what rent a tenant from year to year might reasonably be expected to give for the cemetery. It has been contended on the part of the company that, in forming an estimate of what this rent would be, we should not take into consideration the purchase-money paid for the plots of ground sold in perpetuity. But this is, if not the whole, certainly the largest part of the company's annual income; and the argument came to this, that this purchase-money should be left out of consideration altogether. Mr. Poland says, indeed, that it is to be apportioned over a period of years; but how is this to be done? Mr. Poland does not and cannot say. It seems to me that the case as to this cannot be distinguished from that of *Reg. v. Everist* (*ubi sup.*), where the question was as to the rateability of a brickfield. [His Lordship read again the passage already cited from the judgment of Lord Denman.] "No injustice would be done," says the judgment, "if in every year the occupiers could be assessed according to the actual value in that year; and it is the duty of the overseers to arrive as nearly at this as they can." They have done so in the present case, and I cannot see how they could possibly have done it in any other manner than that they have adopted. I agree with my brother Blackburn that the rule must be discharged.

ARCHIBALD, J.—I am also of opinion that the rate is correct, and that the rule must be dis-

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charged. Mr. Poland has failed to point out any distinction between this case and that of *Reg. v. St. Mary Abbot's, Kensington* (*ubi sup.*). Although there is a difference in the form of conveyance to a purchaser, yet, so far as the question of occupation is concerned, the two cases are substantially the same. Notwithstanding the form of conveyance, in reality nothing more than what might be called an easement is given. As to the other point I agree with my learned brothers, that the test of annual value is the amount which was actually made last year. On the authorities cited, and for the reasons already given, I am of opinion that the rule should be discharged.

Rule discharged.

Attorney for prosecution, *J. Godwin.*

Attorneys for defendants, *Heath and Parker.*

Monday, June 9, 1873.

REG. v. PHILLIPS; *Re* PHILLIPS (app.) AND FARQUHAR AND OTHERS, JUSTICES, &c. (resps.)

Practice—Quarter sessions—Taxation of costs—Adoption by sessions—12 & 13 Vict. c. 45, s. 18. On an appeal to quarter sessions, under 9 Geo. 4, c. 61, s. 27, the sessions in Oct. last dismissed the appeal with costs. After the court had risen a clerk in the office of the clerk of the peace taxed the costs under protest of the appellant's attorney. The sessions had been adjourned, and before the day of adjournment the costs were certified, and the amount was inserted in the order of sessions. The order was removed into this court in March for the purpose of enforcing it.

Held, that the order of sessions purporting on the face of it to be drawn up by the court in the absence of any direct statement that it was not so drawn, will be presumed to have been rightly made; and that there had been a sufficient adoption of the taxation by the adjourned sessions, although no mention of the amount was made in court.

Pritchard on 28th April had obtained a rule calling upon the respondents, the justices, to show cause why an order of Bramwell, B. removing an order of the Quarter Sessions of Monmouthshire into this court for the purpose of enforcing it under the 12 & 13 Vict. c. 45, s. 18, and all proceedings thereon, and the writ of *fi. fa.* and the execution thereupon, should not be set aside, and why the Sheriff of Monmouth should not return the sum levied thereunder, and why the said order of quarter sessions should not be quashed, on the ground that it was made without jurisdiction, the order having been made after the court dissolved, and by a clerk of the deputy clerk of the peace, and not by the deputy clerk himself.

By the affidavits in support of the rule it appeared that at the quarter sessions for Monmouthshire, held on the 14th Oct. 1872, an appeal against the refusal of the respondent justices to renew a licence for an inn at Abergavenny was heard and dismissed with costs. The case was the last of the business, and was heard on the last day of the sessions. As soon as the case was decided the court broke up, the justices composing it and the deputy clerk of the peace left, thereupon the respondent's attorney handed to the appellants' attorney his bill of costs, with notice that it would be taxed then and there before a managing clerk of the clerk of the peace. The appellants' attorney protested against the taxation

being made under the circumstances, but as it was insisted upon, he attended the taxation under protest. The managing clerk taxed the costs and ascertained the sum, and an order of quarter sessions was afterwards drawn up in which the amount was inserted. This order was removed on the 23rd March by an *ex parte* proceeding by the order of Bramwell, B. into the Court of Queen's Bench under 12 & 13 Vict. c. 45, s. 18, and the sheriff levied the amount under a *fi. fa.* On the 28th April the present rule was obtained.

The respondents, in answer, produced an affidavit by Mr. Morris, the clerk who taxed the costs, saying that the sessions were duly adjourned from Oct. to the 4th Nov. following, when such adjourned sessions were held; that before such adjournment the amount of the costs had been taxed and ascertained, and certified, and that afterwards an order was drawn up, and the amount inserted therein.

Pritchard applied to be allowed to use affidavits in reply to explain the affidavit of Mr. Morris, and the facts relating to the adjournment. [BLACKBURN, J.—This is a very technical objection, and beside any merits; therefore we shall not allow you to use any affidavits but those used on moving the rule.]

Smythies showed cause—The sessions were adjourned, and the taxation was completed before the adjournment—that is sufficient.

Pritchard, in support of the rule.—The affidavit does not sufficiently show that the sessions did adjourn. [BLACKBURN, J.—If there was an adjournment, and the costs were ascertained and certified before the adjournment, and the order was afterwards drawn up, would not that be sufficient?] No; the amount ascertained must be reported to the court by their officer, and adopted by them. No adjournment is shown, because all the clerk's affidavit does is to say that the sessions were duly adjourned. The adjournment of sessions is a formal and a judicial act, and the sessions drop if the adjournment is informal, and all acts done subsequently are without jurisdiction. Where a crier adjourns the sessions without the presence of two justices, the trials of prisoners at the sitting of the sessions so adjourned, was held void: (*R. v. Justices of Middlesex*, 5 B. & Ad. 1113.) [BLACKBURN, J.—It is sworn that the sessions were duly adjourned; if that is not true, you have your remedy by an indictment for perjury.] The due adjournment of a sessions is a matter of law of which a lawyer's clerk may well be ignorant. There is no affidavit by the deputy clerk of the peace, or by the crier. Then the sessions must do something to adopt the act of their officer. [BLACKBURN, J.—It is stated that the sum was certified and inserted in their order, which purports to be "by the court."] It is not stated to whom or how the certifying took place. Probably it was all done in the clerk of the peace's office. The adoption of the amount must be by the court: (*Selwood v. Mount*, 1 Q. B. 726; *Reg. v. Long*, 1 Q. B. 760; *Reg. v. Mortlock*, 7 Q. B. 659.) The adjournment without more would not carry it further than if the court had delegated the taxation of the costs to the clerk of the peace, which they cannot do: (*Selwood v. Mount*, and cases cited in the judgment.) The sessions had to award by the statute on which the appeal lay "such sum, by way of costs, as shall in the opinion of such court be sufficient to indemnify

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such justices from all costs": (9 Geo. 4, c. 61, ss. 27, 29.) The taxation of costs is a judicial act: (*Reg. v. Recorder of Cambridge*, 8 E. & B. 637; also *Reg. v. Belton*, 11 Q. B. 379, 17 L. J., N. S., 70.) Then the clerk, acting in the stead of the deputy clerk of the peace, has no power to tax. [BLACKBURN, J.—What difference can that make if the sessions adopt the amount.] In that case it may not make so much difference.

BLACKBURN, J.—It seems to me that the appellant has no case at all. If the facts stated in the affidavits now produced had been known, the rule ought not to have been granted. It will now be discharged with costs. It appears from these affidavits that the sessions were adjourned over the taxation, and the technical objection made upon the motion is therefore answered. *Omnia acta presumuntur rite*, and we must take it that the adjournment was duly formal, and that the proper course was adopted throughout. The proceedings before quarter sessions differ from those before the assizes only in that the latter is a continuing court. The court at Nisi Prius makes an order which is formally drawn up by its officer; the order as drawn becomes then the actual order of the court. At quarter sessions an adjournment is necessary in order to continue its jurisdiction, and if, as in this case, an adjournment is properly made, the order drawn up by any person during the adjournment, if issued by the officer of the court at the adjourned meeting of the quarter sessions, is adopted by the court, and the amount fixed is the amount of costs taxed by the court.

QUAIN and ARCHIBALD, JJ., concurred.

Rule discharged.

Attorney for appellant, J. G. Rice.

Attorney for respondents, A. Scott Lawson for W. F. Batt, Abergavenny.

COURT OF COMMON PLEAS.

Reported by JOHN ROSE and R. A. KINGLAKE, Esqrs.,
Barrister-at-Law.

June 5, 9, and 11, 1873.

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Municipal Election—Presiding officer—Breach of duty—Liability to action—35 & 36 Vict. c. 33.
By the Parliamentary and Municipal Elections Act (35 & 36 Vict. c. 33), certain duties are imposed upon the officer presiding at the polling stations during the time of a municipal election. A declaration alleged that the defendant, who had been appointed presiding officer, neglected to carry out the requirements of the statute by delivering voting papers not bearing the official mark to the voters, and also in not being present in order that the voters might show him the official mark on the back of the voting paper. It was also further alleged that he wilfully neglected to perform the above duties. Held, by the majority of the Court, that the defendant, having undertaken and entered upon a ministerial duty, was liable for the negligent performance of the same; also, that he would not be responsible for the negligence of his clerk in the performance of such duties as he might legally delegate to him, as the relation of master and servant did not exist between them.

Per Bovill, C.J.—The defendant was only liable if the omission had been wilful.

DEMURRER to a declaration.

The declaration stated that before and at the time of the committing of the grievance hereinafter mentioned, a certain election was being held for the election of a councillor to serve in the town council of the borough of Birmingham for a certain ward in the said borough, called St. Martin's Ward, and the defendant had been appointed, under and by virtue of rule twenty-one contained in the first schedule to the Ballot Act, 1872, a presiding officer to preside at one of the polling stations appointed for the said election, and the defendant acted as such presiding officer at the said polling station at and during the said election, and the plaintiff and one Thomas Startin were respectively candidates at the said election for the said office of town councillor; and by the said Ballot Act, 1872, it is enacted as follows, that is to say:

In the case of the poll at an election the votes shall be given by ballot. The ballot of each voter shall consist of a paper (in this Act called a ballot paper) showing the names and description of the candidates. Each ballot paper shall have a number printed on the back, and shall have attached a counterfoil with the same number printed on the face. At the time of voting the ballot paper shall be marked on both sides with an official mark, and delivered to the voter within the polling station, and the number of such voter on the register of voters shall be marked on the counterfoil; and the voter, having secretly marked his vote on the paper, and folded it up so as to conceal his vote, shall place it in a closed box in the presence of the officer presiding at the polling station (in this Act called the presiding officer), after having shown to him the official mark at the back. Any ballot paper which has not on its back the official mark, or on which votes are given to more candidates than the voter is entitled to vote for, or on which anything except the said number on the back is written or marked by which the voter can be identified, shall be void and not counted.

And by the above-mentioned and other provisions of the said Ballot Act 1872, it became and was the duty of the defendant at such elections to deliver to the voters voting at the said polling station ballot papers bearing the official mark appointed for the said election, and it was also the duty of the defendant to ascertain, before the voters placed their said ballot papers in the said closed box, whether the said ballot papers were properly marked with the official mark as aforesaid; and the defendant undertook and entered upon the said respective duties, for performance of which duties aforesaid the defendant received reward; and the defendant as such presiding officer as aforesaid neglected his said duties as follows—that is to say, that he delivered to certain of the said voters at the said polling station ballot papers not bearing the said official mark, and which said last mentioned ballot papers, after having been duly marked and folded by the said respective voters, were placed by the respective voters in the said closed box, and the defendant did not ascertain that the said last mentioned ballot papers did not bear the said official marks before the same were placed in the said closed box as aforesaid. And the plaintiff avers that after the close of the polling at the said election the said Thomas Startin was declared to be elected by a majority of three votes; and the plaintiff afterwards petitioned against the return of the said Thomas Startin under the Corrupt Practices (Municipal Election) Act 1872; and the said petition came on for hearing before George Morley Dowdeswell, Esq., one of Her Majesty's counsel, and after hearing the evidence and examining the ballot papers and other documents pro-

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duced before him, the said George Morley Dowdeswell, Esq., determined that from the number of votes polled in favour of the plaintiff twelve of such votes should be struck off, to wit, two of such votes on the ground that the two persons who gave such votes had personated certain persons entitled to such votes, nine of such votes on the ground that the ballot papers used in giving these votes did not bear the said official mark, and one of such votes on the ground that the voter had, contrary to the provisions of the said Ballot Act 1872, so marked the ballot papers used by him in giving such vote that such voter could be identified; and the said George Morley Dowdeswell, Esq., further determined that from the number of votes given for the said Thomas Startin, fourteen of such votes should be struck off, to wit, three of such votes on the ground that the voters who gave such votes were during the said election the paid canvassers of the said Thomas Startin, ten of such votes on the ground that the ten persons who gave such votes had personated certain persons entitled to such votes, and one of such votes on the ground that the ballot paper used in giving the said votes did not bear the said official mark, and that two votes which had been rejected by the returning officer at the said election should be added to the number of votes polled in favour of the said Thomas Startin; and in the result the said George Morley Dowdeswell, Esq., certified that the said Thomas Startin was duly elected and returned to serve as such town councillor as aforesaid, and by reason of the neglect of the respective duties by the defendant committed as hereinbefore described the plaintiff was prevented from being elected and serving as such town councillor as aforesaid, and lost all the cost and expenses he was put to in endeavouring to procure his said election as aforesaid, and in prosecuting the said petition, and has been and is otherwise damnified. A second count repeated the averments in the first count, and alleged that the defendant as such presiding officer became and was by the above mentioned and other provisions of the said Ballot Act 1872, at and during the said election, bound to be present at the said polling station, so that each voter, before placing the ballot paper by which he voted in the said closed box at the said polling station, could show to the defendant as such presiding officer as aforesaid the official mark appointed for the said election at the back of the said ballot paper; and the defendant neglected his said duty in this, that he was not present, so that nine of the said voters who voted for the plaintiff during the said election at the said polling station could show him the said official mark on the back of the voting paper, and the said nine voters last mentioned received ballot papers not bearing the official mark aforesaid, and, after having duly marked and folded the same, placed the same in the said closed box. The declaration then alleged the striking off of these nine votes, and repeated the damage alleged to have been sustained. In a third count the plaintiff sued the defendant, for that by the Ballot Act 1872, it is enacted that every returning officer, presiding officer, and clerk, who is guilty of any wilful misfeasance, or any wilful act or omission in contravention of the said Act, shall, in addition to any other penalty or liability to which he may be subject, forfeit to any person aggrieved by such misfeasance, act, or omission, a penal sum not exceeding 100*l*, and the defendant

was appointed, and acted in the said election as in the first and second counts mentioned, and described as a presiding officer in manner and for the purposes in the said counts stated, and the plaintiff and the said Thomas Startin were candidates as in the said counts alleged; and the defendant as such presiding officer was bound under and by virtue of the said Ballot Act 1872, to mark the ballot papers on each side immediately before the same were delivered to and used by the voters, and also to be present when each voter placed his vote in the closed box used for the purpose of receiving the ballot papers, and also to ascertain whether each ballot paper, before each voter placed the same in the said closed box, was marked with the official mark, and the defendant took upon himself the said respective duties above mentioned, and entered upon the same for reward to the defendant in respect thereof, and the defendant wilfully omitted to mark a certain number of the ballot papers on each side immediately before the same were delivered to and used by the voters, and also wilfully omitted to be present, so that each of the said voters could show him the said official mark on the back of the said ballot papers before each of the said voters placed his vote in the said closed box used for the aforesaid purpose, and also wilfully omitted to ascertain whether each of the said ballot papers, before the voters placed the same in the said closed box was marked on the back with the official mark, and by reason of the premises upon the petition to question the return of the said Thomas Startin, the said votes so given as aforesaid for the plaintiff disallowed, and thereby the plaintiff lost the said petition and was not declared to be duly elected as he would have been but for the omissions in this count alleged, and the plaintiff has lost the costs and expenses he incurred in endeavouring to procure his election to act and serve as such town councillor as aforesaid, and also was put to great costs and expenses in and about the said election petition, which he would not have incurred save for the grievances hereinbefore alleged, and the plaintiff has been, and is, otherwise damnified, and the plaintiff is entitled to the said sum of 100*l*. for the wilful omission hereinbefore mentioned.

Pleas and demurrers:—The defendant says that he was not appointed nor did he act as a presiding officer to preside at one of the polling stations for the said election, nor did he take upon himself or enter upon the said respective duties in the declaration mentioned, or either of them, as alleged; secondly, not guilty; thirdly, demurrer to first and second counts; fourthly, demurrer to the third count.

Issue and joinder in demurrer.

Holl, for the demurrer.—The defendant is charged with several breaches of duty in that he delivered voting papers at the polling station to the voters not bearing the official mark; that he did not see that the papers were marked before they were put in the ballot box; and also that he was not present, so that the voters could not show him the official mark. I say that the Act does not show any imperative duty imposed upon the presiding officer for which an action will lie; at any rate it must be shown that he was acting in the particular duty, a violation of which is alleged.

[BRETT, J.—By this Act of Parliament do you say it is a breach of duty to deliver the voting paper

without an official mark?] I say it is not. The returning officer is to provide the official stamp and the voting papers, and if the stamps are inefficient and will not mark from a defect of the instrument, that would not be a fault of the presiding officer. The question really becomes what, if any, are the duties of the presiding officer. It is alleged that the presiding officer is to do the work himself, but if, through the fault of the stamping machine, some of the voting papers are not sufficiently marked, and are so handed out, I contend that that would not be the fault of the presiding officer. [BOVILL, C. J.—Every person has a right to vote, and if he puts a paper in without the official mark he loses the privilege of his vote.] There is no doubt a direction that the paper should be marked, but it does not say it is to be done by the presiding officer; there is certainly no duty thrown by the Act on the presiding officer to see it done. [BOVILL, C. J.—The Act says the ballot paper is to contain the names of the candidates, but suppose by a fault of the printer the ballot paper is misprinted; if then an imperative duty were imposed upon the presiding officer, he would be subjected to a vast number of actions without any fault of his own.] The presiding officer may delegate his authority to do certain acts and here the relation of master and servant does not exist to make him liable for any misfeasance committed by his subordinates. It is contended that he is liable for a mere nonfeasance, but there is no case in which an action has ever been brought for a breach of something when the statute is merely directory. Where the statute enjoins or prohibits an act, there the accused party is subject to criminal proceedings or a civil action. If this action can be brought, every one who voted for the plaintiff is a party grieved and can bring an action, although the defendant has committed no wilful mistake or acted maliciously. The case of *Schinotti v. Bumpsted* (6 T. R. 646), is the only case reported where it was held that an action would lie without an allegation of malice, and in *Poyer v. Child*, (7 El. & Bl. 377), Cresswell says, "My brother Shee has brought before us the only solid foundation he could find for his argument, viz., the omission of Lord Holt to insist upon malice in his judgment in *Ashby v. White* (2 Lord Raym. 938). Abbot, C. J. in *Callen v. Morris* (2 Stark. 577), held that malice was essential to an action; and there the Chief Justice commenting on what Lord Holt was supposed to have said in *Ashby v. White*, stated that the reports of that case were very imperfect, and that he himself, if Lord Holt really meant to lay down that malice was not essential to the action, could not assent to that doctrine. He very happily expressed the mischief which might arise from making returning officers responsible beyond this. The returning officer is, to a certain extent, a ministerial officer, but he is not so to all intents and purposes; neither is he wholly a judicial officer, his duties are neither entirely ministerial nor wholly judicial, they are of a mixed nature. It cannot be contended he is to exercise no judgment, no discretion whatsoever in the admission or rejection of votes; the greatest confusion would prevail if such a discretion were not to be exercised. On the other hand, the officer could not discharge his duty without great peril and apprehension if he became in consequence of a mistake, liable to an action." If the presiding officer is guilty of a wilful misfeasance, he is liable to an action under the 11th section of the Act, and

that section shows that the Legislature contemplated a right of action for grievances committed under that section, but not for any others. Again, the declaration does not show that the voting papers which were unstamped came from the defendant's district.

Henry James, Q.C. with him *Tindal Atkinson* for the plaintiff.—There is no doubt that the Act of Parliament casts a duty on someone, and the averments in the declaration show that the defendant is the person who accepted that duty; and, if he did, any breach of that duty will entitle an aggrieved person to bring an action against him. Whatever duty an individual undertakes he is answerable for the negligent performance of it. The signalman who turns the points at a railway siding is liable to penal servitude for life if he, through his negligence, brings about a fatal accident, and every cashier at a bank suffers if he pay too much to a creditor; yet there are plenty of people anxious to fill these posts. The argument of the defendant is that there are so many duties, that he cannot undertake them all; but the answer is he can appoint clerks, and the authorities are empowered by sect. 5 to regulate the number of voters at each booth. It is quite clear the polling papers are to be marked by sect. 2, and it is intended that the marking shall be done by the presiding officer or such other person as he shall have delegated his authority to, and no one else. There are also certain duties which he must perform himself, and which he may not delegate to a clerk. What these are, are shown by sect. 50, and refer to the arrest exclusion or ejection from the polling station of any person. The presiding officer is a ministerial officer only, and he becomes liable for breaches of duty. If a statute casts certain duties on a person, and he undertakes them, he must perform them with due diligence. In *Miller v. Seare* (2 Wm. Black. 1141), it was held that an action of false imprisonment lies against commissioners of bankruptcy for illegal exercise of their discretion in improperly committing a bankrupt who had made a satisfactory answer; and although that case has since been overruled, what De Gray, C.J., says is appropriate, "This is a case which, taken in any view, involves a hardship on either side. Hard that commissioners should be constantly harassed with actions in the case of an innocent mistake, and harder for the public if they are to be invested with an arbitrary power of committing whom and for what they please without being liable to answer for it. It is certain no man ought to suffer criminally for an error in judgment; but it is equally just he should make reparation civilly for the damage which other persons have suffered by such his error." Then the allegation that he was not present so that the voters could show him the official mark, clearly states a most important duty, and the damages the plaintiff has sustained is the expense which he incurred in offering himself for election. He cited

Barry v. Arnault, 10 Ad. & El. 646;
Cullen v. Norris, 2 Starkie 577;
Schinotti v. Bumpsted, 6 T.R. 646;
Toyer v. Child, 7 El. & Bl. 377;
Couch v. Steel, 3 El. & Bl. 402;
Starling v. Turner, 2 Levinz, 50;
Atkinson v. Newcastle Waterworks Company, 6 Ex. 204.

Holl in reply.—It does not in any way appear that the votes struck out by the judge were the votes which were delivered at the defendant's polling

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booth, and the allegations totally fail to show that such unmarked votes arose through the defendant's neglect. The plaintiffs must strictly show that the election was lost through the defendant's neglect.

BOVILL, C.J.—A very important question has been raised upon the construction of the Ballot Act 1872, and also as to the construction of the pleadings. We have not the facts of the case before us, but the statements alleged on the face of the declaration must be taken to be facts at present, and whether these facts on which we pronounce our judgment be of any real use or not, it is not for us to say. The facts may be alleged, and the circumstances may exist different from those which are presented to us, but as the demurrer comes before the trial we cannot help it. The first question to consider relates to the duties of the presiding officer at the ballot under the Act, and it is clear the breach of duty of a person acting in that important position may become a very serious matter. It is necessary first to see the machinery under which the Act is to be carried out. The first provision refers to the polling districts, and by the 5th section the local authorities of every borough shall take into consideration the division of the borough into polling districts, and divide the borough into polling districts in such manner as they may think most convenient for taking the votes of the electors at a poll; then the polling district having been determined, the polling stations are to be provided; how that is to be done is found in rule 15, by which the returning officer shall provide sufficient accommodation for the electors, and shall distribute the polling stations in such manner as he thinks convenient, provided that there shall be at least one polling station at each contributory place of such borough. The 16th rule provides that each polling station shall be furnished with such number of compartments in which the voters can mark their votes screened from observation, as the returning officer thinks necessary, and that at least one compartment be provided for every one hundred and fifty electors entitled to vote at such polling station. Then the 20th rule says that the returning officer shall provide each polling station with materials for voters to mark the ballot papers, with instruments for stamping thereon the official mark, and with copies of the register of voters or such part as contains the names of voters allotted to vote at such station; he is also to keep the official mark secret. We then come to the rule which provides for the appointment of the presiding officer, that is by the 21st rule, whereby the returning officer shall appoint a presiding officer to preside at each station, and the officer so appointed shall keep order at his station, shall regulate the number of electors to be admitted at a time, and shall exclude all other persons except the clerks, the agents of the candidates, and the constables on duty. The general duties of the presiding officer are also referred to in sections 9 and 10, which give him power to have any person who misconducts himself removed from the station, and kept in custody until he can be brought before a magistrate, and also to ask the question, and administer the oath. Provisions being thus made for the appointment of polling places and the other necessities of an election, we come to the duties of the subordinate officers, and sect. 8 provides that every returning

officer shall provide such nomination papers, polling stations, ballot boxes, ballot papers, stamping instruments, copies of register of voters, and other things, appoint and pay such officers, and do such other acts and things as may be necessary for effectually conducting an election. The appointment of presiding officer, therefore, rests with the returning officer, and then the 50th rule shows that the presiding officer may, by his clerks appointed to assist him, do any act which he is required to do at the polling station except ordering the arrest, exclusion, or ejection of any person from the polling station. The machinery of the election being thus defined, we come to what is to be done on the occasion of a poll. This brings us back to sect. 2, which lays down the manner in which the poll is to be taken. The ballot of each voter shall consist of a paper showing the names and descriptions of the candidates. Each ballot paper shall have a number printed on the back, and shall have attached a counterfoil with a similar number printed on the face. At the time of voting the ballot paper shall be marked on both sides with an official mark, and delivered to the voter within the polling station, and the number of such voter on the register of voters shall be marked on the counterfoil, and the voter having secretly marked his vote, on the paper, and folded it up so as to conceal his vote, shall place it in a closed box in the presence of the officer presiding at the polling station, after having shown to him the official mark on the back. Any ballot paper which has not on its back the official mark, or on which votes are given to more candidates than the voter is entitled to vote for, or on which anything except the number on the back is written or marked by which the voter can be identified, shall be void and not counted; and rule 24 for the guidance of the presiding officer states that before a ballot paper is delivered to an elector it shall be marked on both sides with the official mark, either stamped or perforated, and the number, name, and description of the elector, as stated in the copy of the register, shall be called out, and the number of such elector shall be marked on the counterfoil, and a mark shall be placed on the register against the number of the elector to denote that he has received a ballot paper, but without showing the particular ballot paper he has received. It is then necessary to refer to the directions for the guidance of voters in the 2nd schedule, which are to be printed in conspicuous characters, and placarded outside every polling station and in every compartment of every polling station. The voter is to go into one of the compartments, and with the pencil provided in the compartment place a cross on the right side opposite the name of each candidate for whom he votes. He will then fold up the ballot paper so as to show the official mark on the back, and, leaving the compartment, will, without showing the front of the paper to any person, show the official mark on the back to the presiding officer, and then, in the presence of the presiding officer, put the paper into the ballot box, and forthwith quit the polling station. If the voter inadvertently spoils a ballot paper he can return it to the officer, who will, if satisfied of such inadvertence, give him another paper. If the voter votes for more than the proper number of candidates, or places any mark on the paper by which he can be identified afterwards, his ballot paper will be void, and will not be counted.

If the voter takes a ballot paper out of the polling station, or deposits in the ballot box any other paper than the one given him by the officer, he will be guilty of a misdemeanor, and be subject to imprisonment for any term not exceeding six months, with or without hard labour. The only other section necessary to refer to is the 11th section, which enacts that every returning officer, presiding officer, and clerk, who is guilty of any wilful misfeasance or any wilful act or omission, in contravention of this Act, shall, in addition to any other penalty or liability to which he may be subject, forfeit to any person aggrieved by such misfeasance, act, or omission, a penal sum not exceeding 100*l*. There are three allegations of duty on which the plaintiff seeks to maintain this action—first, that it is the duty of the defendant, as presiding officer, to mark the ballot papers with the official mark; the second allegation is that it was the duty of the defendant as such presiding officer to be present at the polling station, so that each voter could show him the ballot paper; and before the voter placed the ballot paper in the box it was his duty to see it bore the official mark. There is no rule in the Act which imposes explicitly these duties on the presiding officer, but I am of opinion that it is his duty to provide the official mark. The mark is to be kept secret in this sense, that the public shall know it, but yet not sufficiently well to be able to carry a correct impression away; still the presiding officer would know it when he sees it on the ballot papers. In the directions to the electors the voter is required to hold up the ballot paper, to show the official mark on the back to the presiding officer. The stamping instrument is to be provided by the returning officer, who selects what mark is to be used, and the ballot paper is to be stamped at the polling station, and on the delivery of it the voters are at once to mark their paper and put it in the box. As these things are to be done, who is to attend to them? The presiding officer is clearly the person to attend and to keep order. In small districts it is possible there would be no clerks, but in populous districts and large towns it would be utterly impossible for the presiding officer to do all the duties himself, and he must have assistance to perform them. Now a duty being cast upon someone to deliver ballot papers, the duty of doing it properly devolves on the person to whom it is entrusted. The presiding officer might do it himself, but after hearing the argument I arrive at the conclusion that a duty exists, the responsibility for which rests with the party undertaking that part of the business at the polling station. Thus assuming a ballot paper delivered out without the official mark, the responsibility rests with the person who delivered it out, whether the presiding officer or the clerk. The relation of master and servant does not exist, each is an officer, although the presiding officer has more authority, and I am of opinion in such a case the presiding officer would not be responsible, but the clerk would be. He has undertaken that particular business, but if the presiding officer interfered in the middle of the election, and handed out ballot papers without the official mark, then he would be responsible. It depends, in fact, how he acted. The next question is as to how far he is bound to be present at the polling station, so that each voter shall show him the official mark at the back of the ballot paper.

The rule says the voter shall show the official mark to the presiding officer, but in a large place like Birmingham, at the dinner hours, it would be impossible for one person to do all, and then the duty of inspection seems to come in, as by the 50th section, the clerks do all the duties except those therein excepted, and in practice I have no doubt that system would be adopted, and one body of clerks would hand out the papers to the voter, and other clerks would see the paper exhibited with the official mark on the back. Under such circumstances the duty seems to rest with whoever undertakes it. The next allegation of duty is with reference to ascertaining whether the ballot papers were properly marked with the official mark. I don't find any positive or imperative duty imposed on the presiding officer, as that duty seems imposed on the voter, but that is satisfied by showing it to the clerk. Section 2 says the voter shall place it in a closed box in the presence of the officer presiding at the polling station, after having shown to him the official mark at the back. I don't, however, see what is to prevent the voter from putting the ballot paper into the box without showing it, if he chooses to put it in in that manner, and if he does so there is nothing to authorise the presiding officer to forcibly interfere; I, therefore, on the whole, have come to the conclusion that there is no imperative duty on the presiding officer, or on the clerks, to ascertain whether the ballot papers are marked or not. These are the three matters in respect of which duties are alleged on the record; but the plaintiff must go further, he must show that the presiding officer personally interfered and personally delivered to the voters the ballot papers, and so also with regard to his being present for the purpose of inspecting the voting papers, it must be shown that he personally inspected them. The first count sufficiently shows that the defendant was the presiding officer, and that he did deliver ballot papers; so with regard to the allegation of duty in the said count that the plaintiff was presiding officer, and that he acted as such is sufficient if it shows he was acting at the time, and, in absence of any statement as to the clerk's acting shows, that he only acted. Then comes the breach of duty as against the plaintiff who was prevented from being elected and serving as town councillor. I think the first count greatly defective, as there is an entire absence of any statement to connect the voting papers with those that were objected to, nor is there any allegation that they were the same, but what the plaintiff relies upon is in fact an insufficient allegation, that by reason of the neglect of the respective duties by the defendant the plaintiff was prevented from being elected a town councillor. We must have the facts whereby the duty arose, and the declaration will be bad unless the facts warrant the conclusion of law; neither is there any allegation of matters of fact which can be cured. I therefore think that the first count is good as to the duty of the presiding officer, and also partly good as to the breach, but not altogether, for want of the identification of the voters who voted without having their papers officially marked, and whose votes were disallowed. I think, therefore, there should be judgment for the defendant. Now, as to the second count, I think there that a duty would arise, but again there is a want of a sufficient allegation to make out the case. Lastly, as to the third count. The

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case is there brought within the 11th section of the Act, and the statement is made that the votes which were given to the plaintiff were disallowed, and that seems to me to be sufficient in point of law. If the observations are well founded that duties do arise, and those duties are broken there is a liability beyond those duties contemplated in the 11th section, and if an imperative and positive duty is imposed, it is not necessary to aver that a breach of such Act was wilful. I am therefore of opinion there should be judgment for the plaintiff on the third count, and for the defendant on the first and second counts.

KEATING, J.—This is an action against the presiding officer at the municipal election for the borough of Birmingham for a breach of duty. The breach of duty charged is that he delivered voting papers without the official mark; secondly, that he did not see they were stamped; thirdly, that he was not present so that the voter could show him the official mark. The first question to consider is whether any duty is imposed on the presiding officer to render him liable to an action. It has been contended that it is not intended to create any duty on the defendant, that no duty is created in any person to render him liable for a breach. It is clear that the Act does impose a duty on someone to perform the object of the Act, and the object of the Act is to carry out the system of secret voting by means of ballot papers. What is done is this: A voter comes to the polling booth, and the officer having ascertained his registered number, and that he is a person entitled to vote, gives him a paper. It is most important that the official mark should be on this paper, which the voter takes into a compartment by himself, where he marks it, and then takes it to the ballot box, and there deposits in the presence of the presiding officer. The defendant occupied the position of presiding officer, and his duty was to preside at the polling station, and keep the ballot box continually in his view. It is quite clear the presiding officer may appoint clerks, and may delegate certain duties to the clerks, for the Act enables him to do so, but, except those specified in the Act, he cannot delegate the duties of presiding officer to anyone, but must perform them himself. It appears quite clear that certain duties devolve on someone, and *primâ facie* that person is the presiding officer. If the presiding officer delegate the duty of issuing the voting papers with the official mark to a clerk, I am far from saying he would be still liable; but *primâ facie* he is so, and to get rid of the duty he must show to whom he delegated his authority. It seems to me therefore that there is a duty cast on the presiding officer of delivering a voting paper. The said duty cast upon him is to see that the voter puts the ballot paper into the box. In this I unfortunately differ with the Lord Chief Justice, for I think it is a duty for the presiding officer to see the paper properly put into the box. Supposing a voter insisted on putting a voting paper into the ballot box by force, the presiding officer has power given him to employ constables to keep order, and as he has to keep the ballot box in view he ought to ascertain if the ballot paper has the official mark upon it, which the voter must show him under the penalty of risking the loss of his vote. As to the third question that he must see the voting paper with the stamp impressed, the Act says the stamped paper shall be put in the ballot box, and no other, and these duties being imposed upon him is there such a

breach as to make him liable to an action? The duty is a ministerial duty, and the breach of such duty without malice is shown by the authority of a large class of cases to render the ministerial officer liable to an action, and I think that is so notwithstanding the exception in section 11. Section 11 is said to limit the remedy to proceedings for a penalty, but this leaves wholly untouched the right of action at common law. On the remaining question as to whether the declaration discloses any statutable duty, I also differ from my Lord, although with great hesitation. I was struck with the argument of the counsel for the defendant, but after consideration I think there is sufficient to sustain the count, even if it is open to the objection that there is no identification of the voters. Enough still remains, for there is a statement of duty and a breach, and it is shown there was a person aggrieved, for I do not consider the concluding allegation simply a conclusion of law, but, in truth, a statement of fact and not the result of law; it is avowedly the result of defendant's neglect of his duties that the plaintiff was prevented from being elected and serving as a town councillor. With reference to the second count, I take a similar view; there also, I think, there is a duty and a breach, and enough to show that the plaintiff was aggrieved by the breach. As to the third count, I entirely agree in the view expressed by my Lord, and I think the plaintiff is entitled to our judgment on all the counts of the declaration.

BARR, J.—The first set of questions depends entirely on the interpretation of the Act of Parliament; the second set are of very little importance, and only in this individual case. As to the construction of the Act of Parliament, it seems the Act imposes certain duties, and gives rules of conduct for people who are paid to administer the carrying out of the Act. The scheme of the Act seems to be this—that the local authority is to appoint polling places and such a number of polling stations as may seem necessary to conduct the election, and the power to appoint officers and clerks is to be gathered from sects. 8 and 10 by inference, and also by inference I gather that the returning officer is to appoint as many officers and clerks as shall be necessary. The 15th rule shows how the polling stations are to be distributed, and by the 21st rule the returning officer is to appoint a presiding officer to preside at each station, who is to keep order and regulate the conduct of the election. It is true that, by the 47th rule, the returning officer may, if he think fit, preside at any polling station; but, if he does not, he must appoint a presiding officer, and the 48th rule assumes he may appoint clerks. The presiding officer being appointed, the scheme is laid out in sect. 2 and rules 23 and 24, and the rules seem to disclose how the enactments are to be carried out. The presiding officer is to have the ballot box kept in his presence. If this was all, the scheme would be inconclusive. Upon the voter receiving the ballot paper he is not to leave the booth, he is to go into the compartment and there mark the paper; he is then to fold it up and take it to the presiding officer, in whose presence he is to put it into the ballot box. The necessary inference is that the presiding officer must be there to look at the paper, or else he cannot see it. This is not for the protection of the voter, but for the protection of the public, in order that the same paper may be put into the box as was issued

to the voter; and this is most important, as the whole effect of the ballot might be lost by the purloining of a single voting paper. The Act really expresses that someone is to deliver a paper and see it properly marked, and that someone is to see that no paper is put into the box unless marked. It seems to me this is a duty. The question then arises is the public officer alone to perform these duties? It is by accepting the office he undertakes these duties, but by rule 50 he may delegate his authority; but I apprehend, all those duties which he does not delegate, he must do himself. The next point is, is he liable for the acts of omission or commission done by his clerk? The clerk is not a servant, and I do not think he is responsible for his clerk's acts, and he could then only be responsible for those duties he personally undertakes. The next question is whether the breach of duties undertaken gives a right of action to an individual without an allegation of malice. These are ministerial acts and the cases of *Schinotti v. Bumsted* (6 T. B. 646), and *Toyer v. Child* (6 El. & Bl. 377), and *Atkinson v. The Newcastle Waterworks Company* (L. Rep. 6 Ex. 414), lay down that an action will lie unless the statute specially stops it. It was urged that sect. 11 had this effect, but in my opinion that is not so; the specific words say this liability is "in addition to any other penalty or liability to which he may be subject." It seems clear that according to the true construction of the statute some person is liable; it is said that it is a hard case against the defendant, and this statute ought to be construed strictly, but this is wrong, this statute should be construed as any other; and it is only necessary for the plaintiff to prove the breach relied upon, and to prove he was the person aggrieved. The damages are damages at large, therefore he need only show he is aggrieved. In the first count the first duty alleged is a duty to deliver papers which were properly marked; it was the defendant's duty, if the breaches are alleged with certainty enough, to show that the plaintiff was the person aggrieved. If we look at what took place before the barrister who went down to try the petition, the allegations may be open to the criticisms which have been made upon them; but in my opinion this is not an allegation of resulting duty or of a result in law. No man can be prevented from being elected except by the vote being thrown away. It can't be said to be the result of law, it is the result of fact, and if these facts are breaches of duty, then the plaintiff is in the position of a person aggrieved. With regard to the second count, although there is no express enactment that it is the duty of the presiding officer to be present, by implication there is that duty imposed unless he has delegated it to someone, and the allegations show, *prima facie*, that the duty is on the defendant. I therefore think the first and second counts sufficient to give the plaintiff a cause of action, and I agree with what my Lord has said as to the third count. I think all three counts sufficiently disclose a cause of action against the defendant, the first and second counts under the common law right, the third under sect. 11 of the statute. If, however, upon the traverse of the duties, it appears that it was the clerk who acted and not the presiding officer, the plaintiff will fail in his action.

GROVE, J.—I am of opinion two out of the

three allegations are well founded, as these are duties cast by the Act upon the presiding officer for the time being. I say for the time being, as the office of public officer may be performed by clerks. With regard to the third allegation that the official mark is to be on the paper, I agree with my Lord that is not a duty imposed on the public officer. The statute does not state in express terms what the public officer is and is not to do, but it points out what duties are to be undertaken by someone. Sect. 2 says the voting paper shall be marked on both sides and delivered to the voter; so then, as it is not expressly said who it is who is to give it out, we must look at the Act. It is not the returning officer, unless he choose to take upon himself the duties of presiding officer. The presiding officer may appoint a clerk, and if he appoint a clerk to issue the papers, that clerk takes the duty of presiding officer upon himself, and becomes the presiding officer for the time being. This must be a duty, for without the delivery of the voting paper the voter could not vote at all. Secondly, is the presiding officer necessarily to be present? The second section says he must be present, for the voter is to place the ballot paper in the box, having shown it to the presiding officer. I come now to the third point, that is whether the duty is thrown on the presiding officer to ascertain if the official mark is on the ballot paper. Such duty is not directly imposed, but only implied, for the voter is to show it to him, and therefore he must be there to see it. I find not only is the duty not thrown on the presiding officer, but directly on the voter, and in the form this is given much more specifically, for the voter is to go into a compartment, and then come out, and, in the presence of the presiding officer, put the paper in the ballot box, and if the voter takes the paper out of the station or puts any other than the ballot paper into the box he is guilty of a misdemeanor, and subject to imprisonment. I think it would be hard, under such circumstances, to put the extra duty on the presiding officer, when clearly the voter is the person on whom the responsibility is thrown. The next question is as to the breach of duty. The cases cited have satisfied my mind. If *Miller v. Sears* (2 Wm. Bl. 1141), had been the only case cited I should not have been satisfied, but the subsequent cases show that in cases not at all partaking of malice, a person is liable for a breach of duty committed to him by Act of Parliament, although the breach is not wilful. Then I must say it seems reasonable to think that the 11th section has not taken away the common law liability of the defendant, and I agree with my brothers Keating and Brett that the allegations are sufficient to show the plaintiff is the person aggrieved. With regard to what took place before the barrister, the declaration does not show that the absence of the official mark was in consequence of the defendant's neglect of duty, it is only alleged that the absence of the official mark was the ground of the barrister's decision, but I am of opinion this is covered by the words, "that by reason of the neglect of the respective duties by the defendant committed the plaintiff was prevented from being elected." This is a question of mixed law and fact, and may be traversed. On the third count I agree with the rest of the court.

Judgment for the plaintiff.

Attorneys: for the plaintiff, *Fearon, Olabon*, and *Fearon* for *Hawkes*, Birmingham; for the defendant, *Cowdell, Grundy*, and *Browne*.

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CUBITT v. MAXSE.

[C. P.]

Friday, June 20, 1873.

CUBITT v. MAXSE.

Public highway—Non-user—Local Act—Provisions must be satisfied.

A strip of land which has been declared by Act of Parliament to be a public highway will not of necessity become so until all the provisions of the Act for making and creating it have been strictly complied with.

Where commissioners, by their award under a local Act, set out a public highway, but no road was ever made in pursuance of the award, and the proposed road always remained impassable to the public:

Held, that the mere allotment of a piece of land by the commissioners was not sufficient to make it a public highway, and that all the regulations of the Act of Parliament must be complied with before it became such a highway as was in the contemplation of the Legislature, and before the parish could be called upon to repair it

The declaration stated that the defendant, on divers days and times broke and entered on certain lands of the plaintiff, and dug up and took and carried away certain trees and shrubs of the plaintiff, growing and being upon the said land, and took and carried away the soil of the plaintiff, and broke and destroyed certain fences of the plaintiff then and there being.

Pleas: First, not guilty; secondly, traverse that the land was the plaintiff's; thirdly, that at the time of the alleged trespasses there was, and of right ought to have been, a common and public highway over the said land for all persons to go and return, on foot and with horses, cattle, and carriages at all times of the year, at their free will and pleasure; and that the defendant had occasion to use the said way, and because the said trees and shrubs were then growing in and upon the said highway, obstructing the same and preventing and obstructing the defendant from passing along the same, the defendant necessarily dug up the said trees and shrubs for the purpose of using the said highway, doing no unnecessary damage in that behalf, which are the alleged trespasses.

Replication and new assignment.

The plaintiff joins issue on the defendant's pleas: and the plaintiff, as to the defendant's third plea, says he sues, not only for the causes of action therein admitted, but also for trespasses committed by the defendant in excess of the alleged rights, and also in other parts of the said land, and on other occasions and for other purposes than those referred to in the said plea.

The defendant pleaded not guilty to the new assignment, whereupon issue was joined.

The action was brought to try the right of the plaintiff to the soil of a certain strip of land, about 40 ft. in width and 800 ft. in length, adjoining a close of land belonging to the plaintiff, formerly part of the manor of Effingham, upon which it was alleged a right of way existed, by reason of the award of the Enclosure Commissioners, appointed by an Act of Parliament, passed in the 42nd of Geo. 3, and who made their award in the year 1808.

The Act recited, *inter alia*, that there was in the parish of Effingham a common or waste called Effingham Upper Common, and it enacted that commissioners were appointed for setting out,

dividing, allotting, and enclosing the waste lands in that part of the common.

The award then proceeds as follows:—"And the said commissioners hath set out and appointed such public carriage road and highways through and over the same lands and grounds, and doth hereby award and confirm the same in manner following, viz., one other public carriage road or highway, of the breadth of 40 ft., leading from a certain place called White Down Gate, and going in a north-easterly direction to Picket's Hole Corner, and from thence in a northward direction to a certain place called Riding's Corner, and from thence in a westward direction to the south end of a certain lane called Bunce's."

This road, although set out, was never actually made, and the public have never used it or enjoyed it in any manner.

By the 8th and 9th sections of the Act of Parliament the commissioners were given power to set out public highways, and instructions were given to the commissioners as to what was to be done previous to their making their award. They were empowered to hear evidence as to the advantages and disadvantages of the proposed roadways, after which their decision was to be final. Power was also given them to appoint a surveyor to lay out and attend to the proper formation and creation of the roads, and to raise the rates for the purpose of defraying the expenses incident to their formation; and after the surveyor had made a road it became a public highway, and repairable by the parish.

At the trial before Cockburn, C.J., and a special jury, at the last Kingston assizes, the judge left the following questions to the jury. 1. Had the plaintiff possession of the strip of land in question prior to twenty years before this action? Answer, Yes. 2. If not, had the plaintiff possession at the time of the trespass? Answer, Yes. 3. Was the 40 ft. wide road which was laid out under the award ever accepted by the public? Answer, No. 4. Were the trees cut down by the defendant for the purpose of using the road, or in the assertion of a right of property? Answer, That the trees were cut down in the assertion of a right. The judge then directed a verdict to be entered for the plaintiff, giving leave to the defendant's counsel to move to enter a verdict for her on any points of law consistent with the findings of the jury.

A rule having been obtained accordingly.

Joseph Brown, Q.C., with whom was Lumley Smith, showed cause.—In 1802, the Act of Parliament was passed for the purpose of enclosing Effingham Common, and in 1808 the commissioners made their award. In their award the commissioners professed to set out a highway 40 ft. wide, but that highway never was laid out or made available, nor did the public ever make any use of it. [BRETT, J.—Then the question is, assuming no user by the public, does that prevent its being a highway?] Precisely so. The road is not shown to have ever been made; before it could have been thrown on the parish it was necessary at least that the provisions of the Act of Parliament should be fulfilled and carried out. Before the Highway Act there was no distinction between a road being a highway and being repairable by the parish; as the road has never been used, I may assume that it has been stopped up. [KEATINGE, J.—You cannot do that. It can only be stopped by a writ of

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ad quod damnum, an order of quarter sessions, or another Act of Parliament.] He cited

Fisher v. Prouse, 6 L. T. Rep. N. S. 711; 2 B. & S. 776;

R. v. The Inhabitants of Haslington Field, 2 M. & S. 558;

Townson v. Tickell, 3 B. & Ald. 31; and *Dovaston v. Payne*, 2 Smith's Leading Cas. p. 146, notes.

Biron (Montague Chambers, Q.C., with him.)—

All the necessary and important acts were performed to create this a highway, and the Act of Parliament having created the road, it is a road for all time, until closed by order of quarter sessions or by any other usual mode. Whatever rights the public had in 1809, that is after the award, they have the same rights now. I can find no case in which a highway has been set out by Act of Parliament where such highway has ever been stopped up or the right disputed. There can be no dedication to the public for a limited time, certain or uncertain; if dedicated at all it must be in perpetuity. Neither can the public by non-user release their rights. That was laid down in *Daves v. Hawkins* (8 C. B., N. S., 848; 4 L. T. Rep. N. S. 288), where an ancient highway was, without authority or interference from the owner of the soil, diverted by an adjoining proprietor who substituted for it a new road which was used by the public for more than twenty years. After the lapse of that period the original road was reopened, and the then owner of the soil over which the substituted road had passed, built a wall and planted trees across the road which had been so substituted. In an action of trespass for pulling down the wall and cutting down the trees, it was held that the above acts afforded no evidence of a dedication of a substituted road to the public. Formerly the usual method of obtaining a highway was by dedication and user, but the more modern procedure is to obtain an Act of Parliament. He cited

Turner v. Ringwood Highway Board, L. Rep. 9 Eq. 418;

R. v. Lyon, 5 D. & B. 497;

Attorney-General v. United Kingdom Telegraph Co., 5 L. Rep. N. S. 338.

And in *Roberts v. Hunt* (15 Q. B. 17), it is stated that if a road has been dedicated to the public and used, but the necessary steps have not been taken by notice, &c., to make it repairable by the parish, it is still a highway in other respects, and an action is maintainable for obstructing it to the plaintiff's damage.

KEATING, J.—This case has been well argued, and we have received every assistance we could from the learned counsel on both sides, but they have been constrained to admit that there is a great dearth of authority. The rule is to enter the verdict on the third plea, which was pleaded to the count of trespass. The contention was that the *locus in quo* was on a common highway, and that the defendant entered on and lawfully committed the alleged trespasses. The Lord Chief Justice, at the trial, put four questions to the jury, who gave an answer to them in favour of the plaintiff. Leave was given by the Lord Chief Justice to the defendant to move on any points of law consistent with the findings of the jury, and in accordance with that leave this rule was obtained. After some doubt in my mind, I am of opinion the rule should be discharged. The defendant having pleaded the existence of a highway, must, in order to justify, prove the existence of a common right of way.

There is no proof shown to have been given of the existence of such a highway, and the user is expressly negatived by the findings of the jury. If then there be no user shown, the defendant is in this difficulty, that she is driven to establish a right of way by virtue of the statute, that is the Enclosure Act passed in 1802, and the commissioners' award under it passed in 1808. The commissioners, it is admitted, did set out a road 40 ft. wide, and which was part of the *locus in quo*; and if that act of their setting out the road under the award were sufficient to constitute that *locus in quo* a public highway, the defendant would have made out her plea; but it appears to me that this act of setting out the road alone was not sufficient, and did not constitute the ground so set out a public highway within the meaning of the statute. The commissioners are to lay out the line of intended roads to be made, and, having done so, a surveyor is to be appointed who is to complete the formation of the road and until it is thoroughly made and put in a state of repair, the parish is not liable to repair it. But it is said, even if that was the intention of the Legislature, it was still a public highway repairable by the parish; that could not be so, for reading the statute in the way I do, I consider that if it became repairable by the parish at common law, yet, when the Legislature says it shall not be repairable by the parish until certain preliminaries have been gone into, that it was the intention of the Legislature that all necessary preliminaries should be gone through before it became a highway, and that it was not their intention to throw the burden on the parish under any other circumstances. I therefore think this rule should be discharged.

BRETT, J.—The question is, whether the Lord Chief Justice was bound to direct the jury that the third plea was proved. I take the fact to be, that after the passing of the local Act, everything was done for the commissioners to make their award. They did so. The road was properly set out, but there is no evidence that anything more had ever been done to the road, or even that it was made a road, more than the setting out by marks and bounds can make a piece of land a road; nor was there evidence that the road was used by the public as a highway. But as it was set out by the commissioners, I think the Lord Chief Justice was bound to direct the jury that the place was a public highway. According to the note in *Dovaston v. Payne* (2 Sm. Lead. Cas. 140), a highway may be created in two ways, either by the express enactment of the Legislature, or by a dedication to the public by the owner of the land over which it extends of a right of passage over it, and this dedication will be presumed from an uninterrupted user by the public of the right of way claimed; and Blackburn, J., says in his masterly judgment in the case of *Fisher v. Prouse* (2 B. & S. 776; 6 L. T. Rep. N. S., 711), that it is not compulsory on the public to accept the use of a way when offered to them. It is true that if evidence of user be given, that is some evidence of a dedication by the owner, but you must have both a dedication and a user by the public to make a road otherwise than by statute, and if the road be made by statute, which is the only other method, the provisions of the Act of Parliament must be strictly followed, or the creation will not take place, and if a person desire to show a road has been created, they must show that the provisions

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of the Act have all been complied with. Several cases have been called to our attention, but there is remarkably little authority on this point. In *Ex v. Haslingfield* (2 M. & S. 558), the judges relied on the construction of the Act of Parliament. However, I look at the award as a grant to the local public of something which they did not possess before, and it concerns the local public far more than the parish, and before the parish take it they are entitled to have the road strictly completed in accordance with the Act of Parliament. The commissioners are placed in the position of an owner who is about to dedicate the land to the public, but they can only do this by making the road complete. In this case the commissioners would have to act under the local Act, but at the same time they would also be subject to the provisions of the general Highway Act. By the local Act this road is to be considered a public highway, and it contains instructions to the commissioners as to what is to be done previous to making the award, and it gives persons power to object, and after hearing them the decision of the commissioners is to be final. It also says that the roads planned by the commissioners may be in places where previously no road existed; and then it says the commissioners are to appoint a surveyor who is to put the roads in a proper state of repair, and then when that has been done, the Act says, it is a public highway and the parish are to repair it. Now, therefore, as soon as it is shown that this was a public highway forced upon the public, those who claim it as such must show it is a way and a highway which has been made a complete road by the commissioners and their surveyor. I say that such is the case where there has been no use of the road—it may be that if the public take to the road and use it, then other considerations may arise, for the public could not turn round after using it, and say the road was never completed, and we will not have it. One of the cases quoted by Mr. Biron and relied on by him was *Turner v. The Ringwood Highway Board*, (L. Rep. 9 Eq. 418), but I do not think that it is an authority contrary to what we are deciding; there is nothing inconsistent with that case to say that the road may not have been completely formed, and that people had only walked over part of it, and in the case of *Attorney-General v. United Kingdom Telegraph Company* (5 L. T. Rep. N. S. 338), and of *Daves v. Hawkins* (8 C. B., N. S., 848; 4 L. T. Rep. N. S. 288), there was no evidence that the roads ever had been created; so in *Ex v. Lyon* (5 D. & Ryl. 497), the way had been a made and used way, and the Act of Parliament treated the road as a highway, and it was actually used as such. None, therefore, of these cases seem contrary to our decision. The road was created by Act of Parliament without user by the public, and the defendant has failed to prove that the stipulations have ever been applied to the road.

GROVE, J.—It is contended as a matter of law, that after setting out the limits, and marking out on the ground a position for a road under the authority of an Act of Parliament, that that piece of ground without any user by the public becomes at once and for ever a public highway, although subsequently the ground may have been cultivated; it requires strong words to make that so, especially when once it becomes a public highway it remains so for all time. Mr. Biron was obliged

to admit that there had always been hedges across the road, so as to make it practically impassable. If the statute be a contract with the public, it is strange, indeed, that the public should be bound when they have not got what they want, and as by the statute the surveyor is to put the road into a fit and proper state before the parish need accept it, can we say that these preliminaries do not amount to a bargain to be performed previous to the dedication to the public? Mr. Biron in his argument nearly said that before the passing of the Highway Act, there could be a highway without the parish having to keep it in repair, but the parish always have repaired before the Act. Suppose the statute enacts that the roads should be common highways, they would necessarily be repairable by the parish—which is borne out by Ashurst, J., in his judgment in *R. v. Sheffield* (2 T. R. 106), where he says, "Now it is an incontrovertible position, that by the general law of the land the parish at large is *prima facie* bound to repair all highways lying within it, unless by prescription they can throw the onus on particular persons by reason of their tenure; but when this is the case, it is by way of exception to the general rule, and therefore, where no other persons are bound to repair, the parish must do so, *ex necessitate*." If then it is an undisputed proposition, that if the road be made by statute without any provision as to its repair, it is to be repaired by the parish, is it not fair to say that if the statute intended it should be a highway, that it does not contemplate its being a public highway until the provisions of the Act are completed and carried out. The bargain with the public being completed, the parish is bound to repair, but to say that that which is not traversable is a highway, seems to me not warranted by any words of the statute. I therefore think this rule should be discharged.

Rule discharged.

Attorney for plaintiff, James and John Hopgood.

Attorney for defendant, Fladgate, Clark, and Co.

COURT OF APPEAL IN CHANCERY.

Reported by E. STEWART ROCHE and H. PRAT, Esqrs.,
Barristers-at-Law.

June 5 and 11, 1873.

(Before the LORDS JUSTICES.)

ERSKINE v. ADEANE.

Landlord and tenant—Noxious shrubs—Implied warranty—3 & 4 Will. 4, c. 42, s. 2—Compensation for loss by game—Parol variation of written agreement.

A tenant for life of an estate with powers of leasing, granting a lease of a farm. The lessor died, and in a suit which was instituted for the administration of his estate, the lessee brought in a claim for damages sustained by the loss of some sheep and cattle which died, more than six months before the lessor's death, from eating branches of yew trees growing on the lessor's land, which projected into the lessee's field, and from eating cuttings of the yew trees which had been thrown into the lessee's field by the lessor's servants.

Held (reversing the decision of the Master of the Rolls) that the claim could not be sustained, as the cause of action (if any) died with the lessor; and the executors were freed from all liability, no action having been brought within the time appointed by the 3 & 4 Will. 4 c. 42.

The lessee made another claim for damages sustained

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since the lessor's death by loss of cattle which had died from eating yew cuttings lying on lessor's land, to which the cattle had gained access through a fence which was out of repair, and which the lessor had not covenanted to keep in repair.

Held, that the executors of the lessor were under no obligation to keep the fence in repair, and that the claim could not be sustained.

The lease reserved the game on the farm to the lessor.

Two months before the lease was executed, the lessor's steward verbally promised the lessee that the game should be killed down, and it was on the faith of that promise that the lessee entered into the lease. In spite of this promise the shooting was let to a gentleman who kept a large quantity of game.

On a claim by the lessee for damages caused by the depredations of the game,

Held (reversing the decision of the Master of the Rolls), that the verbal promise constituted a good collateral agreement, and was binding upon the lessor, and that the lessee was entitled to be paid the amount of the damages sustained by breach of it out of the lessor's estate.

In this case there were two cross appeals from a decision of the Master of the Rolls.

The suit was one for the administration of the estate of Mr. Henry John Adeane, who had been tenant for life of an estate called Babraham Hall, in Cambridgeshire, where he resided during his life.

In the suit two claims for compensation were brought in by a Mr. Bennett, who was lessee of a farm on the Babraham Hall estate called the Home Farm, under a lease for eight years, which was executed in Aug. 1868, under a power of leasing vested in the tenant for life.

The first claim was for damages sustained by the loss of some sheep and cattle which died, more than six months before the death of the tenant for life, from browsing upon branches of yew trees growing on the lessor's land which projected into the fields of the Home Farm, and from eating cuttings of the yew trees which had been thrown into the fields of the Home Farm by the servants of the tenant for life.

The tenant for life died on the 17th Feb. 1870, and his will was proved on the 7th April. The administration suit was instituted on the 9th Feb. 1871, and no claim was made by Bennett in respect of the losses alleged to have been sustained by him till after that date. The present claim was raised by summons, which was adjourned into court.

The Master of the Rolls having allowed the claim, Mr. Adeane's executors appealed.

Fry, Q.C. and Bromehead, for the appellants.—The Master of the Rolls allowed the claim on the ground that there was an implied warranty by a landlord letting a farm that there were no trees on the land which would poison cattle. We contend that there is no such warranty. The maxim *actio personalis moritur cum persona* disposes of this claim. The claim has not been made within the time appointed by 3 & 4 Will. 4, c. 42, s. 2, which provides that "an action of trespass, or trespass on the case, as the case may be, may be maintained against the executors or administrators of any person deceased for any wrong committed by him in his lifetime, to answer in respect of his property, real or personal, so as such injury shall have been committed within six calendar months before such person's death, and

so as such action shall be brought within six calendar months after such executors or administrators shall have taken upon themselves the administration of the estate and effects of such person."

Cracknell (with him Southgate, Q.C.) for Bennett.—There is such an implied warranty as the Master of the Rolls assumed; but if not, there was such negligence on the part of the lessor in allowing his servants to throw the yew cuttings into our fields, that we are entitled to recover the amount of the damage sustained by us. As to the objection that we have lost our right to relief by not bringing an action within the time limited by the 3 & 4 Will. 4, c. 42, s. 2, it was not raised in the court below, and must be taken to have been waived.

Without calling for a reply,

Lord Justice JAMES said: I am of opinion that Mr. Bennett really raised no claim in respect of a warranty, so far as I can understand it, but that this was a claim against the executors of the deceased tenant for life, so far as this part of the case goes, for a wrongful act of his, and for negligence of him and of his servants with respect to the yew trees—the insufficient fencing on the one side, and the cuttings and so on on the other side. That is clearly one of those grounds upon which, at common law, no action could be brought by or against the executors of a deceased person except within a limited time prescribed by the stat. 3 & 4 Will. 4, c. 42, and that time has elapsed. I am of opinion, therefore, that the claim with respect to anything done in the lifetime of the tenant for life cannot be sustained.

Lord Justice MELLISH.—I am of the same opinion. No doubt the rule of common law was that the personal action died with the person, and that no action could be brought against the executors or administrators at all in respect of such a cause of action. This claim, so far as it refers to negligence in keeping up the fences, or negligence in allowing the cuttings from the yew trees to be placed where the cattle could get at them, or negligence in allowing the branches of the yew trees to grow over the hurdles, would, in all these respects be maintainable, if at all, by a personal action. I may say that, in my opinion, as far as regards the yew trees growing over the hurdles, no such claim could be sustained at all, nor in respect of what the Master of the Rolls seems to have given judgment upon as to the yew trees growing on the demised premises. I cannot agree that there is any warranty, and I have never heard that there was any such warranty. The law of this country is, that a tenant, when he takes a farm, must go and see what the state of the farm is. Just as in the case of a purchaser of a business, if there is no warranty, so in the case of taking a lease of property, the lessee must take the property as he finds it. I never heard that a landlord warranted that the sheep should not eat his yew trees, or against what the consequences might be. Yew trees, it appears, are not at all times poisonous; and it seems very difficult to say when they are poisonous; and there is nothing at all extraordinary in plantations on or about a farm. It is but very rarely that any accident happens on account of that. In my opinion a lessee must take his chance of such a damage, or put in an express warranty, if he thinks there is reason to fear that his cattle or sheep may be damaged by it. Throw-

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ing the cuttings in the way of the sheep might be a different thing. If it were necessary to inquire whether there were sufficient evidence of that, it might be necessary to inquire whether there was not contributory negligence in the servants of the tenant in allowing the sheep to go amongst the cuttings. But it is unnecessary to go into that. These causes of action have died with the person, except so far as the statute (3 & 4 Will. 4, c. 42) enabled an action to be brought, and no action having been brought within the time limited by the statute, the executors were at the time this bill was filed, freed from all liability in respect of these causes of action.

The second part of this first claim was against the executors of Mr. Adeane for damages sustained since his death, by reason of some cattle having got out of a field in the home farm across a ditch usually full of water, but then dried up, or through a fence which was out of repair and which ran along part of the ditch where the water was usually shallow, and having been poisoned by eating yew cuttings which were laid in a heap upon one of the fields not comprised in the home farm. There was no covenant in the lease to keep this fence in repair.

The Master of the Rolls having allowed this claim, the executors appealed.

Fry, Q.C. and Bromehead, for the appellants.—There is no obligation upon us to repair the fences. As Bayley J. says in *Boyle v. Tambyn* (6 B. & C. 337), a man "is under no legal obligation to keep up fences between adjoining closes of which he is owner; and even where adjoining lands, which have once belonged to different persons, one of whom was bound to repair the fences between the two, afterwards became the property of the same person, the pre-existing obligation to repair the fences is destroyed by the unity of ownership. And where the person who has so become the owner of the entirety afterwards parts with one of the two closes, the obligation to repair the fences will not revive, unless express words be introduced into the deed of conveyance for that purpose." Here the lessor was under no original obligation to maintain this fence, and as there is no covenant in the lease to repair, no obligation has arisen. In *Laurence v. Jenkins* (28 L. T. Rep. N. S. 406; L. Rep. 8 Q. B. 274), where the defendant's agent felled a tree in a negligent manner, so that it fell over the fence between the closes of the plaintiff and defendant and made a gap in it, and two cows of the plaintiff got through the gap and died from eating the leaves of a yew tree, it was held that the defendant was liable to the plaintiff for the loss of the cows. But that case is quite distinguishable from the present case, for there the evidence showed a prescriptive obligation on the part of the defendant to maintain the fence so as to keep in the cattle in the plaintiff's close. As to injury arising from the executors keeping the yew cuttings in a heap on the land they referred to

Fletcher v. Rylands, 14 L. T. Rep. N. S. 523; L. Rep. 1 Ex. 265; s. c. on app. 19 L. T. Rep. N. S. 220; L. Rep. 3 E. & L. 530.

Cracknell (with him *Southgate, Q.C.*) for Bennett—The appellants ought to have kept the fence in repair, and it was their duty to prevent our cattle from straying into their land. They are liable for having kept the poisonous cuttings in a heap on the land, when the fences were in such

a state that our cattle could get through them. *Fletcher v. Rylands* (*ubi sup.*) is an authority in our favour. He also cited

Jordin v. Crump, 8 M. & W. 782;

Barnes v. Ward, 9 C. B. 392.

Without calling for a reply,

Lord Justice JAMES said: If this had been the case of two adjoining landowners, it seems not to be substantially disputed that no ground of action would have arisen by reason of the accident, or whatever it may be, that has occurred in this case. One piece of property being open to another piece of property, cattle have found their way from the lands of one owner into the lands of another owner, on which was some poisonous matter, consisting of the loppings of some yew trees which had been left there in a heap. In that case, there being no obligation by contract or by prescription as between the landowners, it is clear that no action would lie by reason of the damage that ensued from that which, in the first instance, was the trespass of the cattle of the complainant. Now can it make any difference that the relation of the two adjoining landowners is this—that one man is the landowner in fee of a piece of ground which he has retained in his own possession, and the adjoining person is the landowner for a term of years under a lease created by his neighbour? I am of opinion that there is no authority and no principle upon which any distinction can be drawn in respect of the obligations and rights, as between two owners in fee simple, or between an owner in fee simple and a lessee deriving title from the owner; and if there be anything between those parties, it must arise from a contract express or implied, that the owner of the piece of ground in question should keep the ditch full of water, or in seasons when the ditch was not full of water should supplement it by a sufficient fence to prevent cattle from trespassing into it. I am of opinion, therefore, that the claim has entirely failed in this respect.

Lord Justice MELLISH.—I am of the same opinion. In order to support the claim, it must be proved that there was an obligation on the part of the landlord to keep up a sufficient fence between the land which had been let to the tenant and the land which he retained in his own possession. Now as a general rule, an obligation to repair fences must either originate in prescription or in express contract, or it may be created by Act of Parliament, as is constantly done under Enclosure Acts; but it must be created in some way or other. Here, of course, there is no prescription, and the only possible question is, whether there is any contract between the landlord and the tenant by which the landlord binds himself to keep up the fence. I will assume that the tenant holds from the executors upon the same terms as he originally held from Mr. Adeane, who gave him the lease. There is no covenant in the lease by which the landlord binds himself to repair this fence; there is a covenant on the part of the tenant, which I will assume does not apply to this particular part of the fence, because I think it only applies to those fences on parts of the land which are demised to the tenant, and probably the fences of the plantations which are reserved. Assuming that to be so, then the state of things is, that the tenant has covenanted that he will repair the fences which are demised to him. The landlord, no doubt, for his own protection, will generally, as a matter of fact, repair the fences which are fences of his

plantations, but he has not covenanted with the tenant that he will keep them in repair. I am not aware of any rule of law by which we can import such a covenant into the lease which the lease itself does not contain. As a general rule we all know that the Common Law of England is distinguished from almost all other laws by the fact that it obliges people when they wish to make contracts, to insert the stipulations by which they intend to be bound; and it does not imply contracts and agreements to anything like the extent that most other laws do. No doubt there are circumstances under which contracts may be implied, but the general rule of law is *caveat emptor*—let him who wishes to have a particular stipulation for his benefit take care to have that stipulation inserted in the contract. I see no reason why this obligation should be excepted from what I consider to be the general law. If the tenant, upon looking over the farm, thought it was for his advantage to have this done, and to have certain fences which were in the possession of the landlord kept in repair in order that his cattle might be protected, he should have inserted a covenant in the lease that the landlord would keep those fences in repair, just as the landlord has taken care to insert a covenant on the part of the tenant to keep in repair the fences which are demised to him. Therefore I agree with the Lord Justice that this claim cannot be sustained.

The second claim arose under the following circumstances:—

In June 1868 Bennett was negotiating with one Rush, Mr. Adeane's agent, for the lease, and there was evidence that during the negotiations Rush, on one occasion, told Bennett that he was authorised to say that the game on the estate would not be let any more, but would be killed down and the gamekeepers would be all sent away; that the change could not take place till the end of the season, as the game had been let down to that time to a Mr. Rennie; but that after that time only one man would be kept to kill vermin and rabbits, and a similar promise was afterwards given by Mr. Adeane himself. There was also evidence that Bennett several times stated that the farm would be of no use to him unless the game was killed down, and that he would take the farm only on that understanding.

In Aug. 1868 the lease was executed, and it contained provisions reserving the game to the landlord, but it contained no provision for keeping down the game.

In spite of the promise given by Rush, the game was let again at the end of the season, and such a quantity of game was kept that Bennett said that he had occupied the farm at a considerable loss, and he now claimed a sum of £1000 as compensation.

The Master of the Rolls held that the claim failed, as being an attempt to vary a written contract by a parol agreement, and that the agreement was also void under the Statute of Frauds.

From this decision Bennett appealed.

Southgate, Q.C. and *Cracknell* in support of the appeal.—The objection of the lapse of time which was raised against our other claim cannot avail against this claim, for it is founded on contract. The verbal agreement as to killing down the game was collateral to the lease, and is a good binding

agreement. In *Morgan v. Griffith* (23 L. T. Rep. N. S. 783; L. Rep. 6 Ex. 70) where the plaintiff refused to sign a lease of certain land unless the defendant promised to destroy the rabbits on the land, a verbal agreement to do so was held to be good, as being collateral to the written lease. *Lindley v. Lacey* (11 L. T. Rep. N. S. 273; 17 C. B., N. S., 579) shows that the fact that the lease contains provisions relating to the same subject as the verbal agreement does not invalidate the latter. *Cherry v. Heming* (4 Ex. 631) shows that a parol agreement, when performed on one side within a year, does not come within the 4th section of the Statute of Frauds, inasmuch as that enactment applies only to contracts not to be performed on either side within the year. In the present case the verbal contract was performed on our side in two months by the execution of the lease, which took place on the faith of the verbal agreement. They also cited.

Jervis v. Berridge, 28 L. T. Rep. N. S. 481; L. Rep. 8 Ch. 351.

Fry, Q.C. and *Bromhead* for the executors.—As the lease contains provisions as to game, it clearly overrides any prior verbal arrangements which may have been made with regard to game. At all events the agreement is void under the Statute of Frauds, for it was an agreement running over eight years, and could not be performed within a year.

Without calling for a reply,

Lord Justice JAMES said: I am unable to concur with the opinion of the Master of the Rolls as to this claim. It appears to me that there is abundant evidence, and evidence of a satisfactory kind, such as one likes to get when there is anything in addition to, or, as we may call it, anything collateral to a bargain which is reduced into writing. We have here the evidence of the claimant himself, and the evidence of the agent of the other contracting party, who was present at the negotiation between them, and then we have the statement of the lady who, in my view, really corroborates all that is material and essential to be averred in this case—that is to say, that while an agreement was being negotiated for a lease, it being agreed that the lease should contain certain stipulations only, a promise was made that the game of which the tenant was then complaining should be so dealt with as not to amount to a serious nuisance to the tenant. That was the substance of it. The substance of the agreement was not that there was to be no game at all, or that game was not to be preserved in a reasonable and moderate way, but that there was not to be a quantity of game kept, and that the landlord was not to keep an army of gamekeepers, but such an amount of game as one keeper would be sufficient to deal with, and that the hares and rabbits, the principal subject of complaint, were to be dealt with in a particular way by the tenant to whom Mr. Adeane was not willing to grant power by the lease at all, but it was to be done by a person named by Mr. Adeane. That is a different thing from any power given in the lease to the tenant merely resulting in a counter claim against Mr. Adeane if he should not substantially comply with his bargain, which was that the game should not be a nuisance. I am of opinion that the tenant has a very good claim at law. I am unable to distinguish this case myself from the case in the Exchequer (*Morgan v. Griffith*, 23 L. T. Rep. N.S.

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783; L. Rep. 6 Ex. 70). I am quite certain there would be a good claim in equity against the estate of Mr. Adeane, who has been making money from the game by letting the shooting. That being so, I am of opinion that Mr. Bennett is entitled to this claim against the estate. I think, upon the whole, as the person really interested is the infant son of Mr. Adeane, that it is better for him that the claim should be allowed than that he should grow up in the country under the notion that he was not to pay a claim of this kind by a tenant.

Lord Justice MELLISH.—I am of the same opinion. No doubt, as a rule of law, if parties enter into negotiation respecting the terms of a bargain, and afterwards reduce the bargain into writing, verbal evidence will not be admitted to introduce some additional terms into the agreement; but, nevertheless, what is called a collateral agreement, where the parties have entered into an agreement for a lease or any other agreement under seal, may be made in consideration of one of the parties executing that lease, unless, of course, the stipulation contradicts the lease itself. I quite agree that an agreement of that kind is to be rather closely watched, and that we should not admit it without seeing clearly that it is substantially proved. Indeed, I may say that, this being a case between landlord and tenant, if there had been no evidence, except Mr. Bennett's own evidence, and the agreement had been alleged to have been made in an interview between him and Mr. Adeane, when nobody else was present, I should have thought, and most probably it would have been the duty of the court to say, that that evidence was not satisfactory enough for the court to act upon. But in this case it appears to me that the agreement is proved in the most satisfactory manner, and it is also proved that it was not intended to be part of the agreement contained in the lease, and which was afterwards reduced into writing and made into a deed, but that it was intended to be collateral; for, according to the evidence, which to some extent is confirmed by Lady Elizabeth (the lessor's widow), it was distinctly said that the lease was to be in the ordinary form of Mr. Adeane's leases respecting game. But, nevertheless, he stipulated that he himself would behave in a particular way with reference to the powers which were to be reserved to him by the lease. It would be contrary to common sense and justice, if we consider what this case, supposing it to be true, is, to hold that the tenant could make no claim in respect of the verbal agreement. The case is this: Mr. Bennett, finding a vast quantity of game upon the farm says, "It is impossible that I can take it with that quantity of game on it," and then, even according to Lady Elizabeth, it is quite plain that Mr. Adeane did say this: "You need not care about that, because I am in such a state of health that I no longer want the shooting myself. I am not going to continue letting it. All the keepers will be dismissed except one, and in the result you need not be afraid of the quantity of game." The lease having been executed on the faith of that agreement so made, and upon those representations so made, I say it would be contrary to the ordinary rules of justice if the tenant were to have no remedy for loss sustained by breach of that agreement. There is no imputation against Mr. Adeane himself, because, I think, it appears that he had got into such an infirm state of health

that he was incapable of managing his affairs; and accordingly the shooting was re-let, and the game kept up as much as ever. That is a matter to be inquired into; but all we have to say now is that this verbal agreement is binding in point of law, and, assuming that there has been damage sustained, that Mr. Bennett is entitled to be paid the damage out of Mr. Adeane's estate. There will be an inquiry as to the amount, and he must have the costs of this part of his claim, but they must be entirely distinct from the costs of all the rest of the claim. It is like the case of any other creditor. Mr. Bennett is in this case a mere creditor of the estate.

Solicitors for the executors, *Lake and Co.*

Solicitor for Mr. Bennett, *C. P. Greenhill.*

V.C. BACON'S COURT.

Reported by the Hon. ROBERT BUTLER and F. GOULD,
Esq., Barristers-at-law.

Saturday Aug. 2, 1873.

Ex parte THE RECTOR OF CLAYPOLE.

Railway company—Purchase of glebe lands—Re-investment of purchase-money—Improvement of parsonage house—Lands Clauses Consolidation Act 1845, s. 69.

Money paid into court in respect of certain portions of glebe land taken by a railway company for the purposes of their undertaking, ordered to be paid to the secretary of the bishop of the diocese on his undertaking to apply it in the improvement of the parsonage house.

THIS was a petition on behalf of the Rev. C. P. Plumtre, rector of Claypole, Lincolnshire for the investment of a sum of 390*l.* 15*s.* 5*d.* Consols, representing a sum of 360*l.* paid into court in the year 1851 by the Great Northern Railway Company, in respect of certain portions of the glebe lands belonging to the rectory of Claypole, which the company had taken for the purposes of their undertaking.

In 1857 an order was made directing payment of the dividends to the then rector of Claypole and his successors.

The petition stated that the parsonage house at Claypole required certain alterations and improvements to be made to it, and that, subject to the sanction of the court, the petitioner had entered into a contract for the execution of such alterations and improvements for the sum of 568*l.* And the petition prayed that upon the completion of such alterations and improvements being certified, the sum of 390*l.* 15*s.* 5*d.* Consols might be sold, and the proceeds paid to the petitioner, he undertaking duly to apply the same.

Both the bishop of the diocese and the patron of the living approved of the money being applied in this manner.

Kay, Q.C. and Waller, in support of the petition referred to

The Lands Clauses Consolidation Act 1845, s. 69;

Ex parte The Buckinghamshire Railway Company,
14 Jur. 1065;

Re Davis' Estate, 3 De G. & J. 144;

Ex parte The Incumbent of Whitfield, 1 J. & H. 610;

Re Dummer's will, 2 De G. J. & S. 515; 12 L. T. Rep.

N. S. 626;

Re Leigh's Estate, 25 L. T. Rep. N. S. 644; L. Rep. 8

Ch. 887.

Stevens appeared for the railway company.

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The VICE-CHANCELLOR made an order directing the money to be paid to the secretary of the bishop of the diocese, on his undertaking to apply it, and ordered the costs to be paid according to the Act.

Solicitor for the petitioner, *J. W. Hickin*.

Solicitors for the company, *Johnston, Farquhar, and Leech*.

COURT OF QUEEN'S BENCH.

Reported by J. SHORTT and M. W. MCKELLAR, Esqrs.,
Barristers-at-Law.

Wednesday, May 28, 1873.

ROBERTS (app.) v. HUMPHREYS (resp.)

Sale of intoxicating liquors within prohibited hours—Bonâ fide travellers—Onus of proof—Honest though mistaken belief that persons supplied are bonâ fide travellers—Licensing Act 1872 (35 & 36 Vict. c. 94), ss. 24, 51.

If a person licensed to sell intoxicating liquors on his premises supplies persons within the hours prohibited by the Licensing Act (35 & 36 Vict. c. 94), s. 24, the onus lies upon him of showing that the persons so supplied are bonâ fide travellers.

Quære, whether the existence of an honest, though mistaken belief on his part that the persons so supplied are bonâ fide travellers, is sufficient to exempt him from liability under the Act.

CASE stated by justices under 20 & 21 Vict. c. 43:

1. At a petty sessions holden at King's Heath, in and for the Northfield division of the county of Worcester, on the 6th Sept. 1872, the appellant Morris Roberts appeared in answer to an information under the statute 35 & 36 Vict. c. 94, known as the Licensing Act 1872, charging that he being a person licensed to sell intoxicating liquors by retail to be drunk and consumed on the premises, did on Sunday, the 1st Sept. 1872, at the parish of King's Norton, in the said county, open his house and premises for the sale of intoxicating liquors during the time such premises are directed to be closed, that is to say, at the hour of ten minutes past eleven o'clock in the forenoon of the said day, otherwise than for a bonâ fide traveller or to persons lodging in his house, such premises being situated beyond the city of London, and the liberties thereof, and the parishes and places subject to the jurisdiction of the Metropolitan Board of Works, and beyond the four mile radius of Charing-cross.

2. Upon the hearing of the information it was proved by Richard Humphreys, superintendent of police, that at ten minutes past eleven o'clock in the forenoon of the day named he visited the appellant's premises, known as the Sherborne Hotel and St. Helena Gardens, situate in the Sherborne-road, Balsall-heath, in the county of Worcester, about 200 yards outside the boundary of the borough of Birmingham, in the county of Warwick, in a direct line and within a distance of 400 yards by road; that he found there nineteen persons, having the appearance of, and being in his judgment and opinion, Birmingham artizans, and some were in their working clothes. They were orderly and sober, dispersed about the house and gardens; some were seated; they were drinking, for the most part, ale, and some were smoking. The manager of the appellant's establishment informed him that none but bonâ fide travellers were admitted, and that every precaution was taken to prevent the admission of persons who were not bonâ fide travellers. Humphreys asked the men

their names and addresses. They without hesitation, and with one exception (a man who had come from Oldbury, seven miles distant) stated, in the presence of the manager, that they came from central parts of the town of Birmingham, at distances varying from a mile and three quarters to two miles and a half, which Humphreys subsequently, upon inquiry, found to be correct. It did not appear whether they had travelled or were about to travel any farther, nor did any of them make assertion to that effect.

3. Counsel for the appellant, called William Benbow, a superannuated sergeant of the Birmingham police, who deposed that he was employed by the appellant, and was placed at the entrance to the premises expressly for the purpose of preventing as far as possible admission to the appellant's premises during prohibited hours, of any other than bonâ fide travellers, and acting on the appellant's orders, he questioned all persons applying for admission as to whence and the distance they had come; that four of them told him that they had come from Leicester on the night previous, and had come that morning from Aston, three miles off; others from Walsall, one from Oldbury, and some from the farther side of the town of Birmingham, and no one was admitted who did not state that he had come more than three miles, and anyone who had given such answers as were given to Humphreys would have been refused admittance, and that admittance was refused to all those whose answers to his inquiries were unsatisfactory. It appeared that two notices in large type were posted, one at the entrance, and the other in a conspicuous place within the premises, to the effect that none but travellers were admitted. The appellant's manager gave similar evidence, and deposed that he in his turn questioned the persons applying for refreshments, and did not supply them unless their answers were satisfactory.

4. Upon this evidence the appellant's counsel contended, on the authority of *Taylor v. Humphreys* (17 C. B., N. S., 537; 4 L. T. Rep. N. S. 514); *Peache v. Colman* (35 L. J. 118, M. C.); *Peplow v. Richardson* (L. Rep. 4 C. P. 168); *Davis v. Scrace* (19 L. T. Rep. N. S. 789; L. Rep. 4 C. P. 172); *Morgan v. Hedger* (L. Rep. 5 C. P. 485); and *Copley v. Burton* (22 L. T. Rep. N. S. 888; 5 L. Rep. C. P. 489); that the onus of proof that the persons were not bonâ fide travellers rested upon the complainant, that the distances which the persons had come constituted them bonâ fide travellers; that the appellant had used due diligence, and exercised every reasonable precaution to prevent an infraction of the law, and that was all that could be required of him, and that it was impossible further to test the truth or falsehood of the representations which the men had made.

5. The justices were of opinion, first, that the persons found on the premises were not all bonâ fide travellers. Secondly, that inasmuch as upon certain misrepresentations made by persons who were not bonâ fide travellers intoxicating liquors had been obtained by them, sufficient diligence had not been used. That the cases cited were not applicable to the present case, as, although it had been ruled before the Licensing Act 1872, that the onus of proving that the persons found on the premises were not within the exception rested on the complainant, that Act had, by the

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fourth paragraph of the fifty-first section, materially altered the law in that respect. It enacts that "Any exception, exemption, proviso, excuse, or qualification, whether it does or does not accompany the description of the offence in this Act, may be proved by the defendant, but need not be specified or negatived in the information, but if so specified or negatived no proof in relation to the matter so specified or negatived shall be required on the part of the informant or complainant, and in all cases of summary proceedings under this Act the defendant and his wife shall be competent to give evidence."

6. In the present case the exception was in favour of *bonâ fide* travellers; it was specified in the information; it was not required to be negatived on the part of the informer. The defendant was at liberty to prove it if he could; but, in the opinion of the justices, he had failed to do so. They therefore convicted him in the penalty of 5*l.* and costs.

7. The appellant being dissatisfied with the decision, demanded a case under the 20 & 21 Vict. c. 43, which we state and sign accordingly.

(Signed)

THOMAS LANE.

J. F. SWINBURN.

CHARLES RATCLIFF.

Poland, for the appellant, contended that the conviction was wrong. The Licensing Act 1872, 35 & 36 Vict. c. 94, does not throw the onus on the defendant of proving that the persons supplied within the prohibited hours are *bonâ fide* travellers. Sect. 24 enacts that, "subject as hereinafter mentioned, all premises on which intoxicating liquors are sold, or exposed for sale by retail, shall be closed as follows, &c. Any person who sells or exposes for sale, or opens or keeps open premises, for the sale of intoxicating liquors during the time that such premises are directed to be closed by, or in pursuance of, this section, or during such time as aforesaid, allows any intoxicating liquors to be consumed on such premises, shall for the first offence be liable to a penalty not exceeding 10*l.*, and for any subsequent offence to a penalty not exceed 20*l.*," &c. Then comes a proviso that "none of the provisions contained in this section shall preclude a person licensed to sell any intoxicating liquor to be consumed on the premises, from selling such liquor to *bonâ fide* travellers, or to persons lodging in his house." Sub-section 4 of sect. 51, on which the justices relied, is nothing more than a repetition, with the addition of two words, not material, of the previously existing enactment in sect. 14 of 11 & 12 Vict. c. 43. The Legislature could never have intended to make liable to punishment an innocent man who is induced by the false statements of a pretended traveller to admit him to his premises, and to supply him with liquor. The defendant did all in his power to prevent the admission of any person other than *bonâ fide* travellers, and the justices do not find that he did not honestly believe that the persons to whom the liquor was supplied were *bonâ fide* travellers. [BLACKBURN, J.—The question of *bona fides* is not raised for us by the case. The justices would no doubt mitigate the penalty where the offender has been tricked into the commission of the offence.] The conviction is directly opposed to the case of *Taylor v. Humphreys* (sup.), where it was held that as the exception in the 11 & 12 Vict. c. 49, s. 1, of "refreshment for travellers," was contained in the clause creating

the prohibition, the burthen of showing that the prohibition has been infringed, and that the case is not within the exception, is cast upon the informer; and that if the innkeeper believes, and has reason to believe (of which the magistrates are the judges) when he supplies the liquor, that he is supplying refreshment for a "traveller," he ought not to be convicted. In *Davis v. Scrase* (sup.) a metropolitan police magistrate, having convicted an innkeeper, under 2 & 3 Vict. c. 47, s. 42, for opening his house for the sale of wine, &c., before one in the afternoon of Sunday, the same not being then for the refreshment of travellers, on the ground that the defendant was bound to prove that his guests were travellers, in order to bring himself within the exception of that statute, according to the proviso contained in the 14th section of 11 & 12 Vict. c. 43, it was held by the Court of Common Pleas, on appeal, that the conviction was wrong, the words "except refreshment for travellers" not being an "exemption, exception, proviso, or condition in the statute on which" the information was framed, within the words of the proviso in 11 & 12 Vict. c. 43. [BLACKBURN, J.—Assuming that the words *bonâ fide* travellers in the present Act mean persons *bonâ fide* believed to be travellers, still sect. 51, sub-sect. 4, casts upon the innkeeper the onus of proving this. The facts of the present case do not show that he attempted to do so.] *Rees v. Ivens* (7 C. & P. 213), which shows that it is an indictable offence at common law for an innkeeper to refuse to receive travellers, and *Morgan v. Hedger* (L. Rep. 5 C. P. 485), and *Copley v. Burton* (sup.) were referred to; in the latter of which cases it was laid down that where the landlord of an ordinary alehouse is charged with opening his house during the prohibited hours on Sunday "for the sale of wine and beer, otherwise than as refreshment for travellers," it should be clearly proved, not only that liquor was sold to persons who were not travellers, but also that the landlord knew, or had reason to believe, that they were not travellers, or did not care to inquire whether they were travellers or not. [BLACKBURN, J.—We are all agreed that the onus is on the appellant to show that the persons supplied with drink in his house during the prohibited hours come within the exception in the statute of "*bona fide* travellers." What we are not agreed upon, and what we desire the counsel for the respondent to direct his attention to, is how far an honest though a mistaken belief on the part of the landlord that the persons supplied were *bona fide* travellers is a defence; and in the next place how far the existence of such an honest belief is shown by the facts stated in the case.]

Willis, for the respondent, contended that the offence was committed if the persons served with liquor within the prohibited hours were not in fact *bonâ fide* travellers, and that belief that they were so, however honest, would not exempt the landlord if it were incorrect in fact. And the onus of proving that the persons supplied are *bonâ fide* travellers is on the landlord. Sub-sect. 4 of sect. 51 of the Act expressly provides that, "any exception, exemption, proviso, excuse, or qualification, whether it does or does not accompany the description of the offence in this Act, may be proved by the defendant but need not be specified or negatived in the information; but if so specified or negatived, no proof in relation to the matters so

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specified or negatived shall be required on the part of the informant or complainant," &c. The offence under the statute is the keeping of the house open during certain hours; and a statute may be infringed notwithstanding that the party infringing it honestly believes he is doing what is lawful. In *Morden v. Porter* (7 C. B., N. S., 641), it was held that a party trespassing in pursuit of game under 1 & 2 Will. 4, c. 32, s. 30, is not the less guilty of the offence because he *bonâ fide* believes that he has the licence of the occupier to shoot over the land. In *Hudson v. Macrae* (4 B. & S. 585), it was held that a person accused of fishing within the prohibited hours in water where another person had a private right of fishery, could not justify himself under the *bonâ fide*, but mistaken notion of the existence of a right of fishing by the public in the water in question. As to the existence in point of fact of honest belief on the part of the present appellant that the persons served were *bonâ fide* travellers, the justices do not find either way in the case as stated.

Poland, in reply, referred to *Hearne v. Garton* (2 E. & E. 66), where, on the construction of sect. 168 of The Great Western Railway Act (5 & 6 Will. 4, c. cvii.), it was held that to constitute the offence of sending by the railway any vitriol, &c., without notice, a guilty knowledge on the part of the sender was necessary. Lord Campbell, C.J., said: "*Actus non facit reum nisi mens sit rea*. The act with which the respondents were charged is an offence created by statute, and for which the person committing it is liable to a penalty or imprisonment. Not only was there no proof of guilty knowledge on the part of the respondents, but the presumption of a guilty knowledge on their part, if any could be raised, was rebutted by the proof that a fraud had been practised upon them by Nicholas, in describing the goods falsely, just as much as if, after harmless goods had been delivered by him for consignment, perilous goods had been substituted by him in their place, without the knowledge of the respondents. There was neither negligence nor moral guilt of any kind on their parts; and are they to be made the victims of Nicholas' fraud? I am inclined to think that they are civilly liable to the company, as being the persons who actually sent the goods by the railway; but I am clearly of opinion that they are not criminally liable under this Act, and that Nicholas was the person against whom these proceedings should have been taken." *Peplow v. Richardson* (L. Rep. 4 C. P. 168), was also referred to.

BLACKBURN, J.—In the present case the charge against the appellant is under the Licensing Act 1872 (35 & 36 Vict. c. 44). This Act repeals the Act of 11 & 12 Vict. c. 49, but to a certain extent the enactments contained in the two statutes are similar. The first section of the old Act prohibits the sale of beer, &c., during certain hours on Sunday, except as refreshment for travellers, the exception being engrafted on the description of the offence. Upon the construction of this section several cases were decided in the Court of Common Pleas, that court holding that the onus of proof lay upon the prosecutor to negative the existence of the exception, and to show that the persons supplied with liquor within the prohibited hours on Sunday were not in fact *bonâ fide* travellers. In one case (*Copley v. Burton*, *ubi sup.*), the court expressed an opinion that the belief of the landlord was a

material element in the offence, and that he could not be convicted of the offence unless he knowingly kept his house open for persons who were not travellers. It is not necessary to inquire, in the present case, whether these decisions of the Court of Common Pleas were or were not correct. The interpretation put upon the Act by these cases did, undoubtedly, make the enforcement of the Act a matter of greater difficulty, and made it easier for innkeepers to keep open their houses during the prohibited hours. The Act of 1872, accordingly, in the 24th section, alters altogether the description of the offence, the exception being introduced in a subsequent clause. Section 24 makes the offence to consist in keeping open the house at all during the prohibited hours. A subsequent and distinct clause provides that "none of the provisions contained in this section shall preclude a person licensed to sell any intoxicating liquor to be consumed on the premises, from selling such liquor to *bonâ fide* travellers, or to persons lodging in his house." One part of the section creates the offence; a subsequent part gives a ground of defence; and according to all the rules of pleading the existence of this defence must be pleaded by the defendant. Nor is this all. Sect. 51, subsect. 4, provides that "any exception, exemption, proviso, excuse or qualification, whether it does or does not accompany the description of the offence in this Act, may be proved by the defendant, but need not be specified or negatived in the information, and if so specified or negatived, no proof in relation to the matters so specified or negatived shall be required on the part of the informant or complainant." This provision of the Act seems to be expressly pointed at the decisions of the Court of Common Pleas, on the interpretation of sect. 14 of Jervis's Act (11 & 12 Vict. c. 43), and to make it necessary for the defendant to prove any exception which may exist in his favour. The justices in the present case were, therefore, right in holding that the onus lay upon the appellant to show that the persons supplied with liquor by him within the prohibited hours, were *bonâ fide* travellers; and as it has been found as a fact that all the persons so supplied were not *bonâ fide* travellers, the appellant has failed in proving at least to its full extent, the exception in his favour. However, as the Court of Common Pleas, in the cases referred to, seems to have been of opinion that the innkeeper, who is bound to receive travellers, if he *bonâ fide* believes that the persons he supplies with liquor are travellers, is not guilty of the offence, I will not decide on the case as at present stated, whether such a *bonâ fide* belief on the part of the innkeeper is or is not a sufficient excuse, though I am inclined to think it is not. Even assuming that such a *bonâ fide*, though mistaken belief, is a sufficient excuse, the onus of proving that he entertained such a belief lay on the appellant, and the fact is not in the present case found either way. This being so, and the onus lying on the appellant to prove it, I am inclined to think that he did not raise the point at all before the justices. As my brother Quain differs from me in opinion as to the materiality of the appellant's belief, the case will be remitted to the justices to find, as a fact, whether the appellant did actually entertain a *bonâ fide*, though mistaken belief, that all the persons supplied by him were *bonâ fide* travellers.

QUAIN, J.—I agree with my brother Blackburn

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in thinking that under the Act of 1872 the burthen of proving the exemption lies upon the defendant. I cannot find out from the case whether the justices were or were not of opinion that the appellant entertained the honest belief that the persons whom he supplied within the prohibited hours were *bonâ fide* travellers. They only find that all the persons found on the premises were not in fact *bonâ fide* travellers. Bearing in mind the decisions of the Court of Common Pleas on the subject of a *bonâ fide*, though mistaken belief, by the innkeeper, it is important, I consider, that this point should be distinctly found in the case before we decide it. I am therefore of opinion that the case should be remitted to the justices, in order that they should find this point one way or the other.

ARCHIBALD, J.—I also think that the case should be remitted, to have this point found. It is a doubtful point whether the innkeeper's *bonâ fide* belief that the persons he supplies within the prohibited hours are *bonâ fide* travellers, is sufficient to exempt him from liability under the statute. As at present advised I am rather inclined to doubt that this is so, or that he can justify himself otherwise than by proving that the persons supplied were in fact *bonâ fide* travellers. I keep my mind, however, open upon this point, on account of the importance of the matter, until the justices shall have found whether such a *bonâ fide* belief did in fact exist on the part of the landlord.

Case remitted to find whether the applicant had in fact an honest though mistaken belief that the persons supplied were all bonâ fide travellers; the Court being of opinion that the onus of proof is upon the appellant.

Attorneys for appellant, Gamlen and Son, for Cottrell, Birmingham.

Attorneys for the respondent, Miller and Gane, for Gem, Birmingham.

Monday, June 16, 1873.

REG. v. PAWLETT.

Quarter sessions—Appeal—Power of justices to make rules regulating practice—Reasonableness of rule—Rule requiring entry of appeal three days before sessions—9 Geo. 4, c. 61, s. 27—12 & 13 Vict. c. 45, s. 6.

A court of quarter sessions has no power to refuse to allow the entry of an appeal against the refusal of justices to grant a certificate for a licence, on the ground of non-compliance with a rule of the sessions requiring that appeals must be entered and the grounds of appeal given to the clerk of the peace three clear days before the first day of sessions, when all the requirements of 9 Geo. 4, c. 61, s. 27, have been complied with.

A court of quarter sessions having refused solely on such a ground to allow an appeal to be entered on the first day of sessions, made an order under 12 & 13 Vict. c. 65, s. 6 for the payment of costs by the appellant to the respondents, as on an appeal which had not been entered or prosecuted.

Held, that the order for the payment of costs must be quashed.

In this case a rule had been obtained by Sills, calling upon the Justices of Northamptonshire to show cause why an order made by them on the

17th Oct. 1872, relating to an appeal of one John Pawlett against a decision of certain justices of that county, refusing him a licence to sell excisable liquors by retail, should not be quashed.

It appeared that at a licensing sessions for the district of Oundle, in Northamptonshire, held in Sept. 1872, the justices had refused a certificate to John Pawlett, who thereupon duly gave notice of appeal to the quarter sessions, and entered into the required recognizances. The quarter sessions commenced on the 16th Oct., and the first day for hearing appeals was the 17th. The quarter sessions had made a rule that all appeals should be "entered with the clerk of the peace on the Saturday preceding the sessions at which such appeals are to be tried, and at the same time the grounds of such appeals are to be given to the clerk of the peace." On the morning of the 17th Oct., the appellant's attorney went, before the assembling of the court, to the office of the clerk of the peace, in order to have the appeal entered. The clerk of the peace refused to enter the appeal, on the ground that the requisites laid down by the above rule had not been observed by the appellant. The court of quarter sessions being subsequently applied to on behalf of the appellant to enter and hear, or to enter and respite his appeal, refused to do so, and made an order that the appellant should pay an agreed sum of 10*l.* as costs to the justices whose order was appealed against, and that on payment of this amount the recognizances entered into by Pawlett should be discharged. This order was now brought up by *certiorari*.

Merewether showed cause against the rule, and contended that the quarter sessions had power to make the rule in question for the regulation of the practice in their court, there being nothing unreasonable in the rule; and, if so, the appellant and his legal advisers were bound to know of its existence and to conform to it. One reason for upholding such a rule is that a sufficient number of disinterested justices may be able to attend. In *Reg. v. Derbyshire* (22 L. J. 31, M. C.) the rule to enter the appeal was made absolute only on the ground that it was not clear what the rule of sessions was, or that the sessions had acted on it. Crompton, J. laid it down in that case that courts of quarter sessions have power to make rules regulating the time within which appeals must be entered, and that this court would not interfere with their practice in this respect. *Reg. v. Monmouthshire* (3 Dowl. 306) and *Reg. v. Montgomeryshire* (3 D. & L. 119) are authorities to the same effect. In the latter case where the rule of practice required twenty-eight days' notice, Wightman, J., after referring to the various decided cases on this subject, said: "The result of all of them is that the quarter sessions are the proper judges of their own rules; and this court will not interfere with their rules, unless they appear so unreasonable that they cannot be supported. Here the rule requiring twenty-eight days' notice, though it seems unnecessary, is hardly so unreasonable that I ought to interfere" [BLACKBURN, J.—In that case the rule of practice required twenty-eight days' notice of trial to be given in the case of appeals already entered and respited. It is very different here, where the rule is as to the original entering of an appeal, and the statute simply gives an appeal to the next quarter sessions.] *Reg. v. Wiltshire* (10 East, 404) was in effect overruled by the two last-mentioned cases. Then as

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to the order for payment of costs, sect. 6 of 12 & 13 Vict. c. 45, expressly gives power to quarter sessions to give costs on appeal of which notice has been given, but which has not been entered or prosecuted.

Sills in support of the rule.—In the cases cited, the rule, as already pointed out by the court, had reference only to the hearing, not to the original entry. *R. v. Norfolk* (5 B. & Ad. 990), is a conclusive authority against the validity of the order made in this case. There a resolution of a court of quarter sessions that whenever an appeal against an order of removal should be entered and respited, notice thereof should within one month after such entry and respite, be given to the officers of the removing parish, was held void; and the court of quarter sessions having dismissed an appeal for want of such notice, this court granted a *mandamus* to them to hear it. Lord Denman, C.J., said: "The court of quarter sessions are to say whether reasonable notice of appeal has been given; they are to judge what notice is reasonable, but they have no right to require any other notice than the one required by the Legislature. Here they have attempted to require a notice of the entry and respite of the appeal; but their province is only to determine whether a reasonable notice of appeal has been given, and if they find that notice not reasonable, to adjourn the appeal to the next sessions and then finally determine it." Here the justices have refused to enter the appeal at all, adding to what the Legislature has enacted an additional condition precedent to the right of appeal. It is much more than a mere rule of precedence. In *Reg. v. Surrey* (6 D. & L. 735), Erle, J., said: "In this case the appeal had been entered and respited, and all the notices required by the general law had been given. From the case of *Res v. Norfolk* (*ubi sup.*), I collect that the power of making rules of practice in respect of hearing an appeal does not extend to the creation of a condition distinct from and in addition to the steps required by law, and to authorise the refusal of a hearing if such condition be not performed." Again, in *R. v. Staffordshire* (4 A. & E. 842), where an appeal was made against an order of justices for payment of a church rate, under 53 Geo. 3, c. 127, Lord Denman, C.J., said: "The sessions have no right to introduce a new condition of appeal which is not in the Act of Parliament." Next, as to the question of costs, sect. 6 of 12 & 13 Vict. c. 45 only empowers the quarter sessions to give costs on appeal, where notice of appeal has been given. Such notice of appeal must be proved before the sessions, and that was not done in the present case.

BLACKBURN, J.—As to the last point made, there can be no doubt, on the appellant's own showing, that notice of appeal was in fact given, and the objection, if taken at the quarter sessions, would at once have been cured. But on the other and the main point, I am of opinion that the quarter session have exceeded their jurisdiction in refusing to enter the appeal and in making the order for payment of costs, which order must be quashed. The power of the court of quarter sessions to regulate its own practice has been established by a number of cases; but there is an apparent conflict of authority as to how far this court will look into the question and exercise what is called a visitatorial power over the rules of practice which quarter sessions may make. Where the rule is a

mere rule of practice, the more recent cases appear to establish the doctrine that the Court of Queen's Bench will not interfere, unless the rule of sessions is very unreasonable. Is the rule which the quarter sessions have made in the present case a mere rule of practice? I hardly think so. The rule which the Northamptonshire Quarter Sessions have made amounts to this, that all appeals must be entered four clear days before the day on which they are to be heard. This rule may be a very convenient one, for the reason suggested by counsel, if for no other, namely, that a sufficient number of disinterested justices may be present to constitute the court. But in the present case the quarter sessions have gone further than simply refusing to hear the appeal; they have refused to allow it to be entered at all. They may, perhaps, have had jurisdiction to refuse to hear the appeal under the circumstances, and I do not say that under the circumstances they might not have adjourned the hearing. The appeal is regulated by the 27th section of 9 Geo. 4, c. 61. That section enacts "that any person who shall think himself aggrieved by any act of any justice done in or concerning the execution of this Act, may appeal against any such act to the next general or quarter sessions of the peace holden for the county or place wherein the cause of such complaint shall have arisen, unless such sessions shall be holden within twelve days next after such act shall have been done, and in that case to the next subsequent sessions holden as aforesaid and not afterwards, provided that such person shall give to such justice notice in writing of his intention to appeal, and of the cause and matter thereof within five days next after such act shall have been done, and seven days at the least before such session, and shall within such five days enter into a recognizance with two sufficient securities before a justice acting in and for such county or place as aforesaid, conditional to appear at the said session and to try such appeal, and to abide the judgment of the court thereupon, and to pay such costs as shall be by the court awarded; and upon such notice being given and such recognizance being entered into, the justice before whom the same shall be entered into shall liberate such person, if in custody, for any offence in reference to which the act intended to be appealed against shall have been done; and the court at such sessions shall hear and determine the matter of such appeal and shall make such order therein with or without costs as to the said court shall seem meet," &c. Now the appellant had complied with all the conditions required by this section; but the quarter sessions have added a further condition. They say in effect "you must enter the appeal with the clerk of the peace three clear days at least before the sessions to which you have a right to appeal; if you do not, we will neither hear you nor allow you to enter your appeal." I do not think that the right of the sessions to act in this manner has been established by any of the cases cited. I cannot think that they are entitled to insist that the appeal shall be entered before the court to which the appeal is given has begun to sit. It is a very different thing to make a rule that the appeal shall be entered by a certain time on the first day of sessions, although the hearing of appeals may not commence till the fourth day. It follows that if the quarter sessions had no right to refuse to enter the appeal, neither had they

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power to make the order for the payment of costs, as upon an appeal not entered or prosecuted. The order for costs must, therefore, be quashed.

QUAIN, J.—I am of the same opinion. The statute gives an appeal to the next quarter sessions. An appeal does not lie to a later sessions. Certain notices must be given, and some other conditions are to be performed, all of which the appellant in the present case has duly complied with. I am of opinion that the quarter sessions had no right to impose any further condition; that they cannot require that the appeal should be entered three clear days before the sessions; and further, that the appellant shall at the same time furnish to the clerk of the peace the grounds of appeal. If the Act of Parliament does not require this to be done, I do not see that the quarter sessions had any power to make the order. If they have power to refuse to allow the entry of an appeal where it is not done three clear days before the sessions, they might equally refuse to allow the entry on the ground that the appellant had not furnished to the clerk of the peace the grounds of appeal. *B. v. Norfolk (ubi sup.)* and *B. v. The West Riding of Yorkshire* (5 B. & Ad. 667) are distinct authorities that the justices have no power to impose fresh conditions. They are also strong to show that where a statute gives in general terms an appeal to the next quarter sessions, the justices have no power to refuse to allow an appeal to be entered on the ground that certain rules of practice, which they have imposed as a condition precedent, have not been complied with.

Rule absolute.

Attorneys for appellant, *Taylor, Hoare, and Cook.*
Attorneys for the justices, *Tooke and Holland.*

Saturday, Nov. 15, 1873.

ST. OLAVE'S UNION (apps.) v. ST. GEORGE'S UNION (resps.)

Order of removal—Irremovability—Proviso—Unemancipated child.

The amended proviso in 11 & 12 Vict. c. 111, s. 1, to the Irremovability Act, 9 & 10 Vict. c. 66, s. 1, applies to all children who have not become emancipated, whether living with or apart from their parents.

A girl of nineteen who had been two years in domestic service, and dependent on herself, in the respondents' union, became chargeable; she had no settlement but that of her widowed mother, which was in the appellants' union. The mother had for years lived in and been chargeable to her place of settlement.

Held, that the order of removal of this girl to her mother's place of settlement was good.

At a general Quarter Sessions of the Peace holden in and for the County of Middlesex, upon an appeal wherein the guardians of the poor of the St. Olave's Union in the county of Surrey were appellants, and the guardians of the poor of the St. George's Union, Westminster, in the county of Middlesex, were respondents, against an order dated 6th Feb. 1872, made by two of Her Majesty's justices of the peace for the said county of Middlesex, for the removal of Harriett Hill from and out of the said St. George's Union, Westminster, to the said St. Olave's Union; it was ordered that the said order be confirmed subject to the opinion of the Court of Queen's Bench on the following case.

The only question was whether the said Harriett Hill is irremovable from the respondents' union by reason of the provisions of 9 and 10 Vict. c. 66, and the Acts amending the same, it being admitted by the appellants' union that she has a legal settlement by parentage, in the parish of Rotherhithe, in their union.

At the date of the said order of removal the said Harriett Hill was a spinster, and nineteen years old, and at that time she had been an inmate in the workhouse of the respondents' union for about a year (through illness, which the justices making the order certified will produce permanent disability), having been admitted there on the 21st Jan. 1871.

Before such admission to the workhouse of the respondents' union the said Harriett Hill had been residing as a domestic servant at No. 43, Sutherland-street, Pimlico, in the respondents' union for a little more than two years, having gone into such service on or about the 11th Jan. 1869. Before going to the school hereinafter mentioned she was living with her mother in the workhouse of the appellants' union.

The father of the said Harriett Hill died upwards of twelve years ago, but her mother is living, and is now an inmate of one of the workhouses of the appellants' union. She was for about ten years after her husband's death an inmate of the workhouse of the parish of Rotherhithe, and on the annexation of that parish to the appellants' union about two years ago, she became and has since continued an inmate of the St. Olave's workhouse of the appellants' union.

Before the said Harriett Hill entered the service above-mentioned she had been for about eight years an inmate of and educated at the South Metropolitan District Pauper Schools, situate at Sutton, in the county of Surrey, and maintained therein at the charge of the said parish of Rotherhithe, she being a settled pauper thereof as before mentioned. During the two years she had been in service in Sutherland-street as above-mentioned she had gained her own living entirely independently of her mother, or of any assistance from the parish. She has the same settlement as her mother, as she has never gained a settlement in her own right.

The appellants do not admit that "emancipation," whatever its precise meaning may be in reference to the law of settlement, supplies any test for the purpose of the law of irremovability. It is, however, admitted that the pauper is unemancipated to the extent that any change of her mother's settlement up to the time of the making of the order in this case would have caused a change of her settlement also.

The appellants contended that by reason of such residence for two years in Sutherland-street, in the respondents' union, as above stated, the said Harriett Hill at the date of the said order of removal had acquired a status of irremovability in such union, and that therefore such order of removal was invalid.

The respondents contended that the said Harriett Hill, being an unemancipated child as before mentioned, and having no other settlement than that of her mother, was removable to the place of her settlement, although she had lived as before stated for more than a year in the respondents' union, and that such an order was under the circumstances stated valid.

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The Court of Quarter Sessions decided that she was removable subject, however, to the opinion of the Court of Queen's Bench as above-mentioned.

The question for the opinion of the Court of Queen's Bench was, whether at the date of the said order of removal, the said Harriett Hill was removable from the respondents' union to her place of settlement. If this be answered in the affirmative the order of sessions and the order of removal are to stand confirmed; if in the negative both orders are to be quashed on the ground of her irremovability.

Sir J. B. Karslake, Q.C., and Poland, on behalf of the respondents, supported the orders of Petty and Quarter Sessions:—The question is shortly whether this case comes within the last proviso of 9 & 10 Vict. c. 66, s. 1, as amended by 11 & 12 Vict. c. 111, s. 1. The words of the former are: "Provided always, that whenever any person shall have a wife or children having no other settlement than his or her own, such wife and children shall be removable whenever he or she is removable, and shall not be removable when he or she is not removable." For this proviso the latter Act substituted the following: "Provided always, that whenever any person shall have a wife or children having no other settlement than his or her own, such wife and children should be removable from any parish or place from which he or she would be removable, notwithstanding any provisions of the said recited Act, and should not be removable from any parish or place from which he or she would not be removable by reason of any provisions in the said recited Act." Here the mother has a child,—throughout the poor law statutes a son or daughter is spoken of as a child until emancipated, that is, until he or she becomes married, or has acquired a settlement independent of that of the parent,—which child, the pauper, has no other settlement than her mother's; therefore, her mother being removable from the respondents' union, the pauper is also removable, and the order of removal is good. A recent case exactly in point is *Reg. v. St. Mary, Islington* (L. Rep. 5, Q. B. 445; 6 L. T. Rep. N. S. 606): there a man had deserted his wife and daughter, the latter being eighteen and unemancipated; the wife, therefore, under 24 & 25 Vict. c. 55, s. 3, could, and in this case did, obtain a status of irremovability, independent of that of her husband; but the court held that the daughter, although she had lived with the mother long enough to have shared her status, could be irremovable only from the parish from which the head of the family, the father, was so; therefore, an order to remove the daughter to her father's place of settlement was good. So also in *Reg. v. St. Ann, Blackfriars* (2 E. & B. 440), a pauper lunatic was made chargeable upon her place of settlement, although she had her father's status of irremovability before becoming lunatic, the father having left the place from which he had been irremovable. The pauper in *Reg. v. St. George-in-the-East* (L. Rep. 5 Q. B. 364; 22 L. T. Rep. N. S. 440) was held to be not affected by the proviso in these statutes, because her husband had no settlement at all. The cases on emancipation are collected in Archbold's Poor Law, at p. 440; one of the strongest is that of *Reg. v. Selborne* (2 E. & E. 275), where a minor was held to be not emancipated before marriage, although he was two years in the metropolitan police.

George Tayler, contra.—There is nothing about emancipation in either of these provisos, or in the enacting part of the stat. 9 & 10 Vict. c. 66; and there is, therefore, nothing to prevent a child, living apart from the head of the family, and providing for himself, from obtaining a status of irremovability. The policy of the law seems to be to enable persons to obtain irremovability at least as easily as to acquire settlements; and as the law allows unemancipated children to do the latter, so it should encourage the former. Moreover, the proviso should be read as applicable only to persons living with their wives or children in the same parish. When separation has actually taken place, there can be no object in the proviso; and in this case the order of removal would not bring the mother and daughter together.

QUAIN, J.—It seems to me to be perfectly plain that this is a case within the proviso to the Act concerning irremovability; we shall therefore affirm the orders of sessions. It is found in the case that the pauper has the same settlement as her mother, as she has never gained a settlement in her own right. The question for us is whether under the 1st section of 9 & 10 Vict. c. 66, and the amended proviso in 11 & 12 Vict. c. 111, s. 1, although this girl has not acquired a settlement, she can acquire a status of irremovability apart from that of her mother. I am of opinion that she cannot. She would under the enacting part of the statute have been able to obtain a status of irremovability in the respondents' union, but the proviso applies exactly to her case; in consequence she is situated exactly as if the Act had not been passed at all, and before the Act this order of removal could clearly have been proper. Just as in a question of settlement, a child is settled in the parents' place of settlement until the child is emancipated, so a child is irremovable only when the parent is also so until the same period of emancipation. In *Reg. v. St. George-in-the-East* (L. Rep. 5 Q. B. 364) my brother Blackburn, at p. 368, speaking of these statutes remarked, "The Legislature in the enactment and proviso would seem to say this: in establishing the status of irremovability we leave the common law principle untouched that husband and wife shall not be separated, and therefore when the husband has a settlement and is removable, the wife, though she has resided sufficiently long to have become irremovable, shall be removed with him; and *vice versa*, if the husband is irremovable neither shall the wife be removed; but if the wife has a settlement, and the husband has no settlement, we say nothing as to when the wife is to be removed to her own settlement." Just as the principle of law as to an unemancipated child is untouched, and the pauper here, being without power to obtain a status of irremovability, must be removed to her place of settlement. The order of removal therefore is good.

ARCHBOLD, J.—I also am of opinion that the order of removal is good, and should be confirmed. The statute seems to have been intended to apply differently to emancipated and to unemancipated persons, and this case is exactly within the words of the proviso as amended. Mr. Tayler argues that the proviso applies only to a wife or children actually with and removable from the same place as a husband or parent, but the words are not so limited, and I think were not so intended.

Judgment for respondents.

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[Q. B.]

Saturday, Nov. 15, 1873.

HAMILTON (app.) v. ST. GEORGE, HANOVER-SQUARE (resps.).

Roof of cellar—Pavement of footway—Expense of repair—18 & 19 Vict. c. 120, ss. 96, 102, and 226.

The appellant was summoned under the Metropolitan Management Act 1855 (18 & 19 Vict. c. 120), s. 226, to pay for the repair of his cellar which the respondents had done under sect. 102 of that Act. The magistrate found in fact that in front of the appellant's house and the other houses situated on the north side of Eaton-square were cellars covered by flagstones resting on the walls of the cellars. Those cellars were so formed when the square was built in 1830, and the flagstones were then 5in. thick. The footway on this side of the square was formed by the flagstones and curbstones over the cellars of the houses. The flagstones having been worn down by the traffic over them to the thickness of only 2½in. became dangerous and required repair. The magistrate determined that it would not be just that the respondents should be at the expense of supplying a roof to the appellant's cellar, nor that the appellant should be at the expense of paving the footway in front of his house; he therefore directed that each should pay half the expense of repair.

Held, upon a case stated, that under the circumstances the respondents were liable for the whole expense.

THIS was a case stated under 20 & 21 Vict. c. 43.

The appellant is the owner and occupier of the house, No. 108, Eaton-square, in the parish of St. George, Hanover-square (which is on the north side of the square), and of the cellars hereinafter mentioned. That house, as well as the other houses on the north side, has in front of it an area and cellars.

The cellars are formed of brick walls, one of which is the outer wall of the area, and the other runs parallel with such outer wall at a distance of about 11ft. 9in. There are also two thin partition walls at right angles to these brick walls, separating the cellars of each house.

Extending from the outer wall of the area to the said wall which runs parallel with it are large flagstones, the ends of which rest on the walls in question; they form a covering to the cellars, which without them would be open at the top. The outer or upper surface of these flagstones has been used by the public as a footway from the time they were laid down.

Outside the flagstones are curbstones, which are supported by the outer wall of the cellar near the roadway; and there is also a lower curb, which is supported by the road so that persons can get from the flagstones to the roadway which is lower than the footway.

The upper curbstones, which are level with the flagstones, are 12in. wide.

These cellars were so formed by means of the walls and flagstones before mentioned, when the square was built in or about the year 1830 on land belonging to the builder or his lessor.

The flagstones when they were first put down by the persons who built the houses were 5in. thick.

The upper curbstones contain holes leading to the coal cellars, which holes are covered in the ordinary way with iron coverings.

The footway on the said north side of the square has been a public footway from the time the flags were so laid down, and was formed by the flagstones and upper curbstones over the cellars of the houses there as before mentioned.

The flagstones have been worn down by the traffic over them from 5in. to 2½in., and in the early part of the year 1872 one of them over the appellant's cellar, owing to its being so reduced in thickness became cracked and dangerous, and the appellant previous to the notice hereinafter mentioned applied to the vestry to repair it.

The surveyor to the vestry gave notice to the appellant that it was unsafe, and he (the appellant) thereupon from the interior of his cellar propped up the broken stone, and the surveyor to the parish filled in the cracks with cement. Afterwards the appellant was required to properly repair his cellar, which he declined to do, as he disputed his liability.

On the 10th April, 1872, notice was duly served upon the appellant requiring him to do the repairs, and upon the refusal of the appellant to do the work required, the vestry did it, and the expenses, after allowing for the value of the old stones which were removed, amounted to 8l. 13s. 4d.

It was necessary to substitute one new and entire flagstone for the old stone, inasmuch as there is not under the pavement a brick arch or substructure of any kind upon which pavement of smaller flagstones and of a less expensive character could be placed.

The sum was duly demanded, and upon the refusal of the appellant to pay that amount, he was on the 20th July, 1872, summoned before one of the magistrates of the police courts of the metropolitan, sitting at Westminster Police Court, to show cause why he should not be ordered to pay the same.

By the 18 & 19 Vict. c. 120, s. 96, all pavements are vested in and under the management and control of the vestry of the parish in which they are situated. The vestry claimed the money above mentioned under sect. 102 of the same Act, which is as follows:—

All vaults, arches, and cellars, made either before or after the commencement of this Act, under any street in any parish or district mentioned in either of the schedules (A and B) to this Act, and all openings into the same in any such street shall be repaired and kept in proper order by the owners or occupiers of the houses or buildings to which the same respectively belong; and in case any such vault, arch, or cellar be at any time out of repair, it shall be lawful for the vestry or district board of such parish or district to cause the same to be repaired and put into good order, and to recover the expenses thereof from such owner in the manner hereinafter provided.

Sect. 226 is as follows:—

Where the amount of any compensation or of any damage, costs, or expenses is to be determined by or to be recovered before two justices, it shall be lawful for any justice, upon the application of either party, to summon the other party to appear before two justices, at a time and place to be named in such summons, and upon the appearance of such parties, or in the absence of either of them upon proof of due service of the summons, it shall be lawful for such two justices to hear and determine the matter, and for that purpose to examine such parties, or any of them, and their witnesses on oath, and make such order as well as to the costs or otherwise as to them may seem just.

On the 27th July, on the appearance of the parties, the appellant contended that the flagstones in question were a portion of the pavement of the

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street, which had become vested in the vestry under sect. 96 of the said Act, and which they were bound to repair and replace when necessary.

It was contended on behalf of the vestry that the flagstones were part of the cellars, and were the property of the appellant, and that but for them the cellars would have no covering at all, and that the appellant was therefore bound to repair and replace them when necessary, and keep them in proper order.

The magistrate accordingly ordered the appellant to pay the vestry half the money claimed, viz., 4*l.* 6*s.* 8*d.*, and each party to bear his own costs; and the appellant being dissatisfied with his judgment, as being erroneous in point of law, duly required him, in writing, to state a case for the opinion of this honourable court, which he has accordingly done.

The grounds of the magistrate's determination were that he did not think it would be just on the one hand that the vestry should be at the expense of supplying a roof to the appellant's cellar, or, on the other, that the appellant should be at the expense of paving the footway in front of his house.

The first question for the opinion of this court therefore is, whether the magistrate was justified in ordering the appellant to pay the vestry half the money claimed by them. If he was justified in making such order his decision is to be affirmed; but if he was not so justified, then the next question is, whether the appellant was bound to pay the whole or any part of the expense of replacing the flagstones, or whether the vestry was bound to replace them at their own expense. And if his decision should not be affirmed, the court was respectfully requested to remit this case to him with the expression of their opinion on the question last mentioned.

Manisty, Q.C. (with him *R. E. Turner*) argued for the appellant.—This very point was suggested by *Erie*, C. J., as an illustration of the matter in discussion in *Robbins v. Jones* (15 C. B., N. S. 221), at p. 242: "We may refer, by way of illustration only, to the case of one of the squares, where the footway at one side consists of large flags reaching from the outer wall of the area to the outer wall of the cellar. There the upper part of the flags forms the way, and the lower part of the same flags forms, as we are told, the ceiling of the cellar. Who is to maintain and repair the flagged way? We apprehend, the public, who walk upon it and wear it out, without which it might last an indefinite time." At the time this square was built and the footpaths were dedicated to the public, the local Act, 7 Geo. iv, c. lviii, was in force, by sect. 23 of which the trustees of the parish were empowered, if they thought fit, to require all new squares to be repaved at the cost of the builders. This footpath therefore must be taken to have been dedicated to and accepted by the public merely with this stone between the cellar and road.

Giffard, Q.C. (with him *Poland*), for the respondents.—This place below could not be a cellar without its roof. This stone, therefore, cannot be said to be over the cellar, for it is part of the cellar, and therefore repairable by the owner under sect. 102. At all events it is enough for the respondents to contend, in order to support the magistrate's decision, that this stone, which was five inches thick, was not the whole of it

footway. [*ARCHIBALD*, J.—What if there had been brick arches under the stone?] Then I could not have disputed the respondents' liability for the stone, and it would have devolved upon the appellant to have repaired the arches. [*QUAIN*, J.—But there were no arches at the time of the dedication of the path to the public, and the parish accepted the path as it was dedicated.] It must be a question of fact for the magistrate to decide how much of this stone was roof of cellar, and how much was pavement of the public footway. He has in effect given half to each, and his finding of fact must be final. This being the state of the facts, and the magistrate having power under sect. 226 to make such order as to costs or otherwise as to him may seem just, it is not for this court to question his discretion. No point of law is raised by the case. Moreover, this is a most equitable and just view of the claims of the parties. [*QUAIN*, J.—The only authority for such a decision that I know of, is the division of the living child between the two mothers who claimed it.] The magistrate has found that this flagstone is partly cellar and partly footpath. [*QUAIN*, J.—Surely *Robbins v. Jones* is exactly in point here.] The distinction between that case and this is that there was no statutory obligation upon the owner there, as there is here, to repair the cellar.

Manisty, Q.C., in reply:—The case finds that the footway was formed by the flagstones and upper curbstones over the cellars. The magistrate's decision was inconsistent with that finding.

QUAIN, J.—I am of opinion that this decision must be set aside, and that the appellant ought not to be charged at all for the repair of this footway. It strikes me that the public having done this injury, it is but fair and just that the respondents who represent the public should pay for its repair. The inquiry was exclusively done by the public; it was no fault of Mr. Hamilton, nor was there any failure of the substructure. My view of the equity and justice of the case is that the whole expense of the repair should fall upon the respondents. Now as to the legal question, I find it laid down in *Fisher v. Prowse* (2 B. & S. 770), that where land is dedicated to the public as a highway, the dedication must be taken to be made to the public and accepted by them, subject to the inconvenience or risk arising from the existing state of things. Here it seems the footway dedicated to the public was, as to part of it, a flagstone which formed the roof of a cellar; and it was accepted as a footway over the cellar, although part of the path was actually also the cellar roof. This continued to be the state of things from the time of the dedication to the public until the flagstone was worn out. Then it became the duty of the owner of the house to repair the cellar, and the duty of the parish to repair the footpath. Which was in this case out of repair? I think it was the public path and not the cellar; the injury was done by the public, whose duty it was, therefore, to remedy it. It appears to me that both law and justice are on the side of the owner, and the stone having, in consequence of the use of the path by the public, become so thin as to be dangerous, the parish must pay the expense of renewing it. There is nothing in the statute against this; the words of section 102 of 18 & 19 Vict. c. 120 are, "All vaults, arches, and cellars made either before or after the commencement of this Act under any street," and "all openings into the same in any such street shall be

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repaired and kept in proper order by the owners or occupiers." This cellar was not made under the street at all, but was in existence before any street was there. I think, therefore, that it was not a "cellar" within the meaning of the words of the section. The illustration of Erle, C. J., in *Robbins v. Jones*, cited in the argument, is exactly this case, and seems to me to be an authority upon which we are right in acting. Moreover, the point there decided goes far to support our present decision; he says, p. 241, "This does not fall within the law as to keeping buildings adjoining a highway in such a state, by repair or otherwise, as not to endanger passers by. What was insufficient here was part of the highway itself. Such law may apply to the arches of a cellar under a footway,—though this we conceive to be worthy of argument, and open to distinctions as to the state of things at the time of the dedication, and other circumstances. It cannot apply to the footway itself." Our judgment, therefore, will be for the appellant.

ARCHIBALD, J.—I also am of opinion that the respondents ought to pay the whole of the expense of repairing this flagstone. At first I thought the arrangement proposed by the magistrate was equitable and just between the parties, but, upon further consideration, I do not even think that; and moreover that should at all events have nothing to do with our decision. The magistrate has found that the footway at this place was formed by the flagstones and upper curbstones over the cellars of the houses; this finding conclusively prevents section 102 from applying to this repair; that section relates only to the repair of vaults, arches, and cellars, made under any street, and I think this flagstone cannot upon that finding be taken to be a vault, arch, or cellar, within the meaning of the section. If the stone were, as the magistrate seems to have thought, partly footpath and partly cellar, the vestry would still have been bound to repair it, for there is no provision that an owner or occupier should do the necessary repair to the road, and it would be impossible to deal with it except by taking up the whole stone and placing a new one. If the magistrate had found as a fact that this stone was the roof of the cellar, and was not the footway, his decision might perhaps have been right; but that cannot be upon the facts as they are found. This conclusion is no hardship upon the respondents, for the injury which they have had to remedy was caused entirely by the public use of the stone as a footway.

Judgment for appellant.

Attorneys for appellant, *Markby, Wilde, and Barra.*

Attorneys for respondents, *Capron, Dalton, and Hitchens.*

EXCHEQUER CHAMBER.

Reported by H. LING, Esq., Barrister-at-Law.

ERROR FROM THE COURT OF EXCHEQUER.

Thursday, May 15, 1873.

INGOLDSBY AND OTHERS v. THE PLUMSTEAD DISTRICT BOARD OF WORKS.

Metropolis Local Management Acts, 1855-1862 (18 & 19 Vict. c. 120, sects. 105-250; 25 & 26 Vict. c. 102, s. 77)—Expenses of paving new streets—Apportionment of between owners—Liability of future owners—Charge on land.

Under sect. 77 of the Metropolis Local Management Act 1862 (25 & 26 Vict. c. 102), the amount apportioned by the vestry or district board of a parish to be paid by the owners of houses or lands towards the expenses of paving new streets, under sect. 105 of the Metropolis Local Management Act 1855 (18 & 19 Vict. c. 120), may be recovered by the vestry or board in an action against, either the person who is owner of the premises at the time when the apportionment is made, or any future or subsequent owner of the premises; and that, whether such amount is made payable at once in one sum or at intervals, by instalments, the effect of the above two mentioned Acts of Parliament, taken together, being to impose the liability as a charge upon the land:

So held by the Court of Exchequer Chamber, affirming the judgment of the court below.

In this case error was brought by the plaintiffs in error on the judgment of the Court of Exchequer in favour of the defendant in error, upon a special case.

The plaintiffs in error (who were the defendants below) are trustees of the Planet Building Society. The defendants in error (the plaintiffs below), the Plumstead District Board of Works, had brought an action against the society (in the name of their trustees) to recover 37l. 10s., the amount of paving expenses which had been apportioned by the board under the powers of the Metropolis Local Management Acts 1855 and 1862 (18 & 19 Vict. c. 120, and 25 & 26 Vict. c. 102), in respect of certain houses and property belonging to the trustees of the said society, as mortgagees thereof.

The question to be determined was, whether the action was or was not maintainable against the trustees, the contention on their part being, that the action was not maintainable, on the ground that they were not the owners of the property in respect of which the several apportionments were made at the time when the same apportionments were made.

The Court of Exchequer (Kelly, C.B., Bramwell, Channell, and Pigott, BB.), after hearing the arguments of counsel on both sides, held, that under sect. 77 of the Metropolis Local Management Act 1862 (25 & 26 Vict. c. 102), the amount apportioned by the vestry or board of a parish to be paid by the owners of houses or lands towards the expense of paving new streets, under sect. 105 of the Metropolis Local Management Act 1855 (18 & 19 Vict. c. 120), may be recovered by the vestry or board, in an action against either the person who is owner of the premises at the time when the apportionment is made, and the right to recover first accrues, or against any future or subsequent owner of the premises; and that, whether such amount is made payable at once, in one sum, or at intervals by instalments; the effect of the two Acts of Parliament above mentioned, taken together, being to impose the liability as a charge upon the land.

The facts, and the various sections of the two Acts of Parliament, upon which the question depends, are fully set forth in the report of the case below: (*nom. The Plumstead District Board of Works v. The Planet Building Society*, 27 L. T. Rep. N. S. 656; reported also L. Rep. 8 Ex. 63; 42 L. J. 50, Ex.)

Waddy (with whom was Prest), for the plaintiffs in error, urged all the arguments and cited the cases used and cited in the court below.

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Barrow (with whom was *Morgan Howard*), for the defendants in error, *contra*, was not called on to argue.

BLACKBURN, J.—Mr. Waddy has argued this case with great ingenuity, and has adduced every argument that could possibly be urged in favour of the view taken by him of the case of the plaintiffs in error; but he has not been able to succeed in convincing the court that the decision of the court below is erroneous. We are all agreed that that decision was right and ought to be affirmed, for the reasons therein given.

KEATING, BRETT, GROVE, QUAIN, ARCHIBALD, and HONYMAN, JJ. concurred.

Judgment affirmed.

Attorneys for the plaintiffs in error, *Ingle, Cooper, and Holmes*, 23, Threadneedle-street, E.C.

Attorneys for the defendants in error, *J. M. Dale* (*Newman, Stretton, and Dale*), 75, Cornhill, E.C.

COURT OF EXCHEQUER.

Reported by T. W. SAUNDERS and H. LEIGH, Esqrs.,
Barristers-at-Law.

Thursday, Nov. 20, 1873.

SPEAK (app.) v. POWELL AND CLARKE (resps.).

Excise licence for a carriage—A carriage used solely for the conveyance of any goods or burden in the course of trade or husbandry.—32 & 33 Vict. c. 14, ss. 18, 19 (sub-sect. 6).

By the 32 & 33 Vict. c. 14, s. 18, a duty is imposed upon carriages having a certain number of wheels and being of a certain weight; and by sect. 19, subsection (6), it is enacted that the term "carriage" means and includes any vehicle drawn by a horse or mule "except a waggon, cart, or other vehicle used solely for the conveyance of any goods or burden in the course of trade or husbandry." The defendants were the proprietors of a travelling equestrian circus, and it was their course of business to give a daily parade through the towns which they visit. On the day laid in the information there was the usual parade in Bishop Auckland, and amongst other carriages in the procession there were three drawn by horses; one conveyed the band, consisting of eight performers; two others conveyed four persons each, and the persons in one of these were dressed in a gaudy attire and carried flags. These three carriages were used also for carrying portions of the luggage and property of the circus from place to place, and at the time before mentioned there were clothes belonging to the circus in the back locker of the band carriage, and also the music and musical instruments of the circus, and also in the other carriages there were some loose deal boxes and brackets:

Held, that these three carriages were not within the exemption specified in the 6th subsection of sect. 19 as carriages "used solely for the conveyance of any goods or burden in the course of trade or husbandry," and that they required to be licensed.

IN this case an information had been laid by the appellant against the two respondents for keeping three carriages without having a proper licence as provided for by the 32 & 33 Vict. c. 19, ss. 18, 19, subsect. (6), and sect. 27, but upon the hearing, the justices declined to convict, but stated a case.

By sect. 18 of the 32 & 33 Vict. c. 14, it is enacted that

On and after the 1st Jan. 1870, there shall be granted, charged, levied, and paid for the use of her Majesty, her heirs and successors in and throughout Great Britain, under and subject to the provisions and regulations in the said Act contained, the following duties, namely (*inter alia*):

For every carriage, if such carriage shall have 2 s. d.
four or more wheels, and shall be of the weight
of four hundred weight or upwards 2 2 0
If such carriage shall have less than four
wheels, or having four or more wheels, shall
be of a less weight than four hundred weight 0 15 0
And such duties respectively shall be paid annually upon
licences to be taken out under the provisions of the said
Act by the person who shall keep the carriage.

By subsection 6 of section 19 of the same Act it is enacted as follows:

The term carriage means and includes any vehicle drawn by a horse or mule, or horses or mules, except a waggon, cart, or other vehicle used solely for the conveyance of any goods or burden in the course of trade or husbandry, and whereon the christian and surname and place of abode or place of business of the owner, or the name or style and principal or only place of business of the company or firm owning the same shall be visibly and legibly painted in letters of not less than one inch in length."

By section 27 of the same Act it is enacted (*inter alia*) as follows:

Every person who shall keep any carriage without having a proper licence under this Act shall forfeit the penalty of 20*l.* over and above any other penalty to which such person may be liable, provided that such penalty shall not be recoverable where the defendant in any proceeding for the recovery of the same shall prove to the satisfaction of the justices before whom such proceeding shall be depending, that he had delivered a declaration and paid the proper duties, and obtained a proper licence within the time prescribed by this Act. Provided also that if in any proceeding for recovery of the said penalty any question shall arise as to the number of carriages kept or used, or the weight of any carriage kept or used by the defendant, or whether the defendant was entitled to any exemption from licence under the provisions and regulations contained in this Act, the burthen of proving the number or weight, or right to exemption as the case may be, shall be upon the defendant.

Upon the hearing of the information the following facts were proved, namely, that the respondents were the proprietors of a travelling equestrian circus; that on the 29th July 1872, they had a circus performance at Bishop Auckland; that it is a part of respondents' course of trade or business to give a daily parade of their horses and carriages through the towns which they visit; that on the day in question there was the usual parade in Bishop Auckland; that amongst other carriages in the procession there were three drawn by horses; one conveyed the band, consisting of eight performers; two others conveyed four persons each, and the persons in one of these were dressed in gaudy attire and carried flags; it was also proved that the three carriages in question were used by respondents for carrying portions of the luggage and property of the circus from place to place, and that at the time that the procession took place on the said 29th July, there were clothes belonging to the circus in the back locker of the band carriage, and also the music and musical instruments of the circus, and that in the other two carriages, as well as in the band carriage, there were also at the same time some loose deal boards and brackets. It was admitted that there was no licence in force for the carriages, but that the condition of exemption as to the name and place of business had been fulfilled by the respondents.

On the part of the respondents it was contended

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that the three carriages in question, when in use in the manner stated, were within the exemption contained in sub-sect. 6 of sect. 19 of the Act 32 & 33 Vict. c. 14, as being solely used for the conveyance of goods or burden in the course of trade.

The justices were of opinion that the three carriages in question were within the terms of the said exemption, the ground of their opinion being that the persons carried in the said carriages, in conjunction with the circus clothes, deal boards and brackets, were to be considered as burden conveyed in the course of trade, and they, therefore, dismissed the information.

If the court should be of opinion that the decision was right, the appeal to be dismissed. If that the decision is wrong, then the judgment to be reversed, and a mitigated penalty of 5*l.* imposed upon the respondents, such order being made as to the costs of this appeal as to the court may seem fit.

The *Attorney-General* (H. James, Q.C.) (*Bowen* with him) appeared for the appellant, but the court called upon

Cave (J. O. Lawrance with him) to support the decision of the justices below.—The appellants contend that these carriages were not used in the course of trade, as mentioned in the 6th sub-section of the 19th section of the 32 & 33 Vict. c. 14. But the word "trade" must be construed liberally. In Johnson's Dictionary, the second definition of the word is "occupation, particular employment, whether manual or mercantile, distinguished from the liberal arts or learned professions." Within that definition, this is a trade, and it would be a sensible construction to put upon the statute. There can be no reason why a tradesman who buys and sells should be put upon a footing different to that of a professional man who takes about with him articles which he exposes to the view of the public. A railway contractor does not sell goods, nevertheless he uses in his business a large number of carriages and horses. It is said that the carriages were not used solely for the conveyance of any goods or burden. But suppose a tradesman's cart, when not wanted for the purpose of delivering goods, were to be sent about the town with a representation painted on it, or printed advertisements of his trade attached to it—that would still be using it for the purposes of his trade. The words, "used solely for the conveyance of any goods or burden in the course of trade," must mean, not for the purposes of pleasure. [BRAMWELL, B.—Suppose a traveller was out with his gig, is that exempt?] I should say so. Suppose a greengrocer goes with his empty cart to Covent Garden market for vegetables, it would still be within the exemption. So, a farmer sending an empty cart for coal. The carriages in the present case were sent out and used for the purposes of business. Trade in this statute, means an employment, not in a learned profession, and to be used in trade means not being used for pleasure.

KELLY, C.B.—We ought to interpret the words of the Act of Parliament according to their natural meaning, and we ought not to put any forced or unnatural construction upon them. Now the words here are, "The term 'carriage' means and includes any vehicle drawn by a horse or mule, or horses or mules, except a waggon, cart, or other vehicle

used solely for conveyance of any goods or burden in the course of trade or husbandry." Now what is the natural meaning of these words? Why it means this—a waggon or cart in which a tradesman sends out his goods from place to place—carriages used in his ordinary trade; and I cannot think a carriage in which an actor goes about advertising his performance is a carriage, used for the conveyance of goods in the course of trade. Under the old bankruptcy laws, it could not possibly have been said that he was a trader. These carriages were used as a spectacle, and not for the conveyance of goods, and are certainly not within the exemption of the Act of Parliament. These people are not commercial men. On the ground, therefore, that it would be a forced and unnatural construction to hold that these carriages are exempt from the licence, I must decide in favour of the appellant.

BRAMWELL, B.—This was not a trade in any sense. I think the words of the section must refer to goods which in the course of trade have to be conveyed away; and I cannot think that if a traveller for a tradesman went out in his gig he would be a burden in the sense of the statute. Moreover, even if this were a trade, the carriages are not used solely for the conveyance of goods, since they were used for advertising the performance. Many ingenious arguments may be used to show that a carriage may be really engaged in the purpose of a trade, though not actually conveying goods; but we must look at all the circumstances.

PIGOTT, B.—It may not be very easy to define what constitutes a trade in all its acceptations, but it is quite clear in this case that these carriages were not used solely for the conveyance of goods in the course of trade.

POLLOCK, B.—I agree that these carriages are not exempt. No doubt, in all statutes creating a tax, the words used should be clear, according to the common understanding of them; but I think that in the present instance they are clear, and that it cannot be said that a circus going about a town is conveying goods.

*Judgment for the appellant
without costs.*

Attorney for the appellant, *The Solicitor to the Inland Revenue Department.*

Attorney for the respondents, *Ball, Ebury-street, Pimlico.*

COURT OF COMMON PLEAS.

Reported by JOHN ROSE and R. A. KINGLAKE, Esqrs.,
Barristers-at-Law.

Friday, May 30, 1878.

Lord BOLINGBROKE v. TOWNSEND (Clerk to the Local Board of Health of Swindon).

Practice—Substitution of defendants—Misdescription—Common Law Procedure Act 1852—Sect. 222 (15 & 16 Vict. c. 76).

Where an action had been brought in error against the clerk of a local board of health, the court allowed the name of the local board of health to be substituted in all proceedings for that of the clerk.

MOTION to rescind an order of Blackburn, J., under the following circumstances: Lord Bolingbroke being desirous of bringing an action against the Local Board of Health of New Swindon, a writ of summons was issued on the 21st Feb. 1873 against

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J. C. Townsend, clerk to the Local Board of Health of Swindon New Town, and the writ was served upon Townsend. On the 9th May a summons was taken out calling on defendant to show cause why the plaintiff should not be at liberty to amend the writ and subsequent proceedings (if any) by substituting the local board as the defendants, instead of Townsend, their clerk. The summons came on to be heard before Master Kay, who dismissed the summons; but on the parties appealing to the judge, Blackburn, J. overruled the decision of the master, and made the order.

Collins moved to rescind the order of Blackburn, J.—The learned judge at chambers acted under the powers of amendment conferred by the 222nd section of the Common Law Procedure Act 1852 (15 & 16 Vict. c. 76), by which any judge of the Superior Courts may at all times amend all defects and errors in any proceeding in civil cases, whether there is anything in writing to amend by or not, and whether the defect or error be that of the party applying to amend or not, and all such amendments as may be necessary for the purpose of determining in the existing suit the real question in controversy between the parties shall be so made; but I have now an affidavit stating that the alleged injury for which the action was brought was committed more than six months before the date at which the writ was issued. In *Clay v. Oxford* (L. Rep. 2 Ex. 54), which was an action commenced in the name of a man who was dead at the time the writ was issued, Bramwell, B., said "If we could see some person suing who had a beneficial interest in the claim, though not legally entitled to sue, the case would be within the principle of the authorities cited. But the power of amendment is limited to cases where there was originally a party suing, possessed, though with a variety in legal description, of the same interest with the party to be substituted." But that certainly cannot be said in this case. In the case of *Pryor v. West Ham Board of Works* (15 L. T. Rep. N. S. 250) Montague Smith, J., refused to amend the record at the trial by the substitution of the name of the clerk for the original plaintiffs, they not being a corporate body.

Bovill, C.J.—The court has power to allow this amendment independently of the provisions of the Common Law Procedure Act. If any authority were necessary, the case of *Galloway v. Bleadon* (1 M. & G. 247) shows that the courts have been in the habit of allowing such amendments; and the case *La Banca Nazionale Sede Di Torino v. Hamburger* (2 H. & C. 330) is on all fours with the present case. What was done at chambers by my brother Blackburn was a mere amendment of a misdescription of the real defendant. It is not intended here to substitute one defendant for another, but solely to alter the description of the defendant on the writ; and as it is now too late to commence a fresh action against the defendants, justice would otherwise be defeated. I therefore think my brother Blackburn was right.

KEATING and BRETT, JJ., concurred.

GROVE, J.—In *La Banca Nazionale Sede Di Torino v. Hamburger* (2 H. & C. 330) I find that where a foreign bank sued in a corporate name by which it was known, and the defendant pleaded that it was not a body corporate, the court allowed the writ, declaration and subsequent proceedings to be amended by inserting the name of a director of the bank as nominal plaintiff, it appearing that

by the law of the country the bank was entitled to sue in his name. In that case Pollock, C.B., puts it exceedingly clearly. He says: "Some corporations are entitled to sue in their corporate name, others in the name of a particular officer. Now, suppose a corporation sued in its corporate name when it ought to have sued in the name of an officer, why should not the writ be amended? It is not adding a new plaintiff, but correcting a mere mistake in the name." I think, therefore, the rule should be refused. *Rule refused.*

Attorney for defendants, W. Moon.

CROWN CASES RESERVED.

Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

Saturday, Nov. 15, 1873.

(Before KELLY, C.B., BLACKBURN and LUSH, JJ.
POLLOCK, B., and HONYMAN, J.)

REG. v. RICHMOND.

Larceny—Servant—Bailee—24 & 25 Vict. c. 96, s. 3.
A traveller was entrusted with pieces of silk (about 95yds. each) to carry about with him for sale to such customers as he might procure. It was his duty to send by the next post after sale the names and addresses of the customers to whom any might have been sold, and the numbers, quantities, and prices of the silk sold. All goods not so accounted for remained in his hands, and were counted by his employers as stock. At the end of each half-year it was his duty to send in an account for the entire six months, and to return the unsold silk. Within six months after four pieces of silk had been delivered to him, the traveller rendered an account of the same, and entered them as sold to two persons, with instructions to his employers to send invoices to the alleged customers. It turned out that this was false, and that he had appropriated the silk to his own use.

Held, that he could be properly convicted of larceny as a bailee.

CASE reserved for the determination of the Court for Consideration of Crown Cases Reserved by Mr. Serjeant Cox, deputy-assistant judge at the Middlesex Sessions.

The prisoner was indicted at the Middlesex Sessions on the 30th Sept. 1873 for stealing four pieces of silk from Robert Seneschal and others, his masters.

The prosecutors were silk merchants. The prisoner was engaged to sell silk for them, travelling about the country for that purpose.

His duties were stated to be as follows:

The prisoner carried with him on his journeys pieces of silk, each piece being about 95yds., which he sold to customers of his own finding. He travelled with them where he pleased and when he pleased, and was paid by a commission on the sales effected. It was his duty to send to his employers by the next post after sale the names and addresses of all customers, whether they had paid cash for the goods purchased or otherwise, and in such account to state the numbers of the pieces of goods so sold, and the quantity and the prices at which they were sold.

The prisoner generally collected the moneys, but occasionally the customers remitted directly to the firm. He sold in the name of the firm, and not in his own name. All goods not so accounted for remained in his hands, and were counted by the

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firm as stock. The prisoner paid his own travelling expenses, and at the end of each half year it was his duty to send in an account for the entire six months, and to return the unsold stock.

The prisoner received from the firm, *inter alia*, four pieces of silk, each of ninety-five yards, numbered respectively 13,309, 12,866, 13,382, and 12,956. In February he rendered an account which was produced, in which he had entered as having sold to two persons, whose names and addresses were there stated, the above four pieces of silk, with instructions to send invoices for the customers, charging them respectively 57l. and 62l. for the goods so sold, and in his half-yearly account rendered 31st Dec., he returned those pieces of silk as having been so sold. The firm sent the invoices according to the directions given by the prisoner. But the prisoner had previously left at the address he had given as that to which the invoices were to be sent, several envelopes addressed to himself at his residence in London, requesting that any letters that should arrive for him might be enclosed and posted. The invoices sent by the firm were thus returned to the prisoner. The firm never received payment for those four pieces of silk, and upon inquiry discovered that there were no such persons as the customers whose names had been returned by the prisoner, and that in fact he had not duly accounted for those pieces of silk, but had appropriated them to his own use.

Upon these facts it was contended for the prisoner that he was not a servant of the prosecutors, therefore could not be guilty of larceny of the goods intrusted to him.

It was contended for the prosecution that if not a servant so as to make his possession the possession of his employers, he was a bailee of the pieces of silk, and guilty of larceny as such.

I held that upon these facts the prisoner was not a servant, but that he was a bailee, and I directed the jury that they might find him guilty if satisfied that he had received the silk from his employers to sell for them, and instead of doing so had appropriated them to his own use.

The jury found the prisoner guilty.

On the application of counsel for the prisoner, I postponed passing sentence, and remitted the prisoner to gaol and reserved the question.

Whether I rightly decided that he was a bailee of the silk is for the opinion of this court.

(Signed) EDWARD WM. COX,

Deputy Assistant Judge of Middlesex.

Mead, for the prisoner. — The prisoner was not a bailee. According to *Reg. v. Hassall* (30 L. J., 175, M. C.; 8 Cox C. C. 302), a person who is not bound to return the specific thing entrusted to him is not within the bailee clause (sect. 4 of 24 & 25 Vict. c. 54). Here the prosecutors entrusted the goods to the prisoner for sale, and at the end of each half year it was his duty to account to his employers. In *Reg. v. Henderson* (11 Cox C. C. 593), where jewellery was entrusted to the prisoner for the period of a week or so to show to customers for sale, and then to be returned if not sold, and after the given period the prisoner sold the jewellery and appropriated the proceeds, this court held that the prisoner was properly convicted for larceny as a bailee. There the appropriation was after the lapse of time within which the prisoner was allowed to deal with the jewellery. In the present case the appropriation was before the lapse

of the period of six months within which he could deal with the silk, and before he was bound to return in specie the unsold silk; and therefore it is contended he could not be convicted as a larcenous bailee of the silk.

Besley, for the prosecution, was not called upon to argue.

KELLY, C.B. — All that is said about the six months in the case is, "The prisoner paid his own travelling expenses, and at the end of each half year it was his duty to send in an account for the entire six months, and to return the unsold silk." But here, a short time after receiving silk, the prisoner rendered an account in which he had entered as having sold to two persons, whose names and addresses were there stated, the four pieces of silk, with instructions to send invoices to them, and which was all a fabrication. How can it be said that he was not a bailee of the silk at the time, and that this was not larceny by a bailee?

BLACKBURN, J. — The prisoner was bailee of the silk from the moment he received it from his employers. The silk was not his, but theirs, and he was not authorised to dispose of it to his own private use.

LUSH, J. — The prosecutors might have demanded the silk back from the prisoner at any moment after it was delivered and remained undisposed of to customers.

POLLOCK, B. and HONYMAN, J. concurred.

Conviction affirmed.

Saturday, Nov. 15, 1873.

(Before KELLY, C.B., BLACKBURN and LUSH J. J., POLLOCK B., and HONYMAN J.)

REG. v. ROBERT BARRATT.

Rape—Consent—Idiot girl.

Upon the trial of an indictment for rape upon an idiot girl, the proper direction to the jury is that if they are satisfied that the girl was in such a state of idiocy as to be incapable of expressing either consent or dissent, and that the prisoner had connection with her without her consent, it is their duty to find him guilty.

The two cases of Reg. v. Fletcher are not adverse to one another. The principle is properly laid down in the first case, and the second case was only a decision to the effect that there was not that requisite testimony of want of assent to justify leaving the case to the jury.

CASE reserved for the opinion of this court by Honyman J.

The prisoner, Robert Barratt, was tried before me at the Leeds Summer Assizes 1873, for a rape on Mary Redman.

It was proved by the relatives of Mary Redman that she was fourteen and a half years old, and that ever since she was six weeks old she was blind and wrong in her mind; that she was hardly capable of understanding anything that was said to her, but that she could go up and down stairs by herself; that if placed in a chair by anyone she would remain there till night; that if told to lie down she would do so; that she could not communicate to her friends what she wanted; that she could feed herself a little, but that she was obliged to be dressed and undressed, and that she was unable to do any work; that the prisoner had

known Mary Redman and her family about two years, and knew that she was not right in her mind.

It was proved by a surgeon that there were no external marks of violence, but that, in his opinion, there had been recent connection, and he thought she had been in the habit of having connection.

Mary Redman was brought into court, but not sworn. She was evidently idiotic, and I found it impossible to communicate with her. When I spoke to her she evidently heard a sound, and grinned, but made no reply, except a vacant laugh, and played with her handkerchief, which she had dressed up in the shape of a doll, and mumbled in her mouth.

It was proved by the evidence of her father that on returning home one day he looked through the window of the sitting room, and saw the prisoner lying on Mary Redman on a couch in the room, on which she had been previously placed by her sister (whom the prisoner then sent on an errand to a distance), and who desired Mary Redman to lie on the couch till her return, and that on going into the room he found the prisoner standing up at the end of the couch buttoning up his trousers, while Mary Redman was lying quietly on the couch. The prisoner asked the father not to say anything about it.

Beyond this there was no evidence to show under what circumstances the prisoner had or attempted to have connection with the girl.

For the prisoner it was submitted that there was no sufficient evidence of penetration, or that what took place was without the girl's consent, or against her will.

I declined to stop the case, but reserved for the Court of Criminal Appeal the question whether I ought, under the circumstances, to have directed the jury to acquit the prisoner.

I told the jury that if the prisoner had connection with the girl by force, and if the girl was in such an idiotic state that she did not know what the prisoner was doing, and the prisoner was aware of her being in that state, they might find him guilty of rape; but if the girl, from animal instinct, yielded to the prisoner without resistance, or if the prisoner, from the girl's state and condition, had reason to think the girl was consenting, they ought to acquit him.

The jury found the prisoner guilty of an attempt at rape, and I admitted him to bail.

The question for the opinion of the Court of Criminal Appeal is whether, under the circumstances, I ought to have directed the jury to acquit the prisoner. If so, the conviction to be quashed or otherwise affirmed.

See the cases:

Reg. v. Fletcher (28 L. J., N. S., 85, M. C.; 8 Cox C. C. 131); *Reg. v. Fletcher* (35 L. J., N. S., 172, M. C.; 10 Cox C. C. 248; s.c. L. Rep. 1 C. C. R. 39); *Reg. v. Lock* (L. Rep. 2 C. C. R. 10; 12 Cox C. C. 244). (Signed) GEORGE E. HONYMAN.

No counsel was instructed to argue for the prisoner.

Forbes for the prosecution.—I submit that the conviction ought to be affirmed. At the trial it was supposed that the two cases of *Reg. v. Fletcher* were adverse to one another, and that the first was overruled by the second, but that is not so. The test is as to the degree of idiocy of the prosecutrix, whether it is or not of so great extent as to render her incapable of giving consent, or of

exercising any judgment upon the matter. In the second case of *Reg. v. Fletcher*, the girl displayed a greater amount of intelligence than the girl did in the present case, and the medical evidence was that she was a fully-developed woman, and might have strong animal instincts. The case was left to the jury, in the terms reported to have been used by Willes J., "that if they were satisfied that the girl was in such a state of idiocy as to be incapable of expressing either consent or dissent, and that the prisoner had connection with her without her consent, it was their duty to find him guilty." The jury having found the prisoner guilty, the point was reserved for this court, whether the case ought to have been left to the jury at all, there being no evidence against the prisoner except the fact of connection and the imbecile state of the girl. This court held that there was no evidence to establish either that it was against her will or without her consent. [BLACKBURN J.: In that case the girl was far more capable of giving consent than here.] In *Reg. v. Barrow* (38 L. J. 20, M. C.; 11 Cox C. C. 191), it was decided that to constitute a rape on a woman, conscious and capable of giving consent at the time of connection, there must be an actual resistance of the will. Non-resistance by a woman, under the misapprehension induced by the man that he was her husband, prevents the offence being a rape. But here the girl was an idiot, and incapable of giving consent. In *Reg. v. Lock* (42 L. J. 5, M. C.; 12 Cox C. C. 244), it was held that mere submission by a child of tender years to an indecent assault, without any active sign of dissent, the child being ignorant of the nature of the assault, does not amount to assent.

KELLY, C. B.—I am of opinion that the prisoner, in point of law, was guilty of the crime of rape in this case. I entirely concur in the definition of the crime of rape, as given by Willes J. in his direction to the jury, "that if the jury were satisfied that the girl was in such a state of idiocy as to be incapable of expressing either consent or dissent, and that the prisoner had connection with her without her consent, it was their duty to find him guilty." In this case the poor creature was not capable of giving her consent. As to the cases of *Reg. v. Fletcher*, I cannot see the distinction between them in principle.

BLACKBURN, J.—I am of the same opinion. I agree with the decision in the first case of *Reg. v. Fletcher*, and think that the correct rule was laid down in that case. I do not think that the court in the second case of *Reg. v. Fletcher* intended to differ from the decision in the first case of *Reg. v. Fletcher*. In all these cases the question is whether the prosecutrix is an imbecile to such an extent as to render her incapable of giving consent or exercising any judgment upon the matter, or, in other words, is there sufficient evidence of such an extent of idiocy or want of capacity. In the first case of *Reg. v. Fletcher*, and also in the present case, there was evidence of such an extent of idiocy in the girl as to lead the jury to believe that she was incapable of giving assent, and that therefore the connection was without her consent. In the second case of *Reg. v. Fletcher*, the evidence of that was much less strong, and the point reserved for the court was whether the case ought to have been left to the jury at all, there being no evidence except the fact of connection and the imbecile state of the girl; and all that the court

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said was, "that some evidence of its being against her will and without her consent ought to be given in these cases, and that there was not in that case that sort of testimony on which a judge would be justified in leaving it to a jury to find a verdict. Upon the authority of the decision in the former case of *Reg. v. Fletcher*, it is enough to say in this case that the evidence here was that the connection was without the girl's consent.

LUSH, J.—I am of the same opinion. I do not collect from the decision in the second *Reg. v. Fletcher*, that it was intended to overrule, but only to distinguish it from the first case, and to uphold the first case.

POLLOCK, B.—I am of the same opinion.

HONYMAN, J.—I am of the same opinion. The decision in the second case of *Reg. v. Fletcher*, that there was not the proper sort of testimony requisite in these cases, brings it within the principle acted on in the first case, where there was the proper testimony. This case seems to me the same as when a man has connection with a drunken woman that he finds lying in a road, quite incapable of giving consent, in which case Lord Campbell said it would be monstrous to say that the man would not be guilty of rape.

Conviction affirmed.

Saturday, Nov. 22, 1873.

(Before KELLY, C.B., BLACKBURN, LUSH, and GROVE, JJ., and POLLOCK, B.)

REG. v. ADEN.

Larceny—Bailee.

The prisoner was employed by the prosecutor to fetch coals from C. Before each journey the prosecutor made up to the prisoner 24l., out of which he was to pay for the coals, keep 23s. for himself, and if the price of the coal, with the 23s., did not amount to 24l., to keep the balance in hand to the credit of the next journey. It was the prisoner's duty to pay for the coal as he obtained it with the money received from the prosecutor; and the prosecutor did not know but that he did so, but provided he was supplied with the coal, and not required to pay more than the proper price for it, it was immaterial to the prosecutor in what manner the prisoner paid for it. On the 20th March the prisoner had a balance of 3l. in hand, and the prosecutor gave him 21l. to make up 24l. for the next journey. The prisoner did not buy any coal, but fraudulently appropriated it:

Held, that a conviction of the prisoner for larceny of the 21l. as a bailee was right.

CASE stated for the opinion of the Court by the Chairman of the Wolverhampton Quarter Sessions.

At the quarter sessions of the peace held at Wolverhampton, on the 22nd May 1873, Thomas Aden was tried for larceny. The first count of the indictment charged that the prisoner, being a servant to William Bellis, feloniously stole 21l., the property of his master; the second count charged him with simple larceny.

The prosecutor was a coal merchant, and was possessed of a boat. The prisoner was possessed of a horse, and had for several years been employed by the prosecutor to fetch coal three or four times each week, in the prosecutor's boat, drawn along a canal by the prisoner's horse, from the Cannock Chase Colliery to Wolverhampton. There was no agreement between them as to the period of employment, and either might have terminated it at

the end of any journey. Occasionally, but rarely, the prisoner, when not so employed by the prosecutor, drew boats under similar circumstances for other persons. Before each journey the prosecutor gave or made up to the prisoner the sum of 24l., out of which he was to pay for the boat load of coal, and to keep 23s. for himself as payment for his services and the use of his horse. If the quantity of coal with the 23s. did not amount to 24l., the balance was kept in hand by the prisoner, and a sum less than 24l. by the amount of that balance was given to him for the next journey. The colliery company knew that the prisoner did not buy the coal on his own account, but they sometimes let him have a boat load without paying for it at the time, or upon his paying only a portion of the price, and on such occasions they regarded the prisoner as their sole debtor. It was the prisoner's duty to pay for each load of coal as he obtained it, with the money he received from the prosecutor, and the prosecutor did not know but that he did so, and provided he was supplied with the proper quantity of coal, and not required to pay more than the proper price for it, it was quite immaterial to the prosecutor in what manner the prisoner paid for it.

On the 20th March 1873, the prisoner had, or ought to have had, in hand a balance of 3l. in respect of the previous journey, and on that day he received in the usual manner 21l. in gold from the prosecutor, to make up 24l. for the next journey. The prisoner did not buy any coal or bring any to the prosecutor for this money, but fraudulently appropriated the 21l., and falsely pretended that he had been robbed of it on the canal bank as he was going to fetch the coal. It appeared, however, that after receiving the 21l., the prisoner paid to the Colliery Company the sum of 12l. 9s. 9d., being a balance due to them upon a previous load of coal, for which he had previously received the money from the prosecutor.

Upon these facts, it was contended by the prisoner's counsel, that the prisoner could not be convicted on the first count, because he was not a servant of the prosecutor; nor upon the second count, because he was not the bailee of any money that was specifically to be held for or returned to the prosecutor. The case of *Reg. v. Davis* (10 Cox C. C. 239), was relied upon for the prosecution; and the case of *Reg. v. Hassall* (30 L. J. 175, M. C.; 8 Cox. C. C. 491), for the defence.

The jury found the prisoner guilty of fraudulently appropriating the money, whereupon I respited the sentence, and at the request of the prisoner's counsel, pray the judgment of the Court for Crown Cases Reserved whether, upon the facts above stated, the prisoner can be lawfully convicted upon either count of the indictment.

(Signed) JOHN J. POWELL.

No counsel appeared on either side.

KELLY, C.B.—In this case, a sum of money was placed in the hands of a boatman for the purpose of purchasing coals for the prosecutor from a colliery company, which coals the prisoner was to pay for with the money so placed in his hands by the prosecutor. The prisoner did not buy any coals, but paid away part of the money in satisfaction of a debt owing by him to the Colliery Company, and failed to procure the coals. This was a clear case of larceny of money entrusted to the prisoner as a bailee, within 24 & 25 Vict. c. 96, s. 3.

Conviction affirmed.

Saturday, Nov. 22, 1873.

(Before KELLY, C.B., BLACKBURN, LUSH, and GROVE, JJ., and POLLOCK, B.)

REG. v. DAYNES AND WARNER.

Larceny—Bailee—Offence punishable summarily—
13 Geo. 2, c. 8—24 & 25 Vict. c. 96, s. 3.

The prosecutors (boot and shoe manufacturers) gave out to their workmen leather and materials to be worked up, which were entered in the men's books and charged to their debit. The men might either take them to their own homes to work up, or work them up upon the prosecutor's premises; but in the latter case they paid for the seats provided for them. When the work was done, they received a receipt for the delivery of the leather and materials and payment of the work. If the leather and materials were not redelivered, they were required to be paid for. The prisoner Daynes was in the prosecutors' employ, and received materials for twelve pairs of boots; he did some work upon them, but instead of returning them, sold them to the prisoner Warner. These materials were entered in the prosecutor's books to Daynes' debit, but omitted by mistake to be entered in Daynes' book:

Held, that Daynes could not be convicted of larceny as a bailee, under 24 & 25 Vict. c. 96, s. 3, as the offence of which he had been guilty was punishable summarily under 13 Geo. 2, c. 8.

Quere, whether the transaction, as between the prosecutor and his men, did not amount to a sale of the leather and materials?

CASE reserved for the opinion of this Court by the Recorder of Ipswich:

Richard Daynes and Samuel Warner were tried before me, at the quarter sessions holden for the borough of Ipswich, on the 3rd July 1873, upon an indictment which charged the former, as a bailee, with stealing, and the latter with receiving, a quantity of boots and leather.

Messrs. Clarke and Co., the alleged owners of the property, and the prosecutors, were boot and shoe manufacturers. They employed a large number of workmen, amongst others the prisoner Daynes.

The mode of employment was as follows:—The foreman of the department gave out to each of the men a quantity of leather and other materials, which were respectively entered in the man's book and charged at a fixed price to his debit. The workman then did his proposed work upon them, and afterwards took them back to the foreman and received from him a receipt in his book for the delivery and payment for the work so done. If the materials in their original or improved state were not so redelivered, the man was required to pay for the materials. A similar entry out and in was also made in the books of the firm.

The prisoner Daynes was a nailer. He, on the 8th Feb. 1873, received from the foreman materials for twelve pairs of boots. He did some work upon them, but instead of returning them to the foreman, sold them to Warner, in whose possession they were found under circumstances which showed his complicity. These materials for the twelve pairs of boots were by mistake not entered in Daynes' book, but they were entered in the books of the firm to Daynes' debit, as in other cases.

It was further proved that Daynes, when he so received materials, might either take them to his own home to work up, or might work them up upon the premises of the firm; but if he elected

the latter course, he was required to pay for the seat provided for him upon the premises; and such sum was stopped out of the payments for the work.

He was not paid wages, nor was he, except as herein mentioned, in the employ of the firm.

Daynes, in February, was working upon the premises of the firm, and worked up the materials in question at a seat so provided and paid for, such payments for the seat being entered in his book as "stopped." Shortly after the 8th Feb. he worked at his own home, which he did without any notice to the firm being given or required, and without any alteration being made in his book; and it was proved that there was no difference made between the men who worked on and those who worked off the premises. The men paid for their books.

The counsel for the prosecution contended that the prisoners were liable to be convicted under chap. 96, sect. 3, of the Criminal Law Consolidation Act (24 & 25 Vict.), which is in these words:—"Whosoever being a bailee of any chattel, money, or valuable security, shall fraudulently take or convert the same to his own use, or the use of any person other than the owner thereof, although he shall not break bulk or otherwise determine the bailment, shall be guilty of larceny, and may be convicted thereof upon an indictment for larceny, but this section shall not extend to any offence punishable on summary conviction."

The counsel for the prisoners contended that the conviction was precluded by the concluding words of that section; for that under 13 Geo. 2, c. 8, Daynes was liable to be dealt with summarily for the misappropriation of these materials, and that if there was no stealing to warrant an indictment, there could be no such receiving.

The part of the section is as follows:—"And whereas many frauds and abuses have of late been likewise committed by persons employed in cutting out and manufacturing of skins, leather, and other materials, into gloves, breeches, boots, shoes, slippers, &c. Be it enacted, that if any person or persons, hired or employed, or to be hired or employed, in cutting, paring, washing, dressing, sewing, making up, or otherwise manufacturing of gloves, breeches, leather skins, boots, shoes, slippers, wares, or other goods or materials to be made use of in any of the trades or employments, or in manner last-mentioned, or in any branch or particular thereof, shall fraudulently purloin, embezzle, secrete, sell, pawn, or exchange, all or any part of the gloves, breeches, leather, skins, parings, or shreds of gloves or leather, or other materials with which he, she, or they, shall be intrusted to work up or manufacture, or shall purloin, embezzle, secrete, sell, pawn, or exchange, any gloves, breeches, boots, shoes, slippers, or wares, when made, wrought up or manufactured, and be thereof lawfully convicted," the justices are to award a suitable recompense, and with power of imprisonment in case of nonpayment. Sect. 5 applies to receivers of such property—6 & 7 Vict. c. 40, repeals part of this Act, but not the provisions aforesaid—and 22 Geo. 2, c. 27, ss. 1 and 2, provides further for punishment upon such conviction.

I thought the objection fatal, but the matter being one of frequent occurrence, I consented to leave the facts to the jury, and to take the opinion of this Court. The jury found both prisoners guilty.

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The Court is requested to say whether the conviction can be sustained or not. I admitted both defendants to bail until the next January sessions, to abide the result.

(Signed) WILLIAM JAMES METCALFE,
Recorder.

No counsel appeared on either side.

KELLY, C.B.—After stating the leading facts, proceeded: In this case it might have been contended that the transaction was really a sale of the leather to the prisoner Daynes, and that the property in it passed to him; but that question does not now arise, and need not be determined, because the prisoner was indicted under the 24 & 25 Vict. c. 96, s. 3, which section concludes with these words, "but this section shall not extend to any offence punishable upon summary conviction." Now the present case is completely within the 13 Geo. 2, c. 8, and may be dealt with summarily, and, consequently, is within the proviso in sect. 3. Under these circumstances, the conviction must be quashed. *Conviction quashed.*

Saturday, Nov. 22, 1873.

(Before KELLY, C.B., BLACKBURN, LUSH, and GROVE, JJ., and POLLOCK, B.)

REG. v. COGGINS.

Larceny—Receiving—Accessory in second degree. An indictment charged S. with stealing 18s. 6d., and C. with receiving the same. The facts were: S. was a barman at a refreshment bar, and C. went up to the bar, called for refreshments, and put down a florin. S. served C., took up the florin, and took from his employer's till some money, and gave C. as his change 18s. 6d., which C. put in his pocket and went away with it. On leaving the place he took some silver from his pocket, and was counting it when he was arrested. On entering the bar signs of recognition took place between S. and C., and C. was present when S. took the money from the till. The jury convicted S. of stealing and C. of receiving.

Held, that this was evidence which the judge ought to have left to the jury as reasonable evidence upon which C. might have been convicted as a principal in the second degree; and that therefore the conviction for receiving could not be sustained.

CASE reserved for the opinion of this Court by the Recorder of Brighton.

The prisoner was tried before me at the last sessions for the borough of Brighton on a charge of receiving from one Frederick Silvey the sum of 18s. 6d. the property of the prosecutor, John Buteux Mellison, well-knowing the same to have been stolen, Frederick Silvey being at the same time tried on the charge of stealing the said 18s. 6d.

Frederick Silvey was employed by the prosecutor, John Buteux Mellison, to act as barman at a refreshment bar under the grand stand on the Brighton Race Course during the Brighton race meeting. While the said Frederick Silvey was so employed, the prisoner Coggins went up to the bar at which the said Frederick Silvey was serving, and after calling for a cigar and some lemonade and brandy, put down a florin. Frederick Silvey served the prisoner Coggins with a cigar and some lemonade and brandy, took up the florin, and after going to the prosecutor's till, took some money out of the said till and gave to the prisoner as his

change the sum of 18s. 6d. The prisoner placed the 18s. 6d. in his pocket, and after moving away from the bar was followed by a detective, who saw him take a quantity of silver out of his pocket and proceed to count it, whereupon he was arrested.

On the prisoner, Charles Coggins, entering the bar, signs of recognition took place between him and the prisoner Silvey, and the prisoner, Charles Coggins, was present at the time when the prisoner Silvey took the sum of 18s. 6d. from the till of the prosecutor.

The jury found the prisoner, Frederick Silvey, guilty of stealing the said sum of 18s. 6d., and the prisoner, Charles Coggins, guilty of receiving the said sum knowing it to have been stolen.

The counsel for the prisoner, Charles Coggins, thereupon moved in arrest of judgment on the grounds that on the facts disclosed, the said Charles Coggins was guilty of stealing the said sum of 18s. 6d., and could not be convicted of receiving it knowing it to have been stolen.

I arrested the judgment of the court accordingly, and I now desire the opinion of the Court whether on the evidence above stated the prisoner, Charles Coggins, can be lawfully convicted of receiving the said money knowing it to have been stolen.

(Signed) JOHN LOCKE.

SECOND CASE.

THE prisoner was tried on a charge of receiving from one George Loder the sum of 9s. 6d. the property of the prosecutor, John Buteux Mellison, well-knowing the same to have been stolen, the said George Loder being at the same time indicted for feloniously stealing the said sum of 9s. 6d., he being then the servant of the said John Buteux Mellison.

George Loder was employed by the prosecutor, John Buteux Mellison, to act as barman at a refreshment bar under the grand stand on the Brighton Race Course during the Brighton race meeting. While the said George Loder was so employed, the prisoner, Coggins, went up to the bar at which the said George Loder was serving, and after calling for a sandwich put down a shilling. George Loder served the prisoner Coggins with the sandwich, took up the shilling, and after going to the prosecutor's till, took some money out of the said till and gave to the prisoner as his change the sum of 9s. 6d. The prisoner placed the 9s. 6d. in his pocket, and after moving away from the bar was followed by a detective, who saw him take a quantity of silver out of his pocket and proceed to count it, whereupon he was arrested.

The prisoner, Charles Coggins, was talking to the prisoner, George Loder, before he called for the sandwich, and was present at the time when the prisoner, George Loder, took the said sum of 9s. 6d. from the till of the prosecutor.

The jury found the prisoner, George Loder, guilty of stealing the said sum of 9s. 6d., and the prisoner, Charles Coggins, guilty of receiving the said sum knowing it to have been stolen.

The counsel for the prisoner, Charles Coggins, thereupon moved in arrest of judgment on the ground that on the facts disclosed, the said Charles Coggins was guilty of stealing the said sum of 9s. 6d., and could not be convicted of receiving it knowing it to have been stolen.

I arrested the judgment of the court accordingly, and I now desire the opinion of the court, whether on the evidence above stated, the prisoner,

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Charles Coggins, can be lawfully convicted of receiving the said money knowing it to have been stolen.

(Signed) JOHN LOCKE.

Besley for the prisoner.—The conviction cannot be sustained.

Grantham for the prosecution objected that the objection was not properly taken by motion in arrest of judgment.

The COURT said it must be taken that the point intended to be reserved was whether there was any evidence to go to the jury in support of the conviction.

Besley.—It is clear upon the authorities that a person cannot be a principal in the second degree, and also a receiver of the stolen property. From *Dyer's case* (2 East, P. C. 767), it appears that if a person takes part in the transaction while the act of larceny by others is continuing, he will be guilty as a principal in the larceny, and not as a receiver. In this case it was a continuing transaction so as to make the prisoner Coggins a party to the theft, although as regards the barman, the theft was complete as soon as the money was removed from the till, *animo furandi*. [BLACKBURN, J.—*Dyer's case* no doubt assists you so far that it shows that upon the evidence here, Coggins might properly be found guilty as a thief.] Then, if so, he could not be convicted as a receiver. In *Bea v. Owen* (1 Mood. C. C. 96), where a man committed a larceny in a room of a house, in which room he lodged, and threw a bundle containing the stolen property out of the window to an accomplice waiting in the street to receive it, the judges held that the accomplice was a principal, and that the conviction of him as a receiver was wrong. So in *Reg. v. Perkins* (1 Den. & P. 459; 5 Cox C. C. 554), where A. was indicted for stealing pork, and B. for receiving the same, it appeared that they went together to the premises of A.'s employer where the pork was kept, and that A. took the pork out of a tub where it was kept and brought it outside and gave it to B. Lord Campbell, C.J. there said: "Assuming, as we are bound to do from the case submitted to us, that the prisoner was a principal in the second degree, he could not take the stolen property from himself." And Alderson, B.: "If one burglar stands outside while another plunders the house and hands out the goods to him, he surely could not be indicted as a receiver." And Maule, J.: "My brother Adams seems to have intended to ask us, whether in a case where the prisoner was, in a popular sense, guilty of receiving, he might be treated as a receiver notwithstanding the fact that he was a principal in the theft; and it is clear that he cannot." [Grove, J.—The case of *Reg. v. M'Evin* (1 Bell C. C. 25), seems very like this. The prisoner was charged in two counts with stealing and receiving, and this court held that the jury might return a verdict of guilty on the latter count if warranted by the evidence, although the evidence is also consistent with the prisoner having been a principal in the second degree in the stealing.] In that case, Pollock, C.B., remarked: That in *Reg. v. Perkins*, it was stated as a fact that the prisoner was a principal. The jury negatived that in *Reg. v. M'Evin*.

Grantham for the prosecution.—The conviction may be upheld on the authority of *Reg. v. M'Evin*. In that case the facts were that a woman was walking beside the prosecutrix, and the prisoner, M'Evin, was seen just previously following behind

her. The prosecutrix felt a tug at her pocket, found her purse was gone, and, on looking round, saw the woman behind her walking with M'Evin in the opposite direction, and saw her hand something to M'Evin. And there the jury found M'Evin not guilty of stealing, but guilty of receiving. In the present case there was no evidence of any preconceived plan between Coggins and the barman.

Besley in reply.—The prisoner Coggins was aiding and abetting in the larceny from the moment of passing the florin over the counter.

The Court retired to consider its decision.

KELLY, C.B.—The majority of the court are of opinion that the conviction cannot be sustained. I and my brother Grove take a different view, but not so strong as to amount to dissent from the judgment of the majority.

BLACKBURN, J.—It is not necessary that this case should be argued before all the judges, because the doubts of the Lord Chief Baron and my brother Grove do not amount to an actual dissent from the judgment of the majority of the court. The question which was reserved for our opinion, as we consider, was whether or not there was evidence such as the judge ought to have left to the jury as reasonable evidence on which they might convict the prisoner as a receiver. Unfortunately in this case there is the technical principle that a person assisting in the stealing is a principal in the first or second degree, and that a receiver must be a person who is not a principal felon. Had the question been left to the jury, whether or no from the time the prisoner laid down the florin, after which the barman took the 18s. 6d. from the till and gave it to him, he was aiding and abetting the barman in the commission of the larceny, I think the jury could not but have found that he was aiding and abetting. It might possibly be that he was aiding to carry away the money that had been stolen without his previous knowledge. But what we understand from the case is the point, is, was there such evidence as it was the duty of the judge to leave to the jury, as reasonable evidence upon which they might convict the prisoner of receiving? In point of strict law the prisoner should have been indicted for the offence which he really committed. As the matter stands the majority of the court think that the evidence was not such as the judge ought to have left to the jury as reasonable evidence upon which the prisoner might be convicted of receiving. In *Reg. v. M'Evin*, the circumstances were different. The indictment contained counts both for stealing and receiving, and the judge properly left it to the jury, "That if they did not think that M'Evin was participating in the actual theft, it was open to them, on the facts, to find a verdict of guilty on the count for receiving." That was a proper direction, and the jury found a verdict of guilty on the count for receiving. There was evidence in that case on which the jury might have found either way. Here there was only one count against the prisoner that for receiving, and the majority of the court think that there was not sufficient evidence to sustain the verdict.

Conviction quashed.

Q. B.]

MERSEY DOCKS AND HARBOUR BOARD v. OVERSEERS OF LIVERPOOL.

[Q. B.]

COURT OF QUEEN'S BENCH.Reported by J. SHORTT and M. W. McKELLAR, Esqrs.,
Barristers-at-Law.

Nov. 8 and 19, 1873.

**MERSEY DOCKS AND HARBOUR BOARD (apps.) v.
OVERSEERS OF LIVERPOOL, (resps.).***Poor rate—Dock rates—Tenant's profits—Interest
on debt—Purchased dues—Deterioration—Ex-
penses of collection.*

The Mersey Docks are vested in the appellants, who are authorised to collect certain duties and rates under various Acts of Parliament; but the duties leviable must be reduced if more than sufficient to pay off the mortgages, and the charges of management, of collection of rates, and of improving, repairing, and maintaining the docks and works. There are no shareholders, and no member derives advantage from his execution of the trusts. The docks were erected and purchased with borrowed money, and the interest is paid out of the income. No provision of the Acts of Parliament is to affect the liability of the docks to local or parochial rates. Under an Act of 1857 the appellants purchased certain town dues from the corporation of Liverpool, the surplus of which, after payment of interest upon the sum fixed as consideration for the purchase, goes into their general revenue account.

Held that in assessing the appellants to the poor's rate no deduction should be allowed for tenant's profits, nor for interest upon their debt; that the value of the town dues ought not to be added to the assessment; that the appellants were entitled to a deduction for average deterioration, as well as for the actual repairs of each year; and that the expenses of collecting the rates, which should be deducted from the amount, might be fairly computed by dividing the whole expenses of collecting the appellants' revenue rateably according to the respective amounts of dock rates and town dues.

THIS was a special case stated by the Court of Quarter Sessions of the borough of Liverpool.

By the rate made for the relief of the poor of the parish of Liverpool on the 27th May 1865, the appellants were assessed in the sum of 214,944*l.* in respect of the annual value of certain of the dock estates within the said parish, which are vested in them.

The Board, the now appellants, appealed against the said rate to the Liverpool Quarter Sessions, and thereupon the following case was agreed upon:—

1. The appellants are a corporation incorporated and regulated by and under "The Mersey Docks and Harbour Act 1857," and "The Mersey Dock Acts Consolidation Act 1858;" and under these Acts hold docks and other property used in connection with, and for the purposes of, the docks on both sides of the River Mersey.

2. The first dock on the Lancashire side of the Mersey was made under the authority of an Act of 8th Anne, c. 12, whereby the mayor, aldermen, bailiffs, and common council of Liverpool were incorporated to make a dock (since filled up), on the south side of the town of Liverpool, and the duties leviable under that Act were not to be applied to any purposes except the building and repairing of the dock.

3. Other docks were subsequently made on the Lancashire side of the Mersey by the corporation

of Liverpool, under the authority of other Acts of Parliament, similarly limiting the application of the receipts from the docks, as was provided by the said Act of 8 Anne, c. 12; until by the statute 31 Geo. 3, c. 143, the mayor, aldermen, bailiffs, and common council were formed into a body corporate, and the docks and works on the Lancashire side of the river were vested in them under the style of "The Trustees of the Liverpool Docks."

4. The trustees so incorporated were empowered by the last-mentioned Act to levy certain rates, and when all charges and mortgages upon such rates should be paid off, they were required to lower and reduce the rates and duties thereby granted, so far as could be done in the state of the docks and works, so as to leave sufficient for all charges of management and collection of rates, and improving, repairing, and maintaining the docks and works so vested in them.

5. Subsequently other Acts relating to the docks on the Lancashire side of the Mersey were passed, in all twenty-two in number, and forming a series extending from the said Act of 8 Anne to that of the 21 Vict., both inclusive, all of which may be referred to as part of this case.

6. Other docks were formed on the Cheshire side of the Mersey, at Birkenhead, under the authority of a series of fourteen Acts of Parliament, extending from an Act passed in the 7 & 8 Vict. to an Act passed in the 18 & 19 Vict., by which last-mentioned Act all the Birkenhead docks are now vested in the corporation of Liverpool; all these Acts may be referred to as part of this case.

7. By sect. 27 of the same Act of 1857, it is provided that all such deeds, lights, buoys, lands, buildings, and other property, both real and personal, situate at Liverpool or elsewhere, as were held by or in trust for the trustees of Liverpool docks, under or in pursuance, or for the purposes of any of the said Acts mentioned in the first part of the schedule thereto annexed, should upon and after the said 1st Jan. 1858, vest in the appellants, but subject to all charges and liabilities affecting the same.

8. By sect. 19 of the said last-mentioned Act it is enacted that, subject to the provisions of that Act, the appellants should stand possessed of all the property, powers, rights, and privileges, thereby transferred to them upon the trusts, and for the purposes upon and for which such property, powers, rights, and privileges were holden previous to the commencement of that Act.

9. By sect. 50 of the same Act it is provided that from and after the 1st Jan. 1858, all docks and works belonging to the board, and all docks and works that may hereafter belong to the board, shall be deemed to constitute one estate only, hereinafter called "The Mersey Dock Estate;" and a uniform system of management shall be adopted with respect to the whole of such Mersey Dock Estate.

9A. The 56th section of the same Act enacts as follows:

The following rules shall be observed by the board with respect to the moneys received by them under this Act (that is to say):

(1.) The conservancy expenditure shall be defrayed out of the conservancy receipts.

(2.) The pilotage expenditure shall be defrayed out of the pilotage receipts.

(3.) No portion of the conservancy receipts or pilotage receipts shall be applied in aid of the general expenditure.

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(4.) No sum shall be payable in respect of docks by any vessel that does not use the same.

(5.) Save as by this Act is provided no moneys receivable by the board shall be applied to any purpose unless the same conduces to the safety or convenience of ships frequenting the port of Liverpool or facilitates the shipping or unshipping of goods, or is concerned in discharging a debt contracted for the above purposes.

10. The dock estate at present consists of basins, docks, piers, jetties, graving docks, gridirons, wharves, quays, landing stages, slips, stairs, river walls, dams, embankments, locks, gates, bridges, weirs, sluices, tunnels, cuts, channels, roads, railways, tramways, warehouses, sheds, offices, buildings, cranes, engines, machinery, and other works and conveniences affixed or appertaining to such basins and docks, or necessary for the working thereof; and the appellants are authorised to receive large sums of money under the name of dock rates and duties, by virtue of the said Act of Parliament, from the owners of vessels and goods for the privilege of using the said dock property.

11. The appellants are bound to apply the present dock rates and dues and all other moneys received by them out of the dock estate according to the directions of the said Acts. There are no shareholders, and no member of the board or other person derives any personal advantage or emolument whatsoever from the execution of the trusts of the dock estate, or has any interest in the dock estate, or in the moneys received by the appellants.

12. All the said property vested in the appellants was acquired, and all the dock works, &c., were made and provided by them and their predecessors under the several Acts of Parliament, solely for the purpose of the dock business, and none of the said property, docks, works, &c., are used for any other purposes whatsoever; and all the moneys derived by the board from any part of the property are spent in carrying out the provisions of the said Act of Parliament.

13. The docks and dock property were erected and purchased with borrowed money, and the dock estate is now subject to a large debt in respect thereof, the annual interest on which is paid by the appellants out of their income as hereinafter mentioned.

14. The payment of this interest and the application of the income is provided for by sect. 284 of the Mersey Dock Acts Consolidation Act 1858, by which it is enacted, subject to the provisions of the Mersey Dock and Harbour Act 1857, "All the moneys which shall be collected, levied, borrowed, and raised, or received by the board under or by virtue of this Act or the said Act, the application of which may not be otherwise expressly directed, shall be applied by the board in any order with respect to priority of such application as they shall deem expedient for the following purposes, some or all of them, that is to say: In payment of all expenses and charges of collecting rates. In payment from time to time of all interest accruing due on moneys borrowed and to be borrowed, and in payment of the Mersey Docks annuities hereinafter authorised to be granted, according to the respective priorities of such moneys and annuities under this Act. In the construction of works authorised to be erected, established, and maintained by the board, and in supporting, maintaining, and repairing the same, and in carrying into execution all the provisions of this Act, and of the Mersey Docks and Harbour Act 1857. And

in the general management, conducting, securing, preserving, improving, amending, maintaining, and protecting the Mersey Dock estate.

And the residue or surplus of all such moneys which shall remain after such application thereof as aforesaid, shall from time to time be applied in or towards the repayment of all principal moneys which shall have been borrowed by or shall be due by the board, and in or towards the purchasing up and extinguishing of the Mersey Dock annuities in the manner hereinafter directed, until all such principal moneys shall have been repaid, and all Mersey Dock annuities shall have been purchased up and extinguished; and when by the means last mentioned all such principal moneys shall have been repaid, and all such dock annuities shall have been purchased up and extinguished, then, in such case, the board shall and they are hereby required to lower and reduce the rates hereby authorised to be taken, so far as the same can be done in the then state of the docks, and leaving sufficient for the payment of the expenses of collecting the rates, and the supporting, maintenance, and repairing of the docks and the general management, conducting, securing, preserving, improving, amending, maintaining, and protecting the Mersey Dock estate. And except as aforesaid such moneys shall not be applied by the board for any other purpose whatsoever."

15. By the 285th section of the same Act it is enacted as follows:

Nothing in this Act contained shall alter or affect the question of the liability of any of the docks or works vested in the board to parochial or local rates, but the same shall in all respects be judged of and determined as if this Act had not been passed.

16. A sinking fund is provided by sect. 4 of the Mersey Docks and Harbour Act 1859, by which it is enacted,—

In order to make provision for the repayment of the principal moneys which have been already borrowed, or which may hereafter be borrowed by the board under the authority of Parliament, Be it enacted that after payment in each year of all charges and expenses attending the collection of rates or incidental thereto, and after payment of all interest accruing due on moneys for the time being forming a charge upon such rates, and the dock annuities authorised to be granted by the board, and after payment of all charges and expenses of supporting, maintaining, and repairing the works authorised to be erected, established, and maintained by the board; and of the general management of the Mersey Docks Estates, and of all reasonable expenses necessary for conducting, securing, improving, amending, maintaining, and protecting the same, the board shall yearly, and every year subsequent to the 24th June 1860, apply the surplus, if any, of the rates which shall remain in their hands after such payments as aforesaid to the extent of 100,000*l.*, or such less amount as the said principal moneys which shall then be due and owing on the security of the rates, and which shall then have become due and payable; and in the purchasing up and extinguishing of the Mersey Dock Annuities which may be then existing, according to the respective priorities of such moneys and annuities, until all principal moneys due on the security of the rates shall have been purchased up and extinguished; and subject to the provisions herein contained all rates and other moneys which shall be collected, levied, borrowed, and raised or recovered under or by virtue of the said recited Acts, or either of them, or of this Act, the application of which may not be otherwise expressly directed, shall and may be applied by the board according to the provisions for that purpose contained in sect. 284 of the Mersey Dock Acts Consolidation Act 1858.

17. There has usually been an annual surplus available for the said sinking fund, which has never since 1861 amounted to 100,000*l.*

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18. The Corporation of Liverpool before the passing of the Mersey Docks and Harbour Act 1857 (20 & 21 Vict. c. cxlii.), levied, under a franchise purchased by them many years ago, on goods imported into, and exported from, the port of Liverpool (with certain exceptions), certain dues called "town dues," and certain dues called "anchorage dues," on ships entering the port, and these dues were by sect. 52 of the last-mentioned Act transferred to the appellants for a consideration affixed by sect. 40 at 1,500,000*l.*, and the appellants now derive an income from such dues, the surplus of which (after providing for interest on the said sum of 1,500,000*l.*, and certain conservancy charges) goes into the general revenue account of the appellants.

19. To the annual surplus mentioned in the 17th paragraph, the part of the dock estate within the parish of Liverpool, and which is the subject of this rate now appealed against, may be taken to contribute *l.*; and the said *l.* may be taken to be the net annual income derived from the property in question.

The appellants contend that they are entitled to deduct interest on their debt, as they are only allowed to receive the increased rates in order to pay off the interest; and the rates would have immediately to be reduced if there were no interest to pay.

That they are entitled to deduct tenant's profits, as would be done in any case of a trading body.

That they are entitled not only to a deduction for ordinary repairs, but also a deduction for deterioration of works. They calculate the time when the different works will require renewal, and their claim to deduct every year a sum of money which put out to interest would in the same time be sufficient to renew such works.

The respondents dispute the several contentions of the appellants above specified, and they further contend:

That the income from the town dues after payment of interest on the sum of 1,500,000*l.*, the purchase money of the dues, ought also to be taken into account in the rate.

20. The respondents thinking that the property was so exceptional in its nature that it is impossible to find a tenant, and to estimate its rateable value in his hands in the usual way, have, for the purpose of estimating the rateable value of the dock estate in the parish of Liverpool, taken the revenue of the board from dock rates and dock rents in the parish, not including town dues, as shown by their accounts, and have deducted the proportional expense of working and management of ordinary repairs and rates. In calculating the expenses of working and management for the purpose of making the aforesaid deduction, a proportion of the expenses equal to the proportion which the revenue from the town dues bears to the general revenue of the board, has been set aside as chargeable to such dues; the balance has been deducted from the rateable income of the board. No allowance has been made for deterioration of works beyond the ordinary repairs, nor for tenant's profits, such as are allowed in the case of an ordinary trading company, nor for interest on the bond debt.

The questions for the opinion of the court are: First, whether, under such a state of facts, the Mersey Dock Board are entitled to a deduction for tenant's profits; secondly, whether the amount

of such tenant's profits ought to be estimated at a fixed per centage, or ought to be left to the decision of the sessions; thirdly, whether they are entitled to any and what allowance in respect of interest on their said debt; fourthly, whether the respondents are entitled to take into account the town dues; fifthly, whether the appellants are entitled to a deduction for deterioration of works on the principle mentioned in the 9th paragraph, or on any other and what principle; sixthly, whether the principle adopted by the respondents and set out in the 20th paragraph is correct, and if not, in what respect is it incorrect?

The amount of the rateable value is to be ascertained on the principle laid down by the court, and a judgment in conformity therewith is to be entered at the quarter sessions next or next but one after the amount has been ascertained as agreed, with such costs as the court shall adjudge.

Manisty Q. C. (with him *Crompton*) argued for the appellants.—The appellants' income from the town dues cannot be said to arise from their occupation of the docks. [BLACKBURN, J.—That point you can leave to your reply.] Taking, then, the actual income from the docks, without including the town dues, as the proper basis for calculating the appellant's rateability, the question to be considered is, what should be the deductions allowed? The 20th paragraph says, that no allowance has been made for deterioration of works beyond the ordinary repairs. [BLACKBURN, J.—There is no statement that ordinary repairs do not cover all expenses requisite to remedy all deterioration.] Apparently no allowance has been made for depreciation of the works, and that comes clearly within the words of the Parochial Assessment Act, viz., the probable average annual cost of the repairs and other expenses, if any, necessary to maintain the premises in a state to command such rent. That was distinctly held, in the considered judgment of the court delivered by Coleridge, J., in the case of the three railway Companies, the *London, Brighton, and South Coast, the South-Eastern, and the Midland* (15 Q. B. 313, at p. 364). [BLACKBURN, J.—No doubt a deduction for average annual depreciation should be allowed, if it has not been already made; on this point the statements in the case are not clear.] A very large amount depends upon the first two questions as to tenants' profits; something certainly ought to be allowed for the attention which a tenant would give to the property he rented, and for the risk which he would incur. In *Reg. v. The Southampton Dock Company* (14 Q. B. 587), which decided the mode of rating the Southampton Docks, 20 per cent. was allowed for tenant's profit. [BLACKBURN, J.—That was a trading concern, the hypothetical tenant of which was a probable person, and he would certainly consider the value of his own labour in fixing a reasonable rent. Here the income is not like trade profits, but is more similar to the rent of tolls or tithes.] There can be no reason at all events, why something for tenant's profits should not be deducted from the assessment of tolls or tithes. This point was argued twice in *The Hackney and Lamberhurst Tithes Commutation Rent Charges* (E. B. & E. 1), and in the judgment of Crompton, J., p. 60, after stating that was the case of a clergyman entitled to a rent-charge in lieu of tithes, he proceeds: "We were asked whether in addition to the allowances to

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which he had been held entitled on a former occasion, he was entitled to a further reduction in respect of the profit which a tenant farming or renting the said rentcharge from year to year would reasonably consider to be an adequate inducement to him to take a demise of such rentcharge from year to year, he having to pay such rent in full, and having to calculate the rentcharges according to the corn averages in each year, and collect the same by two collections in the year." Further on, although the court found it impossible to say that the tithe owner was necessarily entitled to any such deduction, yet they thought "that this is a question of fact to be determined according to the circumstances of each particular case, the rule in every case being that the amount must be ascertained as that at which a tenant might reasonably be expected to take from year to year." [BLACKBURN, J.—In this case there could not possibly be a tenant of the dock's income, so we must deduct all items which would be allowed in analogous cases where there might be a tenant. Surely that case bears a close analogy to this, and I find at p. 61 of the judgment, Crompton, J., said: "By the statute the assessment ought to be at what the tenant might reasonably be expected to take for. And if the allowance for collection would not be enough in addition to the allowance against bad debts and law expenses, the tithe owner would be entitled to the further deduction; but in a case like the present, we should think that the sum necessary to induce a tenant to take in addition to the allowance for expenses of collecting, for bad debts and for law expenses, would be if not altogether an evanescent quantity, at most a very small sum." I know of no case in which something for tenant's profits has not been allowed. The only other question is as to the interest on the bond debt, and I can only claim this deduction if the other side is allowed to add the amount of the town dues.

Sir J. B. Karslake, Q.B. (with him *Littler*, Q.C. and *Batten*), argued for the respondents.—As to the tenant's profits, it is sufficient for me to contend that the other side has not made out a case for any allowance on that ground. The interest referred to decided that no tenant would necessarily require an allowance for such profits, and it devolves upon the party claiming it to show some peculiar reason for it. There is no case like this in which tenant's profits have been deducted, although no doubt it would be proper to do so if capital or skill were required to produce the income. The appellants ought to prove the exact sum which a tenant would require in order to take from year to year before the respondents can be compelled to allow it. They have not yet shown any reason or law for any such deduction in this case at all. The next question as to deterioration of the works must depend upon the estimate for repairs. No doubt if not included in that estimate, it must be computed. As to the apportionment of the expenses of collecting the town dues, I do not exactly comprehend the wording of the clause; but if the collection be separate from that of the dock rates, then it should be deducted. I do not, however, think that is so. Lastly, as to the addition to the valuation on account of the town dues. In consequence of the purchase of these dues by the board, less tolls are charged for the use of the docks. But the hypo-

thetical tenant would take the tolls without the dues, as he would receive a larger amount from the tolls than the board do, and he should estimate, the profits he would make in that case. [BLACKBURN, J.—But the hypothetical tenant would be subject to the statutory limitation that no profits should be made beyond the amount fixed.]

Manisty, Q.C. in reply.—As to deterioration of works, a considered judgment of this court in *Reg. v. Wells* (L. Rep. 2 Q. B. 542; 16 L. T. Rep. N. S. 790), is strongly in favour of the appellants' contention. At p. 548 (L. Rep.), "The second question submitted to us is whether any allowance should be made in respect of buildings or machinery. We are of opinion that such allowance ought to be made. Farm buildings and machinery are, by the effects of weather, and of wear and tear, reducible to a state which will render them unworthy of repair, and necessitates their reconstruction. They cannot at length be kept up, but at an expense which renders it practically impossible, because not reasonably prudent to keep them up." [BLACKBURN, J.—We agree that the costs of repair or renewal must be taken over several years, and the average be deducted.] As to tenant's profits, I challenge the other side to point to a single case where no allowance has been made for tenant's profits. [QUAIN, J.—But in a case like this where deductions are made for collection and interest, you would by an allowance of tenant's profits obtain those deductions twice.]

BLACKBURN, J.—We will take time to consider the first two questions, which relate to tenant's profits. As to the other four, we have no difficulty in expressing our opinion now; indeed, we may say the parties have almost agreed upon them during the arguments. Question 3 is whether the appellants are entitled to an allowance for interest upon their debt for the money borrowed in order to erect and purchase the docks and dock property. Mr. Manisty has properly given up the appellants' claim for this allowance; and to that question we therefore answer, No. Question 4 is whether the respondents can take into account the amount which the board receive as town dues. Sir John Karslake has tried to support this contention on the respondents' behalf, but without success, and to that question we also answer, No. Question 5 raises the consideration of the mode in which a deduction ought to be made for deterioration of the appellants' works. They say, in paragraph 19, that they are entitled not only to a deduction for ordinary repairs, but also a deduction for deterioration of works. They calculate the time when the different works will require renewal, and they claim to deduct every year a sum of money which put out to interest would in the same time be sufficient to renew such works. There is some difficulty in comprehending the exact nature of this calculation; and it is not rendered more simple by the statement, in paragraph 20, that no allowance has been made for deterioration of works beyond the ordinary repairs. Our answer must be in the words of the Parochial Assessment Act, that there must be deducted from the estimated rent "the probable average annual cost of the repairs, insurance, and other expenses, if any, necessary to maintain them (the premises) in a state to command such rent." All repairs actually required for the year should be allowed, and also

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the average of that and other years, beyond those repairs required for that year only, should be applied to each year. The probable annual average of extra repairs, and the actual cost of ordinary repairs, should both be taken as necessary to command the rent. What is actually spent in the present year for repairs which must be repeated in the next should be all deducted; and the appellants should not be, therefore, debarred from the allowance of the average of such further cost as may be required in an occupation over several years. If such deductions have not been allowed, the rates should be altered to that extent. The last question relates to paragraph 20, which states the basis upon which the respondents have fixed this rate to be the revenue of the board from the docks only, and not including the town dues. It is quite right and proper that the town dues being unrateable should not be estimated in the hypothetical rent, and at the same time no deduction should be made from the dock revenue for the expenses of collecting those town dues, if not included in the general expenses of collecting. I suppose it would not be possible to separate precisely the expenses of collecting one from those incurred by the other; the collectors of both are most likely the same persons. But probably it would be with sufficient accuracy for practical purposes, and it would apparently be a fair approximation to the exact amount to divide the expenses of collecting the whole rateably according to the amounts collected from both sources of income. There may be some doubt as to whether that is what is here meant; if it be so the mode of computation is right; if not, it should be altered.

QUAIN and ARCHIBALD, JJ. concurred.

Our adv. vult.

Nov. 19.—BLACKBURN, J. delivered the further judgment of the court (Blackburn, Quain, and Archibald, JJ.).—On the argument of this case on 8th Nov. in this term the court disposed of most of the questions submitted for judgment; but we took time to consider whether under such a state of facts as is stated in the case the Mersey Dock Board are entitled to a deduction for tenants' profits, and we are of opinion that they are not. The Parochial Assessment Act (6 & 7 Will 4, c. 96), s. 1, enacts that all rates shall be made on an estimate of the net annual value of the several hereditaments rated thereunto, and that net annual value is thus defined, "that is to say, of the rent at which the same might reasonably be expected to let from year to year, free of all usual tenants' rates and taxes, and tithe commutation rentcharge, if any, and deducting the probable average annual cost of the repairs, insurance, and other expenses, if any, necessary to maintain them in a state to command such rent." Where the hereditaments, or hereditaments of a similar kind, are in practice actually let at a rent, the amount of which is ascertained by what has been called "the higgling of the market," the application of this definition is easy and simple. Where the hereditaments are not in practice let, the problem becomes more difficult. The facts and circumstances which would be taken into consideration by those who in the case of a real tenancy do in the higgling of the market fix the rent, are to be taken into consideration; and on a view of all those the net annual value of the occupation is to be determined, and in many cases the amount that is made by the trade carried on by the occupier's

occupation, less an allowance for the profits which the tenant might elsewhere make by his trade, is an important element in the evidence of the annual value. In such a case as *E. v. Southampton Docks* (14 Q. B. 587) they were properly allowed; but it is not always so. If the hereditaments are such as to afford peculiar facilities for carrying on any kind of business, that facility does beyond all question enhance the value of the occupation; but though the profits which may be reasonably expected to arise from such a business no doubt form an element in estimating the enhanced value of the occupation of the premises, the actual profits made do not form any element, except in so far as they afford evidence of what might be reasonably expected to be made from the occupation of premises affording facility for carrying on such a business. For instance, to explain our meaning, there can be no doubt that the annual rent of a shop in Cheapside is higher than the annual rent of a similar shop in a back street, and that the reason why tenants give a higher rent is because of the superior facility for carrying on business there. But the rent and the rateable value of the shop are quite independent of the amount of the shopkeeper's actual gains. The rateable value is the same whether the tenant is a flourishing trader, or is carrying on business at a loss. So no doubt in fixing the rent of chambers in one of the inns of court, the facility for carrying on the legal profession in them is an element, and an important one, but the actual income of the tenant is not. The chambers command no more rent when let to the Attorney-General than they would do if let to a young barrister just called, who does not as yet pay his expenses. In the present case the value of the occupation depends entirely upon the collection of the rates; sect. 284 of the Mersey Docks Act, 1858, requires that all the rates shall be appropriated in payment of all expenses and charges in collecting the rates, and several other purposes therein specified. If the premises were let to a tenant, it must be to a tenant subject to this Act, bound to hand over the rates received after deducting the expenses and charges of collecting the rates to those purposes; and the persons paying the dock rates would have a right to object to any part of them being applied to pay tenant's profits, except in so far as an allowance for that might be included in the expenses and charges of collecting the rates. But all the expenses and charges of collecting the rates actually incurred by the Mersey Dock Board, who are occupiers, are allowed for and deducted, and the contention for the board is that we are bound, contrary to the fact, to suppose that the premises are let to an actual tenant, who would, contrary to the provisions of the Mersey Docks Act, levy in dock rates a sum in addition to all the actual expenses of collection, for his own benefit. In dealing with a somewhat analogous argument in the case of a tithe rentcharge, Crompton, J., in delivering the judgment of the court observes (*Hackney and Lamberhurst Tithe Commutation Rentcharge*, E. B. & E. 61): "It is difficult to see in such a case why a man might not take the tenancy on the same terms, or nearly so, as the collection." In such a case as the present, where an actual demise on any terms would be impracticable, and where a demise on the terms that the tenant should receive a profit beyond the expenses of collection, would if

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practicable be illegal, we think no deduction should be made on account of tenant's profits.

Attorneys for appellants, *Venn and Son*, for *A. T. Squarey*, Liverpool.

Attorney for respondent, *J. B. Batten*.

Wednesday, Nov. 12, 1873.

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Public Health Act (11 & 12 Vict. c. 63), s. 69—Local Government Act 1858 (21 & 22 Vict. c. 98), s. 63—Apportionment, how far conclusive—Failure to give requisite notices of intention to dispute—Highway or no highway.

Where the expenses incurred by a local board in sewerage, levelling, &c., a street have been apportioned under sect. 69 of the 11 & 12 Vict. c. 63, amongst the owners or occupiers of the premises fronting, adjoining, &c., an owner who has not given a written notice of his intention to dispute the same within three months, as required by sect. 63 of 21 & 22 Vict. c. 98, may, notwithstanding this, dispute his liability to pay, on the ground that the street is a highway.

Sect. 63 of 21 & 22 Vict. c. 98 makes the apportionment after three months binding and conclusive only as to the various amounts settled by it, but not on the question of highway or no highway.

CASE stated by justices under 20 & 21 Vict. c. 43.

At a petty sessions holden at Atherton in and for the division of Warrington, in the county of Lancaster, on the 23rd Sept. 1872, an information and complaint preferred by the said local board of Atherton against the said Jonathan Hesketh under sect. 69 of 11 & 12 Vict. c. 63., charging him with unlawfully neglecting to pay the sum of 85l. 16s. 7d., expenses of sewerage, levelling, paving, and channelling part of a certain street, called Park-street, situate at Atherton aforesaid, was heard and determined by us, the undersigned, three of Her Majesty's justices of the peace in and for the said county, and the appellant was ordered to pay such expenses and 1l. 17s. 6d. costs thereupon. The appellant being dissatisfied with our decision as being erroneous in point of law demanded a case. At the hearing of the said information the following facts were admitted:

In the year 1864 the provisions of the Local Government Acts were duly adopted and put in force within the district of the said respondents.

The appellant is the owner of certain leasehold property fronting, adjoining, or abutting upon a certain street called Park-street, within the district of the respondents, and was called on to pave, &c., part of the street abutting on his property, which he failed to do, and the board did the work, and delivered an account for the same, amounting to 85l. 16s. 7d.

The only evidence called by the respondents was that of the surveyor to the board, who proved that he was surveyor to the board, that he served a notice dated 13th May 1871 personally on the appellant on the 16th May 1871, that the signature to it was that of George Dickinson, the then clerk to the local board; that the appellant did not comply with the notice; that the paving, sewerage, levelling, and channelling of Park-street was duly performed by the respondents; that he (witness) had apportioned the cost payable by the appellant

for and in respect of the execution of the works aforesaid; that the account which was set out in the case was served upon the appellant personally on the 7th March 1872; that he then, and on one other occasion afterwards, personally demanded payment; that the apportionment had never been disputed; that the amount of the action was still unpaid; and that plans, sections, and specifications of the work required by the notice dated 13th May 1871 were lying for inspection at his office as stated in that notice. A witness, George Dickinson, was called into the witness box by the respondents, but he was not examined by either side, and gave no evidence, and no further evidence was tendered by the respondents.

For the appellant it was contended:

That the proof of the notice to pave, sewer, and channel the said street served upon appellant was insufficient, inasmuch as no sufficient proof had been given before the court that George Dickinson, whose signature is subscribed thereto, was the clerk to the respondents at that time, or that he signed the same notice, and that the notice was insufficiently authenticated.

That sufficient proof had not been given that the 16th section of the Local Government Act (1858) Amendment Act 1861, which required plans and sections of the paving, sewerage, levelling, and channelling to be made and to be deposited at the office of the respondents, of the works intended to be executed under that section, and sect. 69 of the Public Health Act 1848 had been complied with, and that unless the plans and sections referred to in the said notice served upon the appellant were proved to have been duly made in accordance with the said 16th section and deposited at the surveyor's office, the justices could not make any order upon the appellant.

That the notice requiring the appellant to pave, sewer, level, and channel the said street, was not a proper or sufficient notice such as by sect. 17 of the Local Government Act (1858) Amendment Act 1861, and schedule A to that Act was required to be given, inasmuch as the notice did not contain those details, information, and particulars as to the nature of the works to be executed by sect. 17 and in schedule A should be and are set out.

That it was incumbent upon the respondents and necessary for the support of their case that it should be shown that Park-street was not a highway repairable by the inhabitants at large, and that in default of such proof no order could be made on the appellant.

That some formal notice of the apportionment made by the surveyor ought to have been served upon the appellant after the apportionment had been made, that such notice should have distinctly set forth its nature so as to indicate to the appellant that he had a right to dispute the justice of the apportionment, and further that such notice should have been signed by the surveyor, or the clerk to the respondents, and that the account served on the appellant on the 7th March 1872, not purporting to be a notice of apportionment, and not containing any such indication, and not being authenticated by any such signature, was insufficient and bad.

The appellant then tendered evidence for the purpose of proving that this was a highway repairable by the inhabitants at large.

The respondents objected that three months

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having elapsed since the making of the apportionment and service of notice thereof, the appellant not having given written notice to dispute the same, was precluded under sect. 63 of the Local Government Act 1858, from giving this or any evidence going to show his non-liability.

The appellant contended that the effect of the 63rd section was simply to preclude him from contesting the justice or fairness of the apportionment as a matter of calculation (supposing the notice of apportionment to be good) and did not debar him from giving evidence going to the root of his liability; that he was still at liberty to show that nothing at all was due, inasmuch as he never had been liable to repair the street, and that under the Local Government Act 1858, and the Public Health Act 1848, he was entitled to give the evidence tendered.

We being of opinion: First, that the notice served upon the appellant to pave, sewer, level, and channel was sufficiently proved; secondly, that the making and depositing plans and sections for the paving, sewerage, levelling, and channelling of the said street, was also sufficiently proved; thirdly, that the notice served upon the appellant to pave, sewer, level, and channel, was a proper and sufficient notice, and sufficiently showed the nature of the works to be executed; fourthly, that it was not necessary that the respondents should show that Park-street was not a highway repairable by the inhabitants at large; fifthly, that the account served on the 6th March 1872, upon the appellant, coupled with the surveyor's verbal demand, was a proper and sufficient notice of apportionment, and was sufficiently authenticated; sixthly, that evidence on the part of the appellant was not admissible to show that Park-street was a highway repairable by the inhabitants at large, as he had not by written notice disputed the apportionment within three months from the time when notice thereof was given to him by the respondents, gave our determination against the appellant in the manner above stated.

The questions of law for the opinion of the court on the above statement are: First, whether there was sufficient proof (if any such were necessary), that the said George Dickinson was clerk to the respondents at the time of his signing the notice (13th May 1871), and of his signature to such notice, and whether the notice was sufficiently authenticated; secondly, whether the making and depositing of the plans and sections was sufficiently proved by the respondents; thirdly, whether the notice served upon the appellants to pave, sewer, level, and channel was a sufficient notice; fourthly, whether under the circumstances of the case, it was necessary for the respondents to show that Park-street was not a highway repairable by the inhabitants at large; fifthly, whether the account served upon appellant on the 7th March 1872, coupled with the surveyor's personal verbal demand, was a sufficient notice of apportionment, and was sufficiently authenticated; sixthly, whether the evidence tendered by the appellant was properly rejected.

If the court should be of opinion that the said order was legally and properly made, and that the appellant was liable as aforesaid, then the said order was to stand, but if the court should be of opinion otherwise, then the said information was to be dismissed.

B. J. Williams, for the appellant, contended

that the appellant, notwithstanding his failure to give notice of his intention to dispute the apportionment within the time limited by sect. 63 of the Local Government Act 1858 (21 & 22 Vict. c. 98), was still entitled to show that he was not liable to pay anything on the ground that the street repaired was a highway. Sect. 63 makes only the apportionment binding; it does not render the award conclusive on all other grounds. It provides that where the local board shall have incurred expenses "for the repayment whereof the owner of the premises for or in respect of which the same were incurred is made liable by the Public Health Act 1848, or any Act incorporated therewith, or by this Act, and such expenses," i.e., those only for which the owner is liable under the Acts mentioned, "have been settled and apportioned by the surveyors as payable by such owner, such apportionment shall be binding and conclusive upon such owner, unless within the expiration of three months from the time of the notice being given by the local board or their surveyor of the amount of the proportion so settled by the said surveyors to be due from such owner, he shall by written notice dispute the same." Though the appellant cannot dispute the accuracy of the apportionment, there is nothing in this section to prevent him from showing that the expenses are such as he was not in any way liable to, on the ground that the alleged highway was not a highway. The award can only bind the appellant as to those matters within the jurisdiction of the arbitrator, and it was not within his jurisdiction to determine the question, highway or no highway. The proportion to be paid by those owners liable to pay is all that he had power to decide. In *Bayley v. Wilkinson* (16 C. B., N. S., 161) it was held that the power of the arbitrator under sect. 123 of the Public Health Act 1848 (11 & 12 Vict. c. 63), was limited to an inquiry into the apportionment of the expenses amongst the several owners of property liable to contribute; and that he was not entitled to inquire whether the gross amount of the expenditure was reasonable or necessary. Erle, C.J. said (p. 189), "I take the word apportionment to be a word of a recognised meaning in the law, as under the Tithe Commutation Act (6 & 7 Will. 4, c. 71). I also look to the provisions in the Local Government Act 1858 (21 & 22 Vict. c. 98, s. 64), which speaks of proceedings before justices where the amount in dispute is less than 20*l.*, whereby the justices are at liberty to require a report of a competent surveyor. At the first reading that appeared to me to authorise an inquiry as to whether the expenses had been properly incurred by the local board; but upon further looking at it I am of opinion that it only applies to the arbitration given by the former statute, and is to be confined within the same limits. . . . Upon the whole the best opinion I can form is that the outlay actually made is to be settled finally by the local board, and to be apportioned amongst the several owners or occupiers by the surveyor, or, in case of dispute, by an arbitrator whose jurisdiction is confined to the question of apportionment, and who has no authority to inquire into the reasonableness of the amount which has been expended upon the works." So Byles, J. (p. 196), "The arbitrator clearly had no jurisdiction except as to the proportions. In going into the question of the general amount, he was acting without jurisdiction; and the excess of

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jurisdiction appears upon the face of his award." And Keating, J. (p. 197), "The reasonableness of the expenditure must be decided by somebody; and it is certainly much more reasonable that it should be determined by the board than by the arbitrator. That being so, it follows that the only matter over which the arbitration could have any jurisdiction is the proportion to be paid by each owner. That is the limit of his jurisdiction." In *Cook v. The Ipswich Local Board of Health* (24 L. T. Rep. N. S. 579; L. Rep. 6 Q. B. 451), speaking of the power of justices acting as arbitrators under sect. 64 of the Local Government Act 1858, to go into the question, whether the amount charged by the local board as having been expended generally was, in point of fact, expended, Cockburn, C. J., said, "In my opinion to have gone into that question would have been to have gone beyond the limits of their jurisdiction. By the second Act, 21 & 22 Vict. c. 98, the two justices are placed in the position of arbitrators. It is quite clear that *quid* arbitrators they could not have gone into any such question; their jurisdiction is limited to inquiring whether, the expenses amounting to a given sum, the amount charged to a particular owner is his fair and just proportion." The arbitrators are equally without jurisdiction to determine the question—highway or no highway; such question could not be raised before them, nor indeed until payment was sought to be enforced. It was a condition precedent to the existence of jurisdiction on the part of the arbitrators that the road should not be a highway. In *Jarrow Local Board of Health v. Kennedy* (L. Rep. 6 Q. B. 128) where it was proved that the work had been done and an apportionment of the expenses made, and notice of it served upon the respondent who had not given notice within three months that he disputed it, but no evidence was given of any notice having been served under 11 & 12 Vict. c. 63, s. 69, previous to the appellant doing the work, it was held by this court that the justices could not make an order unless the preliminary notice was proved to have been given.

Herschell, Q.C., for the respondent, contended that the failure by the appellant to give the requisite notice within the prescribed time precluded him from now denying that the road was not a highway. He relied on a dictum of Mellor, J., in the case of *Jarrow Local Board of Health v. Kennedy*, as reported in 19 W. R. 276: "I think that the preliminary notice is a condition precedent, and without it the board had no authority to do these works at all. Had he, however, received this notice, and had he not (as in this case he had not) disputed the demand within the three months allowed, he would not have been able to set up the question of highway or no highway."

BLACKBURN, J.—When we look at the statute this case becomes very clear. The original Act of 1848 (11 & 12 Vict. c. 63) provides, in sect. 69, "that in case any present or future street, or any part thereof (not being a highway)"—the word highway being defined by a subsequent statute to mean a highway repairable by the inhabitants at large—"be not sewered, levelled, paved, flagged, and channelled, to the satisfaction of the local board of health, such board may by notice in writing to the respective owners or occupiers of the premises fronting, adjoining, or abutting upon such parts thereof as may require to be sewered,

levelled, &c., require them to sewer, level, &c., the same within a time to be specified in such notice; and if such notice be not complied with, the said local board may, if they shall think fit, execute the works mentioned or referred to therein, and the expenses incurred by them in so doing shall be paid by the owners in default, according to the frontage of their respective premises, and in such proportion as shall be settled by the surveyor, or, in case of dispute, as shall be settled by arbitration (having regard to all the circumstances of the case), in the manner provided by this Act; and such expenses may be recovered from the last-mentioned owners in a summary manner, &c." Under this section there are two things to be done: First, proper notice in writing must be given to the owners of premises, who are to bear the burthen, requiring them to do the work; secondly, on their failing to do so, the board may execute the work, and the expenses "in such proportion as shall be settled by the surveyor, or, in case of dispute, as shall be settled by arbitration," are to be recoverable from the owners. Then a subsequent Act of 21 & 22 Vict. c. 98, sect. 63, enacts that "notwithstanding anything in the Public Health Act contained, in all cases where by such Act the local board shall have incurred expenses, for the repayment whereof the owner of the premises for or in respect of which the same was incurred is made liable by the Public Health Act 1848, or any Act incorporated therewith, or by this Act, and such expenses have been settled and apportioned by the surveyors as payable by such owner, such apportionment shall be binding and conclusive upon such owner unless, within the expiration of three months from the time of notice being given by the local board or their surveyor of the amount of the proportion so settled by the said surveyor to be due from such owner, he shall by written notice dispute the same." This enactment provides that the apportionment shall not be disputed after the lapse of three months, and there is an obvious reason for this. The total amount of money required is by the apportionment settled proportionately amongst the various owners; and if, after three months, anyone was allowed to dispute the correctness of his proportion, the whole settlement would thereby be disturbed. It is, therefore, highly expedient that the matter should be finally settled within the short time limited, and disputed within that time if at all. But this does not apply to the question whether the expenses ought to be charged at all on the owners of the adjoining premises, that depending upon the question whether the street repaired is a highway or not. The owners cannot raise that question before the surveyor or arbitrator who makes the apportionment, but must wait until they are called upon to pay. When that time comes, if they can prove that the street is an ancient highway repairable by the parish, in which case, the owners of private property adjoining, are not liable to pay for sewerage, paving, &c., it would be most unjust that they should be precluded from doing so because three months had been allowed to elapse without giving notice of objection to the apportionment of the expenses as being ill proportioned. The Legislature has provided only that "such apportionment shall be binding and conclusive" upon the owners where they do not give the notice, words strictly confined to the apportionment,

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and not in any way applicable to the original liability. I think, therefore, that the justices have made a mistake in holding that it was not open to the parties to show that this street was an ancient highway, and, therefore, that they were not liable to pay. Our judgment must be for the appellant.

QUAIN, J.—I am quite of the same opinion. It is clear from sect. 63 of the Act of 1858 that all that is made binding and conclusive upon the owners liable is the apportionment made by the surveyor or arbitrator. If notice had been given, and the parties had gone before the arbitrator, it is quite clear that this question of highway or no highway could not have been raised before him. That being so, at what time is the question to be raised? If the street is a highway, the local authorities have no jurisdiction. It must be proved that it is a highway, and I do not see how that question could be raised at an earlier stage. So far back as 1856, in the case of the *Local Board of Kingston-upon-Hull v. Jones* (1 H. & N. 483), the question of highway or no highway was raised in an action of debt to recover a sum of 118*l.* 4*s.* 10*d.*, being the amount of an improvement rate assessed on the defendants, as owner and occupier of certain land adjoining and abutting on a street paved, &c., by the Local Board of Health of Kingston-upon-Hull. Notwithstanding the assessment, it was decided that the rate could not be enforced against the defendant, because the street did not come within the meaning of the Act of Parliament. If the question could be raised by action of debt I do not see why it cannot be raised in the manner in which it comes in the case before us. I am of opinion that the justices had jurisdiction to entertain the question of highway or no highway, and that they should have entertained it and gone into evidence upon it.

ARCHIBALD, J.—I am of the same opinion. The construction contended for on behalf of the respondents would be manifestly hard and unfair to persons in the position of the appellant, and therefore clear words are required in the statute to warrant such a construction. There is no opportunity whatever of effectively raising the question of liability until some claim is made to enforce the rate, and I think it would be very hard to construe the Act so as to prevent its being then raised. When we look at the language of the enactment, I think we must see that it is only the apportionment that is made conclusive, and I think it quite fair that the award should be conclusive to that extent; but it would be very unfair to hold it to be conclusive on the question of liability. I think that is a conclusion to which we cannot come, when we look at the words of the Act, that where the "expenses have been settled and apportioned by the surveyors as payable by the owner" such apportionment shall be binding and conclusive upon such owner, unless, within the expiration of three months from the time of the notice being given by the local board, or their surveyor, of the amount of the proportion so settled by the said surveyor to be due from such owner, he shall, by written notice, dispute the same." I think the award is binding only to the extent of the proportion settled for each owner, and that the question of liability is still open. The justices should have entertained that question, and heard evidence upon the subject.

Judgment for the appellant.

Attorneys: *Golding; Chester and Co.*

COURT OF COMMON PLEAS.

Reported by H. F. POOLEY and JOHN ROSE, Esqrs.,
Barristers-at-Law.

Monday, Nov. 17, 1873.

DICKINSON v. FLETCHER.

Regulations in mines—Owner of mine not responsible for negligence of servants—Penal enactments.

The 23 & 24 Vict. c. 151, s. 10, and rule 3, provides that whenever safety lamps are required to be used in collieries or coal mines they shall be first examined and securely locked by a person or persons duly authorised for that purpose. The 22nd section provides that for neglect of the rules and general regulations the owner or agent shall be liable to a penalty of 20*l.*

Held, that the owner of a coal mine is not liable to a penalty for the negligence of his servant in omitting to lock the lamps under the above sections. When the words of a statute are equally applicable to penal or to civil consequences, the court will construe the statute in favour of the latter.

CASE stated by justices under 21 & 22 Vict. c. 43.

The case stated that the respondent, who was the owner of a colliery in Staffordshire, had been summoned before the justices for neglecting the provisions of the 23 & 24 Vict. c. 151, s. 10, subsect. 3, by the inspector appointed to view and examine the respondent's colliery. The 10th section provides that certain rules are to be observed in every colliery by the owner and agent thereof, and the 3rd sub-section directs that whenever safety lamps are required to be used they shall be first examined and securely locked by a person or persons duly authorised for that purpose.

The owner had, in accordance with the rules, appointed a person to attend to the lamps, but he neglected to do so, and a lamp was found by the inspector unlocked.

Upon the hearing the magistrates dismissed the summons, but granted a case for the opinion of the Court of Common Pleas as to whether the owner was personally liable for the neglect of his servant.

The *Solicitor-General* (H. James, Q.C.) and *Charles Bowen* for the appellant.—The question depends upon the wording of the 10th section, and upon the construction the court may put on the 22nd section. By sect. 22 if any coal mine be worked, and through the default of the owner or agent thereof, special rules have not been established for the same, according to the provisions of the Act, or the general rules; or the special rules have not been hung up or affixed or have not after obliteration or destruction been renewed, as required by this Act, or any of such general rules or special rules, the provisions of which ought to be observed by the owner and principal agent or viewer of such coal mine, be neglected or wilfully violated by such owner, principal agent or viewer, such person shall be liable to a penalty not exceeding 20*l.* There is nothing in the statute by which the person whose duty it is to examine the lamps can be punished for neglect of duty, and although I do not contend that it is a personal duty of the owner to see that the lamps are lit, yet if the person employed to attend to it neglects his duty, the owner or agent is liable. In the case *Reg. v. Stephens* (L. Rep. 1 Q. B. 702: 14 L. T.

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Rep. N.S. 593) it was held that the owner of works carried on for his profit by his agents was liable to be indicted for a public nuisance caused by the acts of his workmen in carrying on the works, though done by them without his knowledge and contrary to his consent.

Manisty, Q.C., for the respondent.—This is a penal statute, and must be construed strictly, and the words "through the default of the owner," in the 22nd section, must be read as having effect through the whole section. I submit there must be some personal and wilful neglect on the part of the owner or his agent, to make him liable. He referred to

Reg. v Handley, 9 L. T. Rep. N. S. 827.

KEATING, J.—This is a very important question raised under the 23 & 24 Vict. c. 151, an Act passed to secure the safety of the mining population. The 10th section provides that the following rules shall be observed by the owner and agent of every colliery or coal and ironstone mine; and rule 3, of the general rules, says: "Whenever safety lamps are required to be used they shall be first examined and securely locked by a person or persons to be appointed for that purpose. This section provides that the rules shall be observed by the owner or agent of the colliery, and the present respondent is in that position." The 22nd section provides that, if any coal mine or ironstone mine be worked, and through the default of the owner or agent thereof, special rules have not been established for the same, according to the provisions of this Act, and have not been hung up or affixed, or have not, after obliteration or destruction, been renewed or restored as required by this Act, or any of such general rules or special rules, the provisions of which ought to be observed by the owner or principal agent, or viewer of such coal or ironstone mine, be neglected or wilfully violated by any such owner, agent, or viewer, such person shall be subject to a penalty not exceeding 20*l*. It was contended by the Solicitor-General that if the lamp was not looked in pursuance of the general rules, the owner was liable on the mere fact being proved—that the Legislature, by way of securing the safety of persons who work in mines, have gone the length of saying that the owner should be liable. In my opinion the statute cannot be pushed so far. Although the 10th section has provided that the rules are to be observed, yet the penalty is to be found in the 22nd section, and that penalty is to be paid by the owner or agent. If this be so in this case, the magistrates were right in not convicting. The construction the Solicitor-General contends for would be right if the Legislature had thought fit to enact it; but it would be in contravention of the rule, that no penal consequences should arise without the neglect of the party occasioning them. The courts have held that penalties may be incurred without the *mens rea*; and in *Morden v. Porter* (1 L. T. Rep. N. S. 43; 7 C. B., N. S., 641), where Porter committed a trespass by going on certain land in pursuit of game, under the mistaken impression that he was there by the leave of the owner of the soil, it was held that the party trespassing is not the less guilty because he *bonâ fide* believed he had the license of the occupier to shoot over the land, and that the trespass in pursuit of game is in the nature of a civil act. But in *Nicholls v. Hall* (28 L. T. Rep. N. S. 173), which

was a case under the Contagious Diseases (Animals) Act 1869 (32 & 33 Vict. c. 70), this court decided that before a person can be convicted before a magistrate for a breach of the above enactment, it is necessary to prove that the accused was aware that the animal was suffering from a contagious disorder. The words of the statute as commented on by Mr. Manisty, are what I found my judgment on; and subsequent legislation fortifies the view I take, for in the Mines Regulation Act 1872 (35 & 36 Vict. c. 76) it is provided that in every working approaching any place where there is likely to be an accumulation of explosive gas, no lamp or light other than a locked safety lamp shall be allowed to be used, and whenever safety lamps are required by the Act to be used, a competent person, who is appointed for the purpose, shall examine every safety lamp immediately before it is taken into the working for use and ascertain it to be secure and securely locked, and in any part of a mine in which safety lamps are so required to be used, they shall not be used until they have been so examined and found secured, and securely locked. This enactment strengthens me in the view I take; and I think these parties cannot be convicted, and that the magistrates were right.

BRETT, J.—I must confess I was not free from doubt during the argument of this case. The question is, whether the magistrates were bound to impose on the owner or agent of the mine, or on both, a penalty. To impose a penalty is to say at once that we are to put in force a penal enactment. The facts to be taken notice of are these: A lamp was delivered out without being locked, and there was, therefore, wilful neglect on the part of the person whose duty it was to give the lamps out. Neither the owner nor the agent being present, it is said they are not guilty of any negligence. The question is, are they liable for the neglect of those persons who are supposed to be competent? Does the case come within the 10th section or the 22nd? The 10th section lays down what are the rules to be observed in every colliery or coal mine and ironstone mine by the owner; then follow the rules, and rule three is thus stated: "Whenever safety lamps are required to be used they shall be first examined and securely locked by a person or persons authorised for this purpose." My present impression, if the case rested there, would be that non-observance makes a default, and if lamps are delivered up unlocked and unexamined, the owner would be liable for a breach, although absent, that is, he would be liable for a civil remedy for a breach of the rules. We are, however, called upon to construe the penal enactment, and if the words are equally applicable to penal as to civil consequences, the appellant must show a preponderance to the penal, which he has failed to do. Then, if we turn to the 22nd section, it does not say if the rules be not observed the penalty shall attach; it says, "if any rules which ought to be observed by the owner or agent be neglected, or wilfully violated by any such owner or agent, he shall be liable to a penalty not exceeding 20*l*." If, now, we introduce the words in the introductory part of the section, "through the default of," we obtain the following. If through the default of the owner or agent, any rules which ought to be observed by the owner or agent be neglected or wilfully violated, he shall be liable

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to a penalty. The construction seems more against the imposition of a penalty than in its favour, and whatever may be my impression on reading that section alone, I think we are bound to look at the subsequent statute (35 & 36 Vict. c. 76), and where in a subsequent statute we find a clearer interpretation without the imposition of a penalty, I think we are bound to say that the Legislature did not intend to impose a penalty. I think, therefore, the magistrates were right, although I regret that in our so holding such full protection is not given to the miner as otherwise would be.

DENMAN, J.—I think we ought to decide this case on general principles, that unless it is distinctly stated a party is to be liable, he is not to be considered liable; and although the word "wilful" is not used in the 10th section, it must be imported into every section where the neglect is mentioned. I cannot help thinking that the answer to the argument is that an action will lie against the owner, and that is not at all inconsistent. The owner cannot be aware of all that is being done in the mine, and it would be impossible for him to be present when all the lamps are examined, and to say that under the word "neglect" he is to be made liable to a penalty because some one in his employ commits an act of negligence, would be going a great length.

Judgment for the respondent.

Attorney for the appellant: *Solicitor to the Treasury.*

Attorneys for the respondent: *Thorpe and Co.*

HOUSE OF LORDS.

Reported by DOUGLAS KINGSFORD, Esq., Barrister-at-Law.

Monday, June 16, 1873.

(Present: The LORD CHANCELLOR (Lord Selborne), LORD CHELMSFORD, and LORD COLONSAY.)

DUDMAN v. VIGAR.

Tithes—Modus—Conversion into tillage—Orchard. Before the *Tithe Commutation Act 1836*, an award was made under certain *Inclosure Acts*, by which the tithes of the land, in which the respondent was a landowner and the appellant the rector, were commuted. By this award a yearly modus payable for hay and agistment tithe payments, and also larger sums to be paid yearly for the same lands, when occupied by non-residents or converted into tillage, were fixed by the commissioner.

A house had since been built upon a portion of a field of the respondent mentioned in the award, and a further portion to the extent of twenty-two perches was converted into garden ground, and the remainder of the field made into an orchard. The appellant put in a distress for the larger sum fixed by the award to be paid for this field, on the ground that part of it had been converted into "tillage."

Held (affirming the judgment of the Court of Exchequer Chamber) that, as to the orchard, there had been no conversion into tillage.

This was an appeal from a judgment of the Court of Exchequer Chamber, affirming a judgment of the Court of Common Pleas.

The facts are stated shortly in the head-note and fully in the reports in the court below (24 L. T. Rep. N. S. 734; 26 Id. 76; L. Rep. 6 C. P. 470; 7 Id. 72.)

Philbrick and Edwin Jones for the appellant.

Manisty, Q.C. and *Charles*, for the respondent, were not called on.

The LORD CHANCELLOR (Lord Selborne).—My Lords, the first observation which I will make in addressing your lordships is that, so far as relates to the garden land, as distinct from the orchard land, the parties appear to me to have so presented their case as not to call for any expression of opinion from your lordships upon that subject, because the matter stands thus: whether for the sake of peace and to avoid question, or as conceding the point of principle, the defendant in error, before any distraint was made, actually tendered what is admitted to have been the full amount which would have been payable by him, supposing that the garden ground should be held to have been converted into tillage, and supposing that the conversion of the garden ground into tillage would not extend to the whole of the rest of the land which was not used as garden ground. And in his pleadings I think, in both the courts below, at all events in the points for the defendant in error in the Exchequer Chamber, he appears to me to have adhered to the position which he had taken up by that tender, and not to have proposed to argue any question with respect to the garden ground, excepting this, that the conversion of 22 perches of land out of the allotment into garden ground does not render him liable to the increased rent upon the whole allotment, as if the whole allotment had been converted into tillage. My Lords, it might have been open to argument, though no such argument was presented to your Lordships, that by the terms of the award the conversion of any part into tillage would make the whole liable. The Commissioner says: "I have inserted in the schedule, opposite to such lands, the tithe-money payment to be hereinafter payable thereout respectively, in the event of and during the time when the same lands, or any part thereof, may be occupied by any person or persons not residing within the parish of Pitney Lortie, or shall be converted into tillage." The counsel, I think, have exercised a very proper discretion in not arguing it, for I have a very clear opinion that the meaning of these words is not that the conversion of any part of these lands into tillage shall make the whole liable, but only that it shall make liable the part so converted. But it was apprehended that these words might be the subject of argument, and accordingly, not desiring to take the judgment of the court upon that point, the defendant in error fortified himself by a tender before distraint. The defendant in error limited his argument to this, that assuming the garden land to be converted into tillage, the conversion of that part of the land did not make the orchard land liable. The only question for the opinion of the court is, "whether under the above-mentioned circumstances the plaintiff is entitled to recover against the defendant damages in respect of the said distraint," which he would be entitled to if the distraint was unlawful. The distraint would be unlawful, even if the garden land alone was converted into tillage, because he had made a sufficient tender in that respect. I have said so much that it may be fully understood that, in my view of the case, no opinion whatever is intended to be pronounced by this House one way or the other as to the garden ground. Then the question being limited to the orchard, I confess it appears to me not to be reasonably arguable

that the planting of orchard trees in a field previously occupied for pasture and laid down as grass land, and the continuance of the field in that state with fruit-producing trees so planted upon it, is a conversion of that land into tillage, and in truth it has been only faintly, if at all, argued that it is so. The main stress of the argument was really laid upon an attempt, which I think quite untenable, to read this award, not as saying that the modus is to be paid in all circumstances unless the land be occupied by a non-resident or converted into tillage, but to read it as saying that the modus is to be paid only as long as the land is in that state of cultivation in which, if the Act had not been passed, hay and agistment tithe, and no other tithe, would have been payable, and whenever the state of cultivation is altered to that, if the Act had not been passed, some other than the hay and agistment tithe, whether great or small tithe, would have been payable; then it is to be treated for the purpose of future payments as if it were occupied by a non-resident or converted into tillage. My Lords, I am clearly of opinion that that is not a feasible construction of the Act. The Act settles, or at least was meant to settle by the award, the future payments once for all between the parties; and, except for the purpose of illustration in argument, we have really nothing whatever to do with the law as it would have stood if the tithe had not been commuted. It was meant to commute the whole tithe once for all. Then what does the award say? The award recites the Act, which was very properly conceived in such terms as would apply either to a general modus in lieu of all tithe, or to a particular and limited modus in lieu of some particular description of tithe. After reciting the Act, the award proceeds to say that the schedule is appended for the purpose of ascertaining in future "what estates, lands, and grounds were so claimed to be exempt from the payment of such tithes." Now, no particular description of tithes had been previously mentioned. The words, "such tithes," therefore are unlimited by the antecedent context as to the generality of their meaning. But it does not stop there. The award says that the object of the schedule is to show what the lands are, and to show "the amount of the moduses or customary payments payable thereout in lieu of such tithes." If we had had nothing more, and if we had had a schedule headed as this is, there might have been more room perhaps than there is at present for the argument which has been advanced, but it goes on to say distinctly, "as such claims respectively extended only to the said lands when occupied by the owners thereof, or by persons residing within the said parish of Pitney Lortie aforesaid," (a very special and peculiar kind of modus, one as to which it is just possible that before the passing of this Act some doubt may have existed as to its lawfulness, but of course none can be raised now), and then it proceeds, "and such lands were subject to the payment of tithes in kind to the rector of the parish of Pitney Lortie when occupied by any person or persons not residing within the said parish of Pitney Lortie, or shall be converted into tillage." The award speaks of a modus in terms which do not show any limitation; but then it goes on to show that there is a limitation and to say what that limitation is. It is a limitation as to the residence of the person and also a limitation to this effect, that when the lands shall be con-

verted into tillage, then the modus is to apply; and accordingly the maker of the award inserts it in the schedule with the remark I have already quoted. In the heading of the schedule too there are words which seem to express their meaning "showing the yearly modus payable for hay and assessment tithe payments"; but it does not say in that part of it anything about residence or non-residence. It is clearly not full; it is a short form of description; and then it goes on, "also the sums to be paid yearly for the same lands when occupied by non-residents or converted into tillage." The argument is that the words "converted into tillage" do not mean what they state, but that they mean something entirely different, viz., that they mean converted into any other kind of use in respect of which other tithes would be payable. Then we have the columns of the schedule, which, after all, are the operative parts of the schedule. They mention the particular lands, and two distinct columns are headed "Yearly rents to be paid to the rector of Pitney Lortie when the modus-land shall be occupied by non-residents," and "Yearly rent to be paid to the rector of Pitney Lortie when the modus-land shall be converted into tillage." Now the object of this was to ascertain what was to be paid; and it is ascertained, as clearly and plainly as words can express it, what payment is to be made in either of these two cases, "when the modus-land shall be occupied by non-residents," and "when the modus-land shall be converted into tillage." Under these circumstances, my lords, I think that the judgment of the court below was plainly right, and that this appeal ought to be dismissed.

Lord CHELMSFORD concurred.

Lord COLONSAY.—My Lords, I entirely agree. I think that what we have to do is just to construe this award, and there are no statements before us to show that what is used as an orchard is used in any other than the ordinary way in which orchards are used. Orchards are sometimes used by stirring all the soil below the trees for tillage, but we have no such special matter alleged in this case. We must, therefore, take the use of the orchard to be the ordinary one. I think that the maker of the award must have been at some pains to find an appropriate expression when he used the word "tillage," if it is to have the meaning contended for by the appellant.

Judgment affirmed.

Attorneys for the appellant, *Lowless, Nelson, and Jones.*

Attorneys for the respondent, *Vizard, Crowder, and Anstie.*

ROLLS COURT.

Reported by G. WELBY KING and H. GODEFROI, Esqrs.,
Barristers-at-Law.

Friday, Nov. 21, 1873.

ST. JOHN'S COLLEGE, CAMBRIDGE v. EARL OF EFFINGHAM.

Charity—Trust to living—Springing use—Failure to present—Old decree—Common recovery.

In 1723 five advowsons were settled by deed, giving them to certain persons successively in tail male, upon the "express condition or limitation" that upon a vacancy the person entitled to present

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should nominate and present a Fellow of St. John's, and on failure so to nominate and present, that the advowsons and right of presentation should be to the use, benefit, and behoof of the Master and Senior Fellows of the College. In 1754 Lord Hardwicke made a decree by which, treating the settlement as a "trust or benefaction," he held that the presentation of a certain class of Fellows called Platt Fellows, instead of Incorporated Fellows, or Fellows on the ancient foundation, was void. In 1802 the then patron suffered a recovery. Fellows of St. John's continued to be presented till 1871 to one of the livings, but then Lord E., the then patron, failed to present, and the bishop presented by reason of lapse;

Held, that the settlement created a charitable trust; That the recovery could not operate so as to destroy the conditions upon which presentations were to be made, but simply as a change of trustees; That Lord Hardwicke's decree was binding on the court;

That upon failure of Lord E. to present, the college could say that they had lost the right to present one of their fellows, and that the gift over took effect so as to vest the living in the college.

By a deed of settlement dated 23rd Nov. 1723, the Hon. and Rev. Richard Hill settled and conveyed five advowsons or rights of presentation in and to the churches of Ditchingham, Lopham, Fornocott, Starston, and Aldborough to Sir Rowland Hill, Samuel Hill, Thomas Hill, and Rowland Hill, and their respective issue male in manner therein mentioned, and declared that the same were so settled and conveyed to these persons and their respective issue male upon this express condition and limitation, that is to say: That the said Sir Rowland Hill, Samuel Hill, Thomas Hill, and Rowland Hill, and such other person or persons that should or might at any time thereafter be seized of or entitled to the said advowsons or right of presentation by or under the deed now in statement, or by or under any clause or limitation therein contained (other than and except the said Richard Hill, the settlor), and the said Richard Hill did thereby signify and declare that it was his will and pleasure that the said Sir Rowland Hill, Samuel Hill, Thomas Hill, and Rowland Hill, and such other person or persons as should or might be entitled as aforesaid (except the said Richard Hill) should from time to time and all times, as the said churches or any of them should become vacant, nominate and present such person or persons only who should at the time of such presentation and nomination actually be a Fellow or Fellows of St. John's College, in Cambridge, and that no person or persons whatsoever should at any time thereafter be nominated or presented to the said churches or any or either of them, other than a Fellow or Fellows of the said college; and on failure of the said Sir Rowland Hill, Samuel Hill, Thomas Hill, and Rowland Hill, and such other person or persons who should be so entitled to the said advowsons, to present and nominate as aforesaid (other than the said Richard Hill), and from and after such failure as aforesaid the said advowsons or right of presentation of and unto such church wherein such failure should happen to be, should from thenceforth be and remain to the use, benefit, and behoof of the Master and Senior Fellows of the said college of St. John in Cambridge, and their successors for ever.

The settlor died some time afterwards, having

by his will, dated 1726, devised the same five advowsons to Sir Rowland Hill, in trust for the use and benefit of St. John's College, as was by the deed of 1723 more at large declared.

One Edmund Bentham, a "Platt" Fellow (that is, a Fellow of the foundation under the will of William Platt) having been presented to the living of Aldborough by Sir Rowland Hill, a bill was filed by the Master of the college and the Incorporated Fellows (that is, the Fellows of the old foundation) against Sir Rowland Hill, Edmund Bentham, and certain other parties; and in June 1754, Lord Hardwicke pronounced a decree declaring that according to the true construction of the deed of settlement, and the will of Richard Hill, and the rules and orders upon which the "Platt" Fellows had been admitted into Saint John's College, the "trust or benefaction" created by Richard Hill in the five advowsons in question ought to be confined to the Incorporated Fellows, unless they all refused nomination; and Sir Rowland Hill was ordered to present to the living such of the Incorporated Fellows as he should think fit.

Up to 1839 presentations to the five livings had been duly made to Fellows of St. John's, by the patrons claiming under the deed of 1723, and the will of Richard Hill. In that year, however, the Bishop presented, by reason of a lapse in such presentation. In 1871 the living of Aldborough became vacant in consequence of the failure of the defendant, who claimed the right of patronage, to present. The Bishop then presented a person who was not a Fellow of St. John's. The college, however, claimed the right of presentation upon such failure by the defendant under the remainder over in the deed of 1723.

The defendant now claimed the right to present under a bargain and sale, and a recovery by Sir Richard, eldest son of Sir Rowland Hill, in 1802, and contended that their effect was to annul and destroy all remainders, after the estate limited by the deed of 1723 to the first son of Sir Richard Hill, and to give the fee, including the advowsons, free from any restrictions as to the presentations or nominations to be made thereto.

The plaintiffs contended that the provisions of the deed had always been followed, as to presenting Fellows of St. John's, and that the trusts of the deed formed a permanent charitable trust, which was not barred by the recovery as an ordinary estate tail.

The defendant's title was derived through the Duke of Norfolk, who, as the plaintiff alleged, purchased the advowsons subject to the restrictions on the right of presentation.

The bill therefore prayed for a declaration that the Master and Fellows were entitled to the right of presentation to the living of Aldborough, under the limitation over in the deed of 1723.

Sir R. Baggallay, Q.C. and A. G. Marten for the college.—We contend that though the legal estate in remainder may have been barred by the recovery, the trusts as to the advowsons were not barred. This is a charity:

Attorney-General v. Was-chandlers' Company, L. Rep. 6 H. of L. 1; 28 L. T. Rep. N. S. 681;

Attorney-General v. Sidney Sussex College, L. Rep. 4 Ch. 722.

Lord Hardwicke treated it as such by calling it a "trust or benefaction." Successive Fellows having been presented before the Earl's title accrued, the defendant must be taken to have had notice of the

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trust. We have here a declaration of trust, and no mere springing use, though one in form, which would be barred by the recovery, which had the effect of changing the trustees. The restriction is binding on the remaindermen, and as it is a trust, and not a beneficial interest, the recovery did not affect it. They cited:

Attorney-General v. Trinity College, 24 Beav. 383;
Incorporated Society v. Richards, 1 Dr. & War. 258;
Christ's Hospital v. Grainger, 1 M'N. & G.;
Chamberlayne v. Brockett, L. Rep. 8 Ch. 206; 28 L. T. Rep. N. S. 248;

The devise over to St. John's College means a gift for the purposes of the college, who would take it as such. This is not the case of a strict condition at law. Time is no bar, as the land was already in mortmain at the time of the settlement.

Southgate, Q.C. and *Jones Bateman* for the defendants.—At the time of Lord Hardwicke's decree no bar of the entail had occurred. The effect of the recovery was to bar the legal use in remainder, and the right, if any, of the plaintiffs must therefore be at law. The interest in the right to present is not without a benefit (for the patron might present his son if he were a Fellow), and there is no pretence for saying that the beneficial interest is not barred. We say that Lord Hardwicke decided only a question as between Platt and the Incorporated Fellows. This is a deed, and not a will, so the uses must be taken in their most technical sense.

Sir G. JESSEL.—If there was a good declaration of trust, the remainder over was not barred by the recovery. I am assisted in arriving at a conclusion by an opinion of Lord Hardwicke, by which I need hardly say I am entirely bound. We have here an instrument in the form of a deed setting out a series of limitations. [His Honour stated them]. The gifts here made do not in form admit of a trust, but partake of the nature of a condition and a springing use upon non-fulfilment. The decree I have referred to throws considerable light upon the construction of these limitations. I think, however, that independently of that decree, I am entitled to regard them as good conditional limitations. But then if the condition is one which cannot be enforced at law, I see no reason why, *ut res magis valeat*, I should not hold it to be a trust. Nor is there any reason for saying that the introduction into a deed of the words "will and pleasure" are not a good introduction to a declaration of trust. But the decree of Lord Hardwicke clearly supports that view. Now, looking to the words of the gift over, no doubt they form an imperfect declaration of trust, but it would be opposed to all sound rules of construction to say that one part of this gift is a declaration of trust, and another not. At first sight, I confess, the remainder over looks like a springing use, but the limitation is distinctly to the Master and Senior Fellows of the college, i.e., the governing body of the college. I must hold, therefore, that they take the right without the restrictions, but as a charity for the purposes of the college. Lord Hardwicke, when he decided that the presentation of a Platt Fellow was unsustainable, must have decided that to be a breach of trust; that is, he held that there was a trust involved in the right of presentation; for otherwise he would have had no jurisdiction. The college now say that on the failure of Lord Effingham to present, they have lost the right to present one of their Fellows; that such a failure has occurred "to present and nominate" as is

contemplated by the deed of 1723, and that the gift over takes effect. I think they are right in this contention, but in making the declaration prayed by the bill, I am not prepared, in such a case, to make any order as to costs.

Solicitors for the college, *Cole, Cole*, and *Jackson*, for *Francis, Webster* and *Riches*, Cambridge.

Solicitors for the defendants, *Bennett, Dawson* and *Bennett*.

. Saturday, Dec. 6, 1873.

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Charity—School trustees—6 & 7 Will. 4, c. 70, s. 3 Elementary Education Act 1870, s. 23—Charitable Trusts Acts 1853, ss. 5, 28, 32, 46, and 1860, ss. 2, 7, 8, 9—Transfer to School Board—Charity commissioners—Appointment of additional trustees—Trustee Act 1850, s. 32—Appeal.

By two deeds, made in 1838 and 1849, the two joint rectors of a parish were appointed trustees of a Church of England school. In 1871, it having become necessary to appoint a new master, the then rectors could not concur in any appointment, and the school was closed. A school board having been elected in the district, it was then proposed that the school should be transferred to the board, under sect. 23 of the Education Act of 1870, which requires a majority of two-thirds of the trustees to effect such a transfer. With this view a memorial was presented to the Charity Commissioners, asking them to appoint three additional trustees, so that the requisite majority might be obtained. This course was opposed by one and supported by the other of the two joint rectors. The commissioners, however, made an order appointing three additional trustees, all of whom were churchmen, one of them being chairman of the school board.

On a petition by the opposing rector, by way of appeal from the order, under sect. 8 of the Charitable Trusts Act 1853, praying for the discharge of the order:

Held, on dismissing the petition with costs, that it is no objection to such an order, notwithstanding sect. 5 of the Charitable Trusts Act 1860, that the commissioners have made it on an application of a contentious character.

Observations on Lord Romilly's judgment in Re Hackney Charities (36 L. J., N. S., 169, Ch.; 4 De. G. J. & S. 588).

The 28th and 32nd sections of the Charitable Trusts Act 1853, give the jurisdiction to appoint trustees to the Master of the Rolls and the Vice-Chancellors in cases in which it was previously necessary to file an information, bill, or petition, and by the Act of 1860 this jurisdiction is transferred to the Charity Commission:

Held, that the power to appoint additional trustees is clear under the ordinary jurisdiction of the Court of Chancery; that sect. 32 of the Trustee Act 1850, gives a statutory power for that purpose, and therefore that such a power is vested in the commissioners.

The majority of two-thirds of the school trustees required by the Education Act anticipates any objection to the transfer of a school whose trustees are required to be churchmen.

The court will not, upon appeal, interfere with the exercise of discretion by the commissioners, except in a very strong case of miscarriage of jus-

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tice, and such discretion is properly exercised in a case where in consequence of differences between the existing trustees, the school is closed, and education denied to the children of the district:

Semble, that neither the Court of Chancery nor the Charity Commissioners have power to remove ex-officio trustees.

This was a petition praying that an order made by the Charity Commissioners for the appointment of new trustees of the above-mentioned schools might be discharged or varied, or remitted to the commissioners for reconsideration.

It is enacted by sect. 3 of 6 & 7 Will. 4, c. 70, which is an Act to facilitate the conveyances of sites for school rooms, that it shall be lawful for any spiritual person, being a corporation sole, to convey any portion of the land belonging to any such spiritual person, in the capacity of a corporation sole, in respect of any ecclesiastical preferment held by him, to any trustees to be named by the bishop of the diocese, for the purpose of erecting thereon a schoolroom to be used for the education of poor children in the principles of the Christian religion, according to the doctrine and discipline of the United Church of England and Ireland.

By a deed dated the 3rd Dec. 1838, the Hon. and Rev. Frederick Hotham and the Rev. Bernard Gilpin, in the character of joint rectors of the parish and parish church of Burnham Ulph, conveyed a certain piece of land at Burnham to themselves and their successors, as trustees duly nominated by the Bishop of Norwich (who was also a party to the deed), to uses for the purpose of erecting a suitable schoolroom of the kind contemplated by the Act above referred to. The school was accordingly built. In 1849 the petitioner, Dr. Bates, succeeded Mr. Gilpin as joint rector.

By another deed, dated the 27th Feb. 1851, an additional piece of land was conveyed by the joint rectors for the purposes of the school; and it was declared that the school should be open to the inspectors in conformity with the Order in Council of the 10th Aug. 1840.

The petitioner alleged, and it was not disputed, that he had, by his exertions, and out of his own pocket, procured funds for the erection of large schools on this additional ground, the cost of which had been above 1100*l.*, he having with his friends, who were desirous that Church of England schools should be established, contributed 896*l.*, and the Government having given 320*l.* But a small sum was given by the inhabitants.

The Rev. George Goodenough Hayter succeeded Mr. Hotham, and the schools were used in pursuance of the trusts until the year 1871. In that year the inhabitants of the parish of Burnham Westgate, which adjoins the parish of Burnham Ulph, and of which parish the petitioner is the rector, elected a school board under the provisions of the Elementary Education Act 1870. This board was stated by the petition to have been formed of three churchmen and two dissenters.

In the Act of 1870 the term "managers" includes all persons having the management of any elementary school, whether the legal interest in the schoolhouse is vested in them or not; and by the 23rd section, power is given to the managers of any elementary school in the district of the school board, by a resolution passed by a majority of two-thirds of the managers, to make an arrangement to transfer the school to the school board.

On the 29th Aug. 1871, Mr. Hayter wrote a

letter, expressing his desire to transfer the schools; and at a subsequent meeting of the school board, at which Mr. Hayter (who had then become a member of the board) was present, it was unanimously resolved to apply to the trustees of the schools to make such transfer. The petitioner referred the board to his brother, Mr. Thomas Bates, a member of the Bar, who insisted upon the strict performance of the original trusts, and declined to entertain the proposal for a transfer. The petitioner then alleged that Mr. Hayter and Mr. Blyth (the chairman of the school board) were advised to apply to the Charity Commissioners to appoint three new additional trustees of the deeds of 1838 and 1851, who should be ready and willing to transfer the Burnham Schools to the school board, and secure a majority of at least two-thirds of the trustees, and thus to transfer the schools under sect. 23 of the Education Act.

The jurisdiction of the Charity Commissioners in such case is given to them by reference to sections 28 and 32 of the Charitable Trusts Act 1853, and by sect. 2 of the Charitable Trusts Act 1860 (23 & 24 Vict. c. 136), they have power from time to time, upon the application of any person or persons, who, under the 43rd section of the Charitable Trusts Act 1853 (16 & 17 Vict. c. 137), (*i.e.*, persons interested in or trustees of the charity, or inhabitants of the parish) might be authorised to apply to any judge or court for the like purposes, to make such effectual orders as might be made by any judge of the Court of Chancery for the appointment of new trustees of any charity.

Sect. 7 directs the order to be affixed in a convenient place in the parish; and sect. 8, which gives the right of appeal from the order, is in the following terms:—

The Attorney-General, or any person authorised by him or by the said board [the commissioners], in the case of a charity, whatever may be the yearly income of its endowments, and any trustee or person acting in the administration of, or interested in any charity of which the gross yearly income to be calculated in manner aforesaid, shall exceed 50*l.*, or any two inhabitants of any parish or district in which the same shall be specially applicable, may, within three calendar months next after the definitive publication of any order of the said board appointing or removing any trustee or trustees, or for or relating to the assurance, transfer, payment, or vesting of any real or personal estate, or establishing a scheme for the administration of the charity, present a petition to the High Court of Chancery in a summary way, appealing against such order, and praying such relief as the case may require; . . . and the court upon or before the hearing of any such petition of appeal as aforesaid, or at any stage of the proceedings, may require, if it shall think fit, from the said board, their reasons for making the order appealed against, or for any part of such order, and may remit the same to the board for reconsideration, with or without a declaration in relation thereto, or may make any substitutive or other order in relation to the matter of appeal, as it shall think just.

The court may make such order as it shall think fit; and the Attorney-General (s. 9) may appear as a respondent.

The petitioner alleged, in opposition to an appointment of such additional trustees as would bring about a transfer of the school board, that its effect would be to destroy the Church of England character of the schools and the trusts of the deeds, as no distinctive religious teaching was allowed in a school so transferred.

A memorial was, however, on the 19th July 1872, sent to the Charity Commissioners, asking for an increase of the number of trustees from two

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to five, one of the proposed new trustees signing the memorial, as well as five members of the school board, the intended transfer to which was not mentioned in the memorial. A correspondence ensued between Mr. Thomas Bates and the commissioners, but on the 1st April 1873, they made an order, whereby, after reciting that the endowment of the charity consisted only of the site of the schools, and was not productive of any pecuniary income, and that it was desirable that new trustees should be appointed in addition to and jointly with the incoming and continuing trustees, and upon considering all suggestions and objections made to them with reference to the proposed order, it was ordered that Henry Etheridge Blyth, John Overmann, and William Mitchell, be appointed trustees of the charity, in addition and jointly with the petitioner and G. G. Hayter, and that the lands should vest in the official trustee of charity lands, and his successors, in trust for the charity.

On the 12th April 1873, Mr. Hayter called a meeting of the trustees, at which it was proposed to transfer the schools to the school board. At the request of the petitioner, the resolution was postponed till the 18th April, and it was then passed by a majority of four against the petitioner.

The petitioner impugned the authority of the commissioners to make the order without the consent of the bishop, and also inasmuch as the new trustees, one of whom was the chairman of the board, before being appointed, were pledged to join Mr. Hayter in transferring the schools to the school board, which object was that for which the commissioners had made the order.

The petition then prayed for a discharge of the order, as already stated.

From the evidence it appeared that Mr. Hayter and Dr. Bates had been unable for a considerable period to agree as to the management of the school, and that differences had arisen between them as to the appointment of a master, the result of which had been the closing of the school. Evidence was also entered into to show that there was no personal objection to the trustees appointed by the order.

Sir R. Baggallay and Batten, for the petitioner.

—By sect. 46 of the Charitable Trusts Act 1853, it is enacted "that nothing therein contained shall diminish or detract from any right or privilege which by any rule or practice of the Court of Chancery, or by the construction of law subsists for the preference or the exclusive benefit of the Church of England, or the members of the same church, in settling any scheme for the regulation of any charity, or in the appointment or removal of trustees, or generally in the application or management of any charity." We say that entitles us to ask that we should always have churchmen as trustees. The Act of 1860 does not give the commissioners an unfettered discretion, and Lord Romilly said that it was one they should not exercise in contentious cases:

Re The Hackney Charities, 36 L. J., 169 Ch.; on appeal, 4 De G. J. & S. 588.

[Sir G. JESSEL.—What Lord Romilly there says is not essential to his decision. How can there be an appeal from an order based upon a statement that the commissioners "have considered" the reasons, &c.?] We have not to show whether or not they have used a wise discretion, but we have a distinct right of appeal. The 32nd section of

the Trustee Act 1850, gives the court the power to appoint additional trustees. The power of the commissioners is given by reference to that of this court, and if they exercise it, their order is subject to appeal. The new trustees were, or now are, members of the school board, and were appointed for the purpose of the transfer only. The effect of allowing the order to stand would not only be handing the school over in a manner contrary to the trusts, but is also a denial of the privileges given by sect. 46 of the Act of 1860.

Hemming for the Crown was not called upon.

Sir G. JESSEL.—This is an appeal from an order of the Charity Commissioners, and it raises some questions of public, and some questions of private, interest. The questions of public interest are three in number, and they are all based upon objections urged against the making of this order. In the first place it is said that the application to the commissioners was made in such a manner as to partake of so contentious a character as to deprive the commissioners of the jurisdiction to make the order. This objection is apparently founded on a view of the operation of the 5th section of the Act of 1860. I should not at first sight have thought that any weight could be attached to this view, but it is sought to be supported by Lord Romilly's opinion in the case cited. But this is not only a mere *obiter dictum*, but the decision of his Lordship was, I find, reversed on appeal. The 5th section is as follows:—

"The said board also shall not exercise the jurisdiction hereby vested in them in any case which, by reason of its contentious character, or of any special questions of law or of fact which it may involve, or for other reasons, they may consider more fit to be adjudicated by any of the judicial courts." Now, in my opinion, the meaning of that section is quite plain. I read it as intending that the Charity Commissioners are not to be compelled to take upon themselves any jurisdiction in cases which can be dealt with in a judicial court, or which for some reason are not proper for the commissioners to deal with. I do not feel myself bound by my predecessor's opinion, as I find that there is in his judgment no decision at all upon the point relied on. The second objection urged by the petitioner is, that there was no jurisdiction at all in this case to appoint trustees. I cannot accede to this view. I am of opinion that there is a clear jurisdiction, depending upon the 28th and 32nd sections of the Charitable Trusts Act 1853, which give to the Master of the Rolls and Vice-Chancellors in chambers, in the case of charities of which the gross annual income exceeds 30*l.*, power to appoint or remove trustees in all cases in which it was theretofore in the power of the court to do in respect either of its special or statutory jurisdiction; and a similar provision was made in case of charities with incomes of less than 30*l.* by giving similar powers to the County Courts and District Courts of Bankruptcy. All these powers were by the Act of 1860 transferred to the Charity Commissioners. Now it is not disputed that independently of the Trustee Act of 1850, the court has power to appoint additional trustees; and the 32nd section of that Act gives an express statutory jurisdiction for that purpose. That is quite clearly established, and the powers of the Charity Commissioners I hold to be equally clear. The third objection to the order of the commis-

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sioners is, that even if the court have the jurisdiction to appoint additional trustees generally, yet that it would not be exercised in a case where the appointment of such trustees of a Church of England school might have the effect of handing it over to a school board. I can conceive cases in which the court might be very careful in exercising its undoubted jurisdiction, but that is no reason for saying that any legislation with respect to such schools has taken away that jurisdiction. In fact, a statutory provision has anticipated the objection by requiring a majority of two-thirds of the trustees to effect such a transfer. The only other objection upon what I call public grounds is, that the exercise of the power to appoint these trustees interferes with the provision contained in the 46th section of the Act of 1853. That section might in the case of a church school prevent the court from appointing any trustee who was not a member of the Church of England. This is undoubtedly a Church of England charity, and if the objection had had any foundation in fact, it would certainly have been fatal to the appointment. The three gentlemen mentioned in the order are now ascertained to be all churchmen, although at first it was thought that this was not the case. These are all the objections upon public grounds, and I have no doubt that they do not warrant me in interfering with the order of the commissioners. The private objections are of a different character. It is said that assuming that the Charity Commissioners have the jurisdiction which they have exercised, they have not used a wise discretion in so exercising it, and further that they have not used a wise discretion in exercising it by appointing these particular gentlemen. Now it must be observed that this is a statutory appeal, and not an appeal in the nature of a rehearing. It is to be further remarked that it has long been laid down as a general principle (which I am glad to say was introduced by the House of Lords into the Judicature Act), that courts of appeal should in no case interfere in a matter entirely dependent upon the personal discretion of the judges of the court below. There is, however, an exception in cases of gross misconception of the law, or a distinct miscarriage of justice. But that must be a very strong case of that character. I do not find that any such case has been made out here. On the first branch of these objections I have no hesitation in saying that the discretion of the commissioners was wisely exercised. Now what are the facts? There are two clergymen, Dr. Bates and Mr. Hayter, joint rectors of a parish in which there is a church school. Dr. Bates contributes personal exertions and money for building the schoolhouse, and may be considered as one of its founders. For fifteen years Mr. Hayter managed the school, and managed it, it seems, very well. A new schoolmaster is required, and nominally Dr. Bates' concurrence is necessary to the appointment. For some reason or another no concurrence is obtainable; and Dr. Bates appears to prefer that the children should go without education rather than agree to an appointment suggested by Mr. Hayter. So does Mr. Hayter with regard to any suggestion by Dr. Bates. At that time there was, moreover, no school board. This is a lamentable state of things, brought about by each of the rectors standing on his extreme rights; and both are in some degree censurable for taking that course. The charity, in fact, comes to nothing,

and an application is made to the Charity Commissioners. It is, at least, extremely doubtful whether *ex officio* trustees are removable either by the commissioners or by the Court of Chancery. The only course then was to get three trustees appointed who could outvote these two; and in appointing these I think a wise discretion was exercised. The next point is, that these three new trustees were so grossly unfit for their office that I ought to discharge the order appointing them. Now in Nov. 1871 the school board was appointed. The witnesses say that it was impossible to get enough subscriptions to keep up the school, and that the best course was a transfer to the school board. Dr. Bates has a strong objection to the absence of distinctive religious teaching in the board schools. That being so, eighteen landowners of the parish present a memorial to the Charity Commissioners for the appointment of new trustees. Dr. Bates opposed this, and the commissioners were fully informed of all that was going on with regard to the charity; that there was a party in favour of a transfer, and a party opposing it; and that one of the proposed trustees was in fact the chairman of the school board. The evidence shows that the three trustees were churchmen, and that so far from being pledged to transfer the school to the board, they would not, if they had acted on their own religious opinions, apart from the educational wants of the parish, have concerted together to bring about the transfer. Then, again, Dr. Bates was offered an opportunity of nominating a trustee himself, and he chooses Mr. Blyth, who is, in fact, one of those appointed by the commissioners. This cannot therefore be called a grossly improper exercise of the power of appointment. On the evidence before me I hold that the commissioners acted quite impartially. I do not say that I should have appointed all three of these particular persons, but it is not necessary for me, holding, as I do, that the discretion was properly exercised, to go into that question. The petition must be dismissed with costs.

Solicitors for the petitioner, *Warry, Robins, and Co.*

Solicitors for the Crown, *Raven and Bradley.*

V.C. BACON'S COURT.

Reported by the HON. ROBERT BUTLER and F. GOULD,
Esq., Barristers-at-law.

Thursday, Dec. 4, 1873.

Ex parte THE REV. JOHN EDWARDS.

Prohibition—Commission under the Church Discipline Act—Discretion of bishops—3 & 4 Vict. c. 86, s. 3.

An application made to the ordinary jurisdiction of the Court of Chancery out of term, for a prohibition to prevent the Bishop of Gloucester from issuing a commission under the Church Discipline Act, to inquire into certain offences alleged to have been committed by the vicar of a parish, until the vicar had been heard by counsel before the bishop as to certain preliminary objections, and especially as to the fitness of the promoter, was refused, the court holding that there was nothing in the Act to fetter the discretion of the bishop.

THIS was an application to the ordinary jurisdiction of the Court of Chancery, as distinguished from the extraordinary jurisdiction which is usually

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exercised by the court, and was made here because it could not out of term time be made to the Court of Queen's Bench. The application was for a prohibition, and was made under the following circumstances:—

Certain charges had been made by a Mr. Combe, as promoter, against the plaintiff, who is vicar of Prestbury, in Gloucestershire, and the bishop had been applied to to issue a commission under the Church Discipline Act (3 & 4 Vict. c. 86), the 3rd section of which provides: "That in every case of any clerk in holy orders who may be charged with any offence against the laws ecclesiastical, it shall be lawful for the bishop of the diocese within which the offence is alleged or reported to have been committed, on the application of any party complaining, thereof, or, if he shall think fit, of his own mere motion, to issue a commission under his hand and seal to five persons, of whom one shall be his vicar-general, or an archdeacon or rural dean within the diocese, for the purpose of making inquiry as to the grounds of such charge or report. Provided always that notice of the intention to issue such commission, under the hand of the bishop, containing an intimation of the nature of the offence, together with the names, addition, and residence of the party on whose application or motion such commission shall be about to issue, shall be sent by the bishop to the party accused fourteen days at least before such commission shall issue."

The vicar objected to the commission being issued until the bishop had heard him by counsel on his behalf as to certain objections which he entertained to the issuing of the commission, on the ground that Mr. Combe was not a fit and proper person to be the promoter; and he alleged that Mr. Combe was not acting *bonâ fide*, not being the real promoter; that he was a Dissenter, and that he was being maintained by other persons. To prevent the issuing of the commission the vicar, on the 26th May 1873, entered a *caveat* in the registry of the Consistory Court of Gloucester.

On the 7th Nov. 1873, notice was given to the vicar of the intention of the bishop to issue the commission, and on the 28th Nov. a further notice was served on the vicar that the commission had been issued, and that the commissioners would hold a sitting on the 8th Dec.

The vicar consequently now moved, *ex parte*, for a prohibition, insisting on his right to be heard by counsel before any proceeding was taken under the commission.

Dr. Stephens, Q.C. and Phillimore in support of the application.—The present application is warranted by authority: see

Re Bateman, L. Rep. 9 Eq. 660; 22 L. T. Rep. N. S. 60;

Ex parte Lynch, 1 Madd. 15.

The bishop is to give fourteen days' notice before issuing the commission, and to state the name and residence of the promoter: the object of this is clearly to give the accused an opportunity of raising the objection that the promoter is not a fit and proper person. It is in the discretion of the bishop whether he will or will not issue the commission. If he refuses to hear a preliminary objection, the Court of Queen's Bench has power to issue a *mandamus* to compel him to do so:

Hamden's case, Jebb's Rep. 330;

Reg. v. Archbishop of Canterbury, 6 E. & B. 546.

The bishop is bound to decide judicially as to the

person of the promoter: (*Elphinston v. Purchas*, L. Rep. 3 P. C. 245; 23 L. T. Rep. N. S. 285.) Objections have in former cases been made on this point, and it has always been held that the objection was taken too late. There must be some proper time for raising the objection: (*Martin v. Mackonochie*, L. Rep. 2 A. & E. 116, 123.) According to the old practice in the Ecclesiastical Courts a citation was never issued after a *caveat* had been lodged without first hearing the person who had lodged it.

The VICE-CHANCELLOR said: This matter, in my opinion, is very clear indeed. I am bound by the decision in *Re Bateman* (22 L. T. Rep. N. S. 60), which has been referred to, and I entertain no doubt as to the authority of the court to issue a prohibition in a proper case. But in this case the argument turns upon, and must be confined to, the terms of the statute. The statute has invested the bishop with a power to be exercised by him, upon the application of any person, to institute the inquiry which has been issued in this case, and he is bound moreover to give fourteen days' notice of that to the person who is concerned in that inquiry, furnishing him with the names, descriptions, and addresses of the persons promoting the charge. There is not one word in this Act of Parliament that abridges the power of the bishop to issue the commission. There is no preliminary inquiry to be entered into. The bishop is to satisfy himself that it is a proper case in which an inquiry should be made by means of the commission, and his only other preliminary duty is to see that the notice is properly given. In this case the gentleman who is now moving, upon receiving an intimation either that the commission would be applied for, or that it would be granted, lodges what is called a *caveat*, a wholly inofficious proceeding as it seems to me. Under what obligation is the bishop to take any notice of his *caveat*? He says, "I desire to be heard by counsel on the objection stated in my *caveat*;" and the bishop thinks it is not a case in which he need trouble himself to hear counsel, for that if every word alleged in the objection were true, nevertheless he, in his discretion, exercising the authority imposed upon him by the Legislature, thinks it right that an inquiry should be made. None of the cases that have been referred to touch this point in the slightest degree. The cases of the promoters in *Martin v. Mackonochie* (L. Rep. 2 A. & E. 116, 123), and *Elphinston v. Purchas* (23 L. T. Rep. N. S. 285), do not touch it. In one the judges say: "We must presume that the bishop got a proper promoter before he surrendered to him the authority to prosecute the inquiry." The other was only a question whether of two persons one was preferable to be promoter: and there is not the shadow of a decision in either of them upon any matter touching the present application. I find that all that the bishop has done has been done leisurely, deliberately, in the exercise of his discretion, and, as he conceives, in the proper exercise of his function; and he has put this matter into a train of inquiry, being, I suppose, though I know not, satisfied that if all the alleged objections were proved a thousand times over, it would be no reason why the inquiry should not go on. Unless, therefore, there is something in the Act of Parliament that compels the bishop to make some preliminary inquiry, to entertain some *caveat*, to have a litigation not contemplated by the statute, but, on the contrary, as far as the

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provisions of the statute go, expressly excluded, I cannot see that the bishop has done anything which authorises me to pronounce that he has exceeded the law. Upon all that is before me in the shape of evidence I think he has acted according to law; and I have no authority whatever to interfere with the power which the statute gives him.

Solicitors, *Brooks, Tanner, and Jenkins.*

CROWN CASES RESERVED.

Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

Saturday, Nov. 15, 1873.

(Before KELLY, C.B., BLACKBURN, and LUSH, JJ.,
POLLOCK, B., and HONYMAN, J.)

REG. v. TWIST.

Larceny—Indictment—Corpus delicti.

Prosecutor bought a horse, and was entitled to the return of 10s., chap money, out of the purchase money. Prosecutor, afterwards, on the same day, met the seller, the prisoner, and others, and asked the seller for the 10s., but he said he had no change, and offered the prosecutor a sovereign, who could not change it. The prosecutor asked whether any one present could give change. The prisoner said he could, but would not give it to the seller of the horse, but would give it to the prosecutor, and produced two half-sovereigns. The prosecutor then offered a sovereign with one hand to the prisoner, and held out the other hand for the change. The prisoner took the sovereign and put one half-sovereign only in the prosecutor's hand, and slipped the other into the hand of the seller, who refused to give it to the prosecutor, and ran off with it.

Held, that the indictment rightly charged the prisoner with stealing a sovereign.

CASE stated for the opinion of this Court by the Chairman of the Worcestershire Quarter Sessions.

Samuel Twist was tried before me at the last sessions on an indictment charging him with stealing one sovereign, and money to the amount of one pound from the prosecutor, Richard Pearson.

The facts proved were as follows: The prosecutor purchased a horse at Winchcomb Fair on the 28th July last from a person, whose name did not appear, for 28l., out of which he was to receive, but did not at the time receive, ten shillings by way of chap money. The prisoner was not present at the sale.

Afterwards, on the same day, the prosecutor was taking the horse to Evesham, when a party with horses, among whom were the prisoner and the person who had sold the horse, overtook him, and on arriving at Evesham he was surrounded and pushed about by the same party, who tried to persuade him to resell the horse, which turned out to be broken winded, for 10l. This the prosecutor refused to do, saying he would abide by the loss, and he then asked the person who had sold him the horse for the ten shillings chap money; and that person then said he had no change by him, and offered the prosecutor a sovereign, but the prosecutor could not give change, as he had nothing but sovereigns with him.

The prosecutor then asked whether any one present could give the change. The prisoner said he could, but that he would not give it to the

person who had sold the horse, but would give it to the prosecutor, and he held out two half-sovereigns towards the prosecutor in the palm of his hand. The prosecutor thereupon took a sovereign out of his pocket, and offered it to the prisoner with one hand, and at the same time held out his other hand for the change. The prisoner took the sovereign so offered to him by the prosecutor, and put one of his half-sovereigns only into the prosecutor's hand held out to receive the change, and slipped the other half-sovereign into the hand of the person who had sold the horse, and that person thereupon stepped back, and though asked, refused to give it to the prosecutor.

The prosecutor immediately fetched a policeman, who took the prisoner into custody, but the person who had sold the horse had disappeared, and has not since been heard of. The prisoner on being charged by the policeman stated, contrary to the fact, that he had given both the half-sovereigns to the prosecutor. The prosecutor would not have given his sovereign to the prisoner, unless he had expected to receive both the half-sovereigns shown to him by the prisoner in exchange.

Upon these facts I directed the jury that if they were of opinion that the prisoner at the time when he took the sovereign offered to him for change intended to defraud the prosecutor of the whole or any part thereof, and in pursuance of such intention fraudulently withheld from the prosecutor one of the half-sovereigns in the manner stated in the evidence, they might properly find him guilty, but if otherwise, they ought to acquit.

The jury returned a verdict of guilty, and the prisoner was sentenced to four months imprisonment with hard labour.

In the course of the trial it was objected by the counsel for the prisoner that on the above facts, even assuming them to be proved, the prisoner could not be legally convicted of the offence charged in the indictment. I overruled the objection, but reserved the point, and in the meantime respited execution of the judgment, and admitted the prisoner to bail.

The question on which I respectfully desire the opinion of the Court is: Whether under the circumstances above stated the prisoner was properly convicted of larceny.

(Signed) R. PAUL ARPHLETT,
Chairman of the above Court of Quarter Sessions.

No counsel appeared for the prisoner.

Jelf for the prosecution.

KELLY, C.B.—In this case the prosecutor never parted with the possession of the sovereign, and never intended to part with it unless the two half-sovereigns were given to him in exchange. The conviction must be affirmed.

Conviction affirmed.

(Before KELLY, C.B., BLACKBURN, LUSH, and
GROVE, JJ., and POLLOCK, B.)

Saturday, Nov. 22, 1873.

REG. v. WEAVER.

*Evidence—Register of births—Certified copy—
14 & 15 Vict. c. 99, s. 14.*

An instrument purporting to be a copy of an entry in the Register Book of Births, and to be signed by the officer in whose custody the Register Book is stated therein to be, is admissible in evidence

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on its mere production under the 14 & 15 Vict. c. 99, s. 14.

CASE reserved for the opinion of this court.

Handy Weaver was tried before me at the last Midsummer Quarter Sessions for the county of Glamorgan on an indictment for unlawfully and carnally knowing and abusing a girl, being above the age of ten years and under the age of twelve years.

The prisoner was convicted upon sufficient evidence in other respects, but it was objected by the counsel for the prisoner that the proof of age was not sufficient; and, having some doubt, I respited the execution of the sentence of penal servitude for five years in order to obtain the opinion of the Judges.

A copy of an entry in the Register Book of Births in the Registrar's District of Merthyr Tydvil Lower certified to be a true copy by the deputy superintendent registrar, with a further certificate that the said Register Book was then lawfully in his custody, was tendered by the counsel for the prosecution and received in evidence. The entry proved that a child, named therein Jane Watkins, was, at the date of the offence alleged in the indictment, of the age of eleven years and eight months. This certified copy was tendered by the counsel for the prosecution without verifying or producing it in the proper way, no witness being in attendance to do so.

Elizabeth Abraham, the grandmother of the child who was the subject of the indictment, was called, and spoke the Welsh language only. I directed the sworn interpreter to translate every word of the certified copy into Welsh in the hearing of the witness. She then said:—"I believe, on my oath, that the child now present, and known as Jane Watkins, is the child named in the certificate now read." She also proved that the said child was the illegitimate child of Ann Abraham,

daughter of the witness (now in Australia) and of Benjamin Watkins; that her daughter, Ann Abraham, now passed as Ann Watkins; that she (the witness) was present at the birth, but not at the registration of the birth of her daughter's child, and that the said child was baptized in the name of Jane Watkins, though her mother was unmarried, and was Ann Abraham, and that she did not know the precise age of the child of her own knowledge, but knew it only by means of the said entry.

Sergeant Frederick Jennings proved that when he arrested the prisoner, and informed him that he was "charged with carnally knowing Jane Watkins last Friday," he replied, "I have nothing to say. She is a wicked girl. I could have no quiet for her," &c.

I told the jury that I thought there was some evidence that the girl Jane Watkins named in the indictment was the Jane Watkins named in the register, and, if they were satisfied as to that point, then that the girl was within the statutable age, and they must proceed to find whether the prisoner had committed the offence set forth in the indictment.

The jury brought in a verdict of guilty.

The point reserved on which the opinion of the Court of Appeal is requested is whether the reception of the certified copy of the register, as tendered by the counsel for the prosecution without calling a witness to produce it, was right, and, coupled with the evidence of the child's grandmother, was sufficient to support the finding of the jury.

The certificate itself is hereto annexed, and forms part of the case.

(Signed) JNO. COKE FOWLER,

Deputy Chairman of the Glamorganshire Quarter Sessions.

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1861.

BIRTHS IN THE DISTRICT OF MERTHYR TYDVIL LOWER IN THE COUNTY OF GLAMORGAN.

No.	When and where born.	Name (if any).	Sex.	Name and Surname of Father.	Name and Maiden Surname of Mother.	Rank or Profession of Father.	Signature, Description, and Residence of Informant.	When Registered.	Signature of Registrar.	Baptismal name if added after Registration of birth.
463.	Twenty-seventh of September 1861; 65, Ynyngan-street, Merthyr.	Jane.	Girl.	Benjamin Watkins.	Ann Watkins, formerly Abram.	Iron Miner.	X The Mark of Ann Watkins, Mother, 65, Ynyngan-street, Merthyr.	Fifth November, 1861.	Herbert James, Registrar.	

I certify that the above is a true copy of an entry in the Register Book of Births in the Registrar's District of Merthyr Tydvil Lower, in the Superintendent Registrar's District of Merthyr Tydvil, in the counties of Glam and Brecon. And I further certify that the said Register Book is now lawfully in my custody.

Witness my hand, this 1st day of July, 1873.

H. LEWIS, Deputy-Superintendent Registrar.

Book No. 45.

By the 14 & 15 Vict. c. 99, sect. 14, a copy of any book which is of such a public nature as to be admissible in evidence on its mere production from the proper custody, is made admissible in evidence in any court of justice, provided it purport to be signed and certified as a true copy by the officer to whose custody the original is intrusted.

No counsel appeared on either side.

KELLY, C.B.—The only questions raised in this case were, first, whether there was evidence of the identity of the girl Jane Watkins, upon whom the

offence was committed, with the Jane Watkins named in the certified copy of the entry and the baptismal register produced, about which there is no doubt; and, secondly, whether the instrument produced, purporting to be a certified copy of an entry in the register book of births was admissible in evidence on its mere production. That depends on two Acts of Parliament—the 6 & 7 Will. 4, c. 86, and the 14 & 15 Vict. c. 99, s. 14. The later Act is the material one, and it provides that "Whenever any book or other document is of

July 1,
1873.
H. L.
D. S. R.
STAMP.

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such a public nature as to be admissible in evidence on its mere production from the proper custody, and no statute exists which renders its contents provable by means of a copy; any copy thereof, or extract therefrom, shall be admissible in evidence in any court of justice, provided it be proved to be an examined copy or extract, or provided it purport to be signed and certified as a true copy or extract by the officer to whose custody the original is intrusted." This instrument comes within that provision, for it purports to be a true copy of an entry in a book of a public nature, which is admissible in evidence on its mere production certified as a true copy by the officer to whose custody the original is entrusted.

Conviction affirmed.

COURT OF QUEEN'S BENCH.

Reported by J. SHERRE and M. W. McKELLAR, Esqrs.,
Barristers-at-Law.

Wednesday, Nov. 19, 1873.

PIMLICO, PECKHAM, AND GREENWICH STREET TRAMWAYS COMPANY (apps.) v. THE ASSESSMENT COMMITTEE OF THE GREENWICH UNION (resps.)

Tramway — Liability to rating — Tramways Act 1870 (33 & 34 Vict. c. 78).

The owners of tramways constructed under the provisions of the Tramways Act 1870 (33 & 34 Vic. c. 78) are rateable to the poor rate in respect of the occupation of the soil by the tramways so constructed.

THIS was an appeal to the court of general assessment sessions against a supplemental valuation list for the parish of St. Paul's, Deptford, in which was included the appellants' line of tramway within that portion of the said parish which lies within the county of Surrey. And after due notice of appeal, under the Valuation Metropolis Act 1869, to the assessment sessions, and by the consent of the parties, and by the order of Hannen, J., dated the 15th Feb. 1872, according to the said Act, the following case has been stated for the opinion of the court:

1. The appellants are a company formed under the private Acts known as the Pimlico, Peckham, and Greenwich Street Tramways Act 1869 (32 & 33 Vict. c. 95), the Pimlico, Peckham, and Greenwich Street Tramways Act 1870 (33 & 34 Vict. c. 167), and the Pimlico, Peckham, and Greenwich Street Tramways (Extension) Act 1870 (33 & 34 Vict. c. 174), with which is incorporated the Tramways Act 1870 (33 & 34 Vict. c. 78). Upon the argument of this case either party is to be at liberty to refer to any of the said Acts.

2. In pursuance of the above-mentioned Acts, and subject to their provisions, the appellants formed themselves into a company for the laying down and working certain tramways within the Metropolis, and have laid down and now work the tramways situate in the respondents' said parish, in respect of which the assessment now appealed against was made.

3. The said tramway was laid down and remains as shown by the model (marked A.), which is to be taken as part of this case. The road marked thereon is a public street or highway in the respondents' said parish.

4. Sect. 34 of the Tramways Act 1870 gives to

the appellants the exclusive use of the tramway for carriages with flange wheels, or other wheels suitable only to run on the prescribed rail. And sect. 54 of the same Act imposes a penalty of 20*l.* upon persons other than the appellants or those claiming under them, or by licence from the Board of Trade, as by that Act provided, who may use the tramway with carriages with flange wheels or other wheels suitable only to run on the prescribed rail.

5. By sect. 46 of the said Act, the local authority of the district in which any tramway is laid down has power to make regulations as to the following matters, that is to say:—

(1.) Speed at which the appellants' carriages may travel.

(2.) The distances between the carriages.

(3.) The stoppages of carriages using the tramway.

(4.) The traffic of the road in which the tramway is laid.

6. The appellants are bound by sect. 48 of the said Act, and the powers thereunder exercised, to have all the carriages, drivers, and conductors working on their tramway duly licensed. By sect. 61 it is enacted, as follows:—"Nothing in this Act shall limit the powers of the local authority or police in any district to regulate the passage of any traffic along, or across any road along or across which any tramways are laid down, and such authority or police may exercise their authority as well on as off the tramway, and with respect as well to the traffic of the promoters or of lessees as to the traffic of other persons." The appellants have been fined by the magistrates for infringement of the police regulations with respect to hackney and other carriages, and the Court of Queen's Bench have confirmed the decision of the magistrate.

7. By sect. 57 of the said Act, it is enacted that the appellants should not acquire or be deemed to acquire any right other than that of user of any road along or across which their tramways are laid. And by sect. 62 it is enacted as follows:—"Nothing in this Act or in any bye-law made under this Act shall take away or abridge the right of the public to pass along or across every or any part of any road along or across which any tramway is laid, whether on or off the tramway with carriages not having flange wheels or wheels suitable only to run on the rail of the tramway."

8. Sects. 29, 30, 31, 32, and 60 of the said Act preserve the rights of certain public and other authorities to alter and divert the road, and sect. 32 further provides that the said authorities shall not be liable to pay the appellants any compensation for injuries done to the tramway by the execution of the work for which the said section provides, or for loss of traffic occasioned thereby, or for the reasonable exercise of the powers so vested in them as in the section provided.

9. Sect. 35 of the said Act gives power to the Board of Trade to issue licences (specifying the tolls to be paid by the licensees to the appellants or their lessees) to persons other than the appellants to use the said tramways with flange wheels, where it has been proved to the satisfaction of a referee, under the said Act, that the public are deprived of the full benefit of the tramway.

10. The court is to have power to draw such

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inferences of fact as the court of general assessment sessions, or a jury, would have power to draw.

The question for the opinion of the court is whether the appellants are liable to be included in the said supplemental valuation list in respect of the said tramway.

If the court shall be of opinion that the appellants are liable to be so included in the said supplemental valuation list in respect of the said tramway, then the question as to what amount the valuation is to stand at shall be referred to the judgment and determination of the court of general assessment sessions, and it is agreed that a judgment in conformity with the decision of this court, and for such costs as the court may award, shall be entered for the respondents.

If the court shall be of opinion that the appellants are not liable to be included in the said supplemental valuation list, then judgment is in like manner to be entered for the appellants, together with such costs as the court may award.

Giffard, Q.C. (with him *Poland*), for the appellants, contended that in order to make the appellants liable to be rated, they must occupy exclusively the soil of the land in respect of which they are rated, and that there was no such exclusive occupation in the present case by the Tramway Company of the land over which their carriages passed. In *Roads v. The Overseers of Trumpington* (23 L. T. Rep. N. S. 821; L. Rep. 6 Q. B. 62), *Blackburn, J.* says: "The appellant was in the occupation of the land in respect of which he was rated, and he was therefore properly rated. . . . If he had a mere easement over the land, he was not in possession, and could not properly be rated." The facts of that case showed an exclusive occupation by the appellant, quite different from anything that is to be found in the present case. There the appellant was under an agreement to enter upon certain land of another person, and there dig for coprolites in a specified manner, and should effectually fence the excavations and complete them by a given time, and should then reinstate the land, and then yield and deliver it up. There were no words giving a right to the exclusive occupation of the land, but the excavations and works contemplated by the agreement required a constant occupation of the land by the appellant until the coprolites were raised, and the land could not be used for any other purpose from the commencement of the excavations until it had been reinstated, which could not be done for a year or more after the coprolites were raised. That case is very different from the present. In *Smith v. The Overseers of St. Michael, Cambridge* (3 E. & E. 390), the court said of the agreement under which the rooms were let in that case: "We think that we must look not so much at the words as the substance of the agreement; and taking the whole together," &c. So here, not the words of one particular section must be looked at, but the general meaning of the Acts of Parliament relating to tramways. [*BLACKBURN, J.*—Is not the present case like that of gas pipes under a road, as to which it has been held that the owners are liable to be rated?] It is submitted that the cases are not similar. The tramway becomes part of the road itself, and as such is vested in the parish authorities by virtue of sect. 96 of the Metropolitan

Management Act 1855 (18 & 19 Vict. c. 120). The question really turns on the provisions of the General Tramways Act (33 & 34 Vict. c. 78). Sect. 34, no doubt, gives the promoters and their lessees "the exclusive use of their tramways for carriages with flange wheels, or other wheels suitable only to run on the prescribed rail;" but subsequent sections of the Act show that it was not intended that the company should have any exclusive occupation of any part of the road. In fact, there is no exclusive occupation of the land by the company, and it is only such an occupation that is liable to be rated; except when the company's cars are actually passing over the rails the company has no more occupation of the soil on which the rails are placed than the general public have. Sect. 57 expressly enacts that "notwithstanding anything in this Act contained, the promoters of any tramway shall not acquire, or be deemed to acquire, any right other than that of user, of any road along or across which they lay any tramway, nor shall anything contained in this Act exempt the promoters of any tramway laid along any turnpike road, or any other person using such tramway from the payment of such tolls as may be levied in respect of the use of such road by the trustees thereof." Sect. 61 provides that "nothing in this Act shall limit the powers of the local authority or police in any district to regulate the passage of any traffic along or across any road along or across which any tramways are laid down, and such authority or police may exercise their authority as well on as off the tramway, and with respect as well to the traffic of the promoters or of lessees as to the traffic of other persons." Further, sect. 62 provides that "nothing in this Act or in any bye-law made under this Act shall take away or abridge the right of the public to pass along or across every or any part of any road along or across which any tramway is laid, whether on or off the tramway, with carriages not having flange wheels or wheels suitable only to run on the rails of the tramway." These provisions surely give no exclusive right of occupation to the tramway company, or anything beyond a right of user. In *R. v. Jolliffe* (2 T. R. 90), it was held that if A. has an exclusive right of using a wayleave over lands which he holds in common with B., paying B. a certain sum yearly, and has the privilege of using a wayleave occupied by C., paying him so much per ton for the goods carried over it, A. is not liable to be rated to the relief of the poor in respect of either of such wayleaves. This case was followed in *R. v. Bell* (7 T. R. 598), in which the appellants were held liable to be rated, but on grounds which would exempt the present appellants. There, A. having granted to B. a lease for years of wayleaves (for the purpose of carrying coals), and the liberty of erecting bridges and levelling hills over certain lands, B. made the waggon ways, inclosed them, thereby excluding all other persons, erected bridges, and built two houses on the land for his servants, it was held that B. was liable to be rated to the poor for the ground called the waggon way. Lord Kenyon, C. J. said: "I entirely agree with the opinion in the case of *R. v. Jolliffe*; but this case is very distinguishable from that . . . without going through the different parts of the case which show an occupation of the ground by the defendants, it is sufficient to say generally that they clearly appear to be the occupiers." Grose, J. said: "It is impossible to read this case without seeing

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that the defendants have the exclusive occupation of this ground. It is stated in the case that the defendants have inclosed the ground to the extent of five or six acres, thereby excluding 'the lessees of the dean and chapter and their under tenants, as well as all other persons;' that they have placed gates across the way, erected a bridge, and built two houses on it, which were occupied by the servants of the defendants. They were therefore properly rated as the occupiers of this ground." There is nothing like exclusive occupation in the present case; every member of the public has an equal right to pass over the space on which the rails are laid. [QUAIN, J.—In *The Electric Telegraph Company v. The Overseers of Salford* (24 L. J. 175, M. C.), it was held that the Electric Telegraph Company was liable to be rated to the relief of the poor in respect of the telegraph wires, posts, and land in which the same were fixed.] The telegraph posts occupy the land; but all that can be said of the rails of the tramway company is, that they prove a stronger foundation for the road; the use of them is open to all the world. There is no exclusive physical occupation of the land, as in *R. v. Bell*. [BLACKBURN, J.—Not to the same extent, no doubt, as in *R. v. Bell*. But in point of fact does not the tramway occupy the land?] It is submitted that the tramway company have merely got a parliamentary right to pave the road in a particular manner. [QUAIN, J.—Is not the property in that pavement in the tramway company?] Under sect. 41 of the Tramways Act, if the working of the tramway is discontinued for three months, the Board of Trade may make an order putting an end to the powers of the promoters, and the road authority may remove the tramway at the expense of the promoters. Might not the road authority in such a case waive the removal, and would the tramway company be still rateable? [BLACKBURN, J.—That would not be a practical question, whether they were rateable at all or rateable at nothing. LUSH, J.—I see by sect. 41 that the rating authority may in the case there mentioned sell the materials of the tramway, but must pay over to the promoters whatever balance is left after paying the costs of removal.] Sect. 25 shows that the top of the tramway is to be part of the surface of the road. [BLACKBURN, J.—Put the case of a cellar leading up to a hole over which there is an iron covering which is part of the road, and over which every one must go. Is not the owner of the cellar rateable in respect of it?] There is nothing exclusive either in the occupation or the user of the tramway company. [BLACKBURN, J.—The tramway company is to have the exclusive right of using it in the only in which it is of any use, i.e., with carriages with flanged wheels. With regard to all other kinds of carriages, these rails are an obstruction rather than otherwise to the use of the road.]

Field, Q.C. (with him Bullen), for the Greenwich Assessment Committee, were not called upon.

In the second case *H. Lloyd, Q.C.*, and *F. M. White* for the Lambeth Assessment Committee were not called upon.

BLACKBURN, J.—I think we need not trouble the other side. When once we understand the facts of the case, there is no difficulty in saying that the tramway company are the occupiers of the property under the statute of Elizabeth. I

quite agree with the first proposition laid down by Mr. Giffard, that in order to be liable under this statute, the tramway company must be shown to be in occupation of some portion of the land, but I do not agree in limiting that to the earthy or solid part of the land. I think if they occupy any portion, either above or below, that is sufficient. I also fully agree with the decision in *R. v. Jolliffe* (*ubi supra*), that where a person merely enjoys a wayleave, he is not rateable as an occupier of any portion of the soil. It may be that the actual occupier, if he receives payment in respect of it, may have the value of his occupation thereby enhanced, but the person who enjoys the easement would not be an occupier. But when we come to look at the facts of the present case, we find a different state of things. We find that under the Tramway Companies Act, power is given to the company, under certain conditions, to lay down along the road tramways which are so constructed that carriages with flanges may run along them; and the tramways are laid down solely for the purpose of facilitating the use by these carriages of that portion of the road on which the tramways are laid down. Taking the whole Act together, must we not perceive that the intention was that the promoters who were to lay down the tramways were to have the occupation of that portion of the road on which they should be laid? And it seems to me that they are clearly liable to be rated in respect of that occupation, enhanced in value by their power of carrying on a passenger traffic in their carriages; just as in the case of gas and water companies, who lay down their main pipes in the road, and carry them along beneath its surface. Such companies are held liable to be rated in respect of so much of their land as their pipes fill. Are the tramway companies occupiers of land in the same sense in which the owners of these gas and water pipes are? There is this difference between the two cases, that the pipes are generally buried in the soil and under the pavement, whilst the tramways are placed on the surface. But I do not think that difference is material. Sect. 34 of the Tramways Act 1870 (33 & 34 Vict. c. 78) enacts, that "the promoters of tramways authorized by special Act, and their lessees, may use on their tramways carriages with flange wheels, or wheels suitable only to run on the rails prescribed by such Act; and, subject to the provisions of such special Act and of this Act, the promoters and their lessees shall have the exclusive use of their tramways for carriages with flange wheels, or other wheels suitable only to run on the prescribed rail." The promoters are to have "the exclusive use" of the tramways. Clearer words could hardly be used to show that the tramways are to be laid down solely to facilitate the passage of the company's carriages. Various subsequent sections of the Act no doubt provide that notwithstanding this, the public are to have the same rights over the road as if the tramway had not been laid down; and the tramway company is not to be exempt from the payment of such tolls as may be levied in respect of the use of the road by the trustees thereof (sect. 57); but the public are not to use the tramways for the sole purpose for which they are laid down; and the other provisions of the Act are not inconsistent with the promoters being *de facto* occupiers of that portion of the road, the use of which is given to them exclusively for a particular

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purpose. Judgment must therefore be given for the respondents.

LUSH, J.—I am of the same opinion. The Act of Parliament enables the promoters to appropriate to their own purposes a certain portion of the public road necessary for the conveyance of their carriages along the road. A portion of the soil is occupied by them for that purpose, and exclusively occupied. The promoters are not the less occupiers because the public have a right to pass over the surface of their rails. The tramway itself is exclusively used by the promoters, and they are liable to be rated in respect of it.

QUAIN, J.—I am entirely of the same opinion. I am unable to distinguish this case from the cases as to occupation decided under the Gasworks and Waterworks Acts. The principle is laid down by Wightman, J., in *Reg. v. West Middlesex Waterworks* (1 E. & E. 720), in the following terms: "In this case, the first question is, whether the companies are rateable for their mains which are laid under the surface of the highway, without any freehold or leasehold interest in the soil thereof being vested in the company. We think they are. These mains are fixed capital, vested in land. The company is in possession of the mains buried in the soil, and so is, *de facto*, in possession of that space in the soil which the mains fill, for a purpose beneficial to itself. The decisions are uniform in holding gas companies to be rateable in respect of their mains, although the occupation of such mains may be *de facto* merely, and without any legal or equitable estate in the land where the mains lie, by force of some statute." It seems to me that the only difference between such a case and the present is, that the gas and water mains are fixed deeper in the soil than the tramways are. According to the 25th section of the Tramways Act 1870, every tramway is to be "laid and maintained in such manner that the uppermost surface of the rail shall be on a level with the surface of the road." That is the only difference between the two cases. But both mains and rails physically occupy the soil, though one is deeper down than the other. I do not see in any of the other sections of the Act which have been referred to any provision which interferes with the occupation of the soil by the tramway company's rails. They only preserve to the public the right of going over the surface. The rails remain the private property of the tramway company; and I think the tramway company is clearly rateable in respect of the occupation of the soil by them.

Judgment for respondents.

Attorneys for Tramway Company, *Ashurst, Morris, and Co.*

Attorneys for Lambeth Assessment Committee, *Michael Abrahams, and Roffey.*

Attorney for Greenwich Assessment Committee, *Saw.*

THE METROPOLITAN BOARD OF WORKS (apps.) v. FLIGHT (resps.).

Metropolitan Building Acts—Dangerous structures—Payment of expenses incurred in respect of dangerous structures—Surveyor's fees—Metropolitan Buildings Act 1855 (18 & 19 Vict. c. 122), s. 73.

Sect. 73 of the Metropolitan Buildings Act 1855

(18 & 19 Vict. c. 122) provides that where the commissioners cause a dangerous structure to be taken down or repaired, "all expenses incurred by the said commissioners in respect of" the dangerous structure shall be paid by the owner of such structure, &c. The expenses thus payable include the costs of preparing notices and posting them, and also a reasonable sum for the clerk's time in serving the notices, but do not include general office expenses.

THIS is a case stated under the 20 & 21 Vict. c. 43.

1. In the month of Jan. 1872, a certain structure situate at 5, Davey's Buildings, Bedfordbury, of which Thomas Flight was the owner, was certified to the Metropolitan Board of Works, as the authority for the regulation and supervision of dangerous structures under the Metropolitan Building Act 1869 (32 & 33 Vict. c. 82), to be in a dangerous state. Whereupon the said board on the 3rd Feb. duly gave notice in writing to the said Thomas Flight, calling upon him, according to the provisions of the Metropolitan Building Act 1855 (18 & 19 Vict. c. 122), s. 72, to repair or otherwise secure the said structure. A summons was issued from the Bow-street Police Court, calling upon him to appear there on the 13th May to answer a complaint of the Metropolitan Board made against him for having failed to obey such notice. The said Thomas Flight repaired the premises, and upon the 1st July 1872, it was reported to the said board that the requirements of the said notice had been complied with.

2. On the 11th Jan. 1873, the said Thomas Flight, as owner of the said premises, appeared before me in pursuance of a summons to answer the complaint of the Metropolitan Board of Works for neglecting to pay on demand the sum of 2l. 7s. 6d. for the surveyor's fee and special services hereinafter set out in the 5th paragraph of this case.

3. On the hearing of the said summons it was proved that the said structure had, upon the 30th Jan. 1872, been reported to the Metropolitan Board of Works acting in execution of the Metropolitan Building Act 1869, to be in a dangerous state, and that thereupon a requisition for a survey of the said structure had been issued by the said Metropolitan Board of Works directed to one Charles Forster Hayward, a competent surveyor, requiring him to certify his opinion as to the state of the said structure. On the 2nd Feb. 1873, the said Charles Forster Hayward certified the said structure to be in a dangerous state, and upon the 3rd Feb. notice in writing, as required by the Metropolitan Building Act 1855, was given to and served upon the said Thomas Flight, requiring him to repair and secure the said structure.

4. The said Thomas Flight did not obey the said notice, and on the 17th Feb. it was further reported by the said Charles Forster Hayward to the said Metropolitan Board of Works, that the works required by the notice to be done had not been commenced. On the 10th April, it was reported by the said Charles Forster Hayward, that the works had been partly carried out, and on the 3rd May it was again reported by the said Charles Forster Hayward that nothing had been done since his last report of 4th April. Thereupon complaint was made before the magistrate at

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Bow-street, and a summons obtained thereupon, directed to the said Thomas Flight, calling upon him to appear and answer a complaint by the Metropolitan Board against him for having failed to comply with the requisition of the said notice on the 3rd Feb.; such summons came on for hearing on the 13th May, and was attended on behalf of the Metropolitan Board by their officer, when, in consequence of the repairs being in progress, the summons was adjourned by consent until the 27th May, [upon which day the said Charles Forster Hayward attended, and stating that the works were still in progress, a further adjournment was granted until the 10th June, upon which latter day the case was again adjourned until the 1st July, when the said Charles Forster Hayward reported that the works had been completed, and with the permission of the magistrate the summons was withdrawn.

5. It was further proved on the said hearing that the sum of 2l. 7s. 6d. had been actually paid by the said Metropolitan Board of Works to the said Charles Forster Hayward for work done by him, services rendered and expenses incurred by him as disclosed by the following account:—

The Metropolitan Board,		To C. F. HAYWARD, Surveyor.	
1872.			£ s. d.
Feb. 2.	To making a survey of the structure, &c.....	0 15 0	
	<i>Special Services.</i>		
Feb. 17, &c.	The board's notice not having been complied with at the above structure certified dangerous, reporting thereon	1 0 0	
May 27, &c.	To attending the police court to give evidence.....	0 7 6	
July 1.	To visiting the structure and reporting to board completion of works	0 5 0	
		<u>22 7 6</u>	

And it also alleged that the said board had incurred other expenses, that is to say, 10s. 6d. for costs in respect of the said structure belonging to the said Thomas Flight so certified to have been in a dangerous state.

6. The said sum of 10s. 6d. was charged in accordance with a table of fees settled by a resolution of the said Metropolitan Board of Works, on the 12th May 1871, to be levied upon owners or occupiers in respect of expenses incurred by the said board in exercising its powers over the dangerous structures of the metropolis, pursuant to the Metropolitan Building Act 1869.

7. The resolution of the said Metropolitan Board of Works, together with the table of fees so settled, were put in evidence, and as an exhibit marked "A." are to be read as part of this case.

8. It was proved that the said sum of 10s. 6d., so demanded of and not paid by the said Thomas Flight, was made up of the following items:—

	s. d.
1. For preparation of notices, forms for same, and postage	3 6
2. Service of notices, clerk's time	2 6
3. For summonses	2 0
4. General office expenses.....	2 6
	<u>10 6</u>

Which items are in accordance with the table of fees so settled by the said Metropolitan Board of Works.

9. Evidence was given, in vindication of the reasonableness of the said table of fees, that the sum of 10s. 6d. demanded of the said Thomas Flight was a fair proportion, if he was liable to pay the same, to require him, as the owner of a dangerous structure, to contribute towards the expenses incurred generally by the said Metropolitan Board of Works in the exercise of its jurisdiction over the dangerous structures of the metropolis under the Metropolitan Building Act 1869, and the tables marked exhibits B. and C. accompanying this case, and to be read as part of it, were put in evidence to support this view.

In reference to the sum of 2l. 7s. 6d. so paid as before mentioned to the said Charles Forster Hayward, it was objected on the part of the defendant that in point of law the said Charles Forster Hayward was entitled to the sum of 2l. and no more, for all or any services he might have rendered in pursuance of the requisition from the board directing him to visit and report on the said structure situate at 5, Davey's-buildings, Bedfordbury, and that as to the item of 7s. 6d., "to attending the police court to give evidence," no charge could be made for it. I made an order on the said Thomas Flight requiring him to pay 2l. of the amount claimed in the said account, but I made no order as to the sum of 7s. 6d. claimed for attendance at the police court. As to the sum of 10s. 6d. it was contended on the part of the said Thomas Flight, the owner of the said structure, that the said Metropolitan Board of Works had no power to make any such charge; that the only expenses the said Thomas Flight could be called upon to pay were the actual expenses incurred by the said Metropolitan Board of Works for work actually done upon and to the particular structure situate at 5, Davey's-buildings, Bedfordbury, aforesaid, of which he was the owner. That the said Metropolitan Board of Works had no power to frame a table of fees to be applied generally, but were only entitled to be reimbursed for the moneys actually expended in each individual case, and that by the Metropolitan Building Act 1855 (Amendment Act), any expenses incurred by the board in carrying into execution part 2 of the said Act (being the sections relating to dangerous structures) should be deemed to be part of the expenses in carrying into execution the said Act, and should be raised and paid accordingly. It was replied on the part of the said Metropolitan Board of Works that it was clear, from the Metropolitan Building Act 1855, that the Legislature intended that the expenses incurred by the authority supervising and controlling the dangerous structures of the metropolis should be borne by the owners or occupiers of such dangerous structures, and should not fall upon the rates. That by sect. 4 of the Metropolitan Building Act 1869, powers being given to the said board over all the dangerous structures of the metropolis, the board was entitled under the 13th section of the Metropolitan Building Act 1855, to be repaid all expenses incurred in the exercise of those powers; that from the said exhibits B. and C. it was clear that heavy expenses had been entailed upon the board in the general exercise of its control and supervision of the dangerous structures of the metropolis. That the items set out in the table of fees for the purpose of meeting these expenses had been fairly and regularly calculated so as to make every owner or occupier of a dangerous structure pay his fair pro-

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portion of them according to the amount of the trouble and expenditure to which he might put the board; that the charges contained in the sum of 10s. 6d. were reasonable and proper. I refused to make any order upon the said Thomas Flight in reference to the 10s. 6d. for special services.

The appellants being dissatisfied with my decision, as being erroneous in point of law, applied to me in writing to state a case for the opinion of the Court of Queen's Bench, which I now do.

The question for the opinion of the court therefore is, whether, under the circumstances before detailed, I was right in refusing to make an order for the 8s. 6d. or any part thereof, the sum of 2s. costs of the withdrawn summons, part of the said sum of 10s. 6d., not being in contest between the parties.

FREDK. FLOWERS.

Philbrick, on behalf of the appellants, contended that as to the 8s. 6d. the magistrate was wrong in refusing to make an order for the payment of it by the respondent. Sect. 69 of the Metropolitan Buildings Act 1855 (18 & 19 Vict. c. 122), empowers the commissioners to have a survey made of dangerous structures. By sect. 71, on the completion of his survey, the surveyor employed is to certify to the commissioners his opinion as to the state of the structure. By sect. 72, if the certificate is to the effect that the structure is in a dangerous state, the commissioners are to cause it to be shored up or otherwise secured, and a proper hoard or fence to be put up for the protection of passengers, and to cause notice in writing to be given to the owner or occupier, requiring him forthwith to take down, secure, or repair the structure. On noncompliance with this notice, a justice, by sect. 73, may summon the owner or occupier, and make an order to comply with the requisition. By sect. 78, if any special service is required to be performed by the district or other surveyor, under these enactments, for which no fee is specified in the schedule, the Metropolitan Board may order such fee to be paid for such service as they think fit; and by sect. 79, all fees so paid to the district or other surveyor are to be deemed to be expenses incurred by the commissioners in the matter of the dangerous structure in respect of which such fees are paid, and are to be recoverable by them from the owner accordingly. The 8s. 6d. in respect of which the magistrate refused to make the order, was an expense incurred for preparation of notices, forms for same, postage, clerk's time in serving notices, and general office expenses, which are clearly expenses incurred by the commissioners "in the matter of the dangerous structure," and therefore within the provisions of the Act, which, in this respect are not altered by the amending Act of 1869 (32 & 33 Vict. c. 89). [QUAIN, J.—How can you be entitled to 2s. 6d. for general office expenses, in addition to 2s. for the time of the clerk who served the particular notice? BLACKBURN, J.—If every owner kept his structure in good order, the general office expenses would still go on as before; and, if the appellant's contention on this point be right, in case there was a single defaulter, the whole of the general office expenses would have to be borne by him.] The appellants will not insist on the respondent's liability to pay the 2s. 6d. for

general office expenses; neither will they contend for his liability to pay the 2s. for the withdrawn summons. They insist, however, on their right to be paid the other two items, amounting to 6s.

Waddy, for the respondent, relied on the language of sect. 73 of the Act of 1855, which enacts that "if the owner or occupier, to whom notice is given as last aforesaid, fails to comply, as speedily as the nature of the case permits, with the requisition of such notice, the said commissioners may make complaint thereof before a justice of the peace; and it shall be lawful for such justice to order the owner, or on his default the occupier of any such structure, to take down, repair, or otherwise secure, to the satisfaction of the surveyor who made such survey as aforesaid, or of such other surveyor as the said commissioners may appoint, such structure or such part thereof as appears to him to be in a dangerous state, within a time to be fixed by such justice; and in case the same is not taken down, repaired, or otherwise secured within the time so limited, the said commissioners may, with all convenient speed, cause all or so much of such structure as is in a dangerous condition, to be taken down, repaired, or otherwise secured in such manner as may be requisite; and all expenses incurred by the said commissioners in respect of any dangerous structure, by virtue of the second part of this Act, shall be paid by the owner of such structure, but without prejudice to his right to recover the same from any lessee or other person liable to the expenses of repairs." It is submitted that the expenses referred to in the latter part of this section are expenses incurred in the doing of the requisite repairs, not in the way of office expenses—expenses incurred in actually doing what the owner should have done. [QUAIN, J.—The words are, "incurred in respect of" the dangerous structure—not "paid." Even supposing that the commissioners could recover such expenses from the owner, under the Act of 1855, it is submitted that this is altered by sect. 5 of the amending Act of 1869, which provides that "all payments directed by part 2 of the Metropolitan Building Act 1855, as amended by this Act, to be made by the Metropolitan Board of Works in respect of any structure situate within the limits of that Act, and not within the city of London, and all expenses incurred by the said board in carrying into execution part 2 of the said Act, shall be deemed to be part of their expenses in carrying into execution the said Act, and shall be raised and paid accordingly.

BLACKBURN, J.—The case must go back to the magistrate, with our opinion that as to the 6s. he was wrong, but as to the 2s. 6d. that he was right.

LUSH and QUAIN, JJ. concurred.

Case remitted accordingly.

Attorney for appellants, *W. W. Smith*.

Attorney for respondent, *Batt*.

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THE MAYOR AND CORPORATION OF KIDDERMINSTER v. HARDWICK.

[Ex.]

COURT OF EXCHEQUER.Reported by T. W. SAUNDERS and H. LEIGH, Esqrs.,
Barristers-at-Law.

Friday, Nov. 14, 1873.

**THE MAYOR AND CORPORATION OF KIDDERMINSTER
v. HARDWICK.***Corporation — Parol contract — Mutuality — Part
performance — Corporate seal — Town clerk — Au-
thority of — Agent appointed under seal.*

In pursuance of a resolution of the town council of K., passed on the 17th July 1872, and entered in the corporation books, and sealed with the corporate seal, a market, and the tolls thereof, belonging to the corporation, were, on the 18th July 1872, put up to lease by auction for the term of one year, with an option to the lessee to extend the term to three years. By the conditions of auction a lease was to be granted on or before the 17th Aug. 1872, the rent to be paid by equal monthly payments, the first payment to be made to the clerk of the lessors "immediately on the fall of the hammer," and the lessee to be always one month's rent in advance; and in case of failure by the lessee to perform any of the conditions, the rent then already paid was to be absolutely forfeited, and the lease to be null and void. The lessee was also, "at the fall of the hammer," to produce two sureties, to be approved of by the lessors or their clerk, for the payment of rent and performance of covenants, and who were also forthwith to sign the conditions and lease.

The defendant, as the highest bidder, became the purchaser or renter of the said market and tolls for one year, and thereupon the contract at the foot of the conditions was signed by him, and also by the town clerk, although the latter was not authorised by the corporation under seal so to do. The defendant also paid one month's rent in advance to the town clerk; but, not being prepared with the required sureties, a week's time was given to him by the town clerk to produce them, which period was subsequently further extended. A report of the above lettings to the defendant, and his payment of the month's rent, was made to the corporation, and was adopted by them by a resolution of the 7th Aug. 1872, entered in the corporation books, and sealed with the corporation seal.

By some mistake the keys of the market buildings were, without the authority of the corporation, and contrary to the instructions of the town clerk, handed by the market keeper to the defendant, who retained them for some days, but who never otherwise obtained possession of the market, and never received any tolls. The defendant finally failed to produce his sureties, the corporation relet the premises to another person, and brought an action against the defendant to recover damages for his breach of contract.

Held by the Court of Exchequer (Kelly, C.B. and Pigott and Pollock, BB.), that, as the contract was not under the corporation seal, or signed by an agent of the corporation duly and expressly authorised by them under seal for that purpose, and as the resolution of the 7th Aug. was after the breach, and so too late to operate as a ratification, and there was no such part performance as to entitle the defendant in equity to a specific performance on the part of the plaintiffs, the contract was

void for want of mutuality, and the plaintiffs' action thereon was not sustainable.

Per Kelly, C.B.—*The town clerk, although he is the agent and representative of the corporation for many purposes, is not their agent to make any contract for the sale or letting of lands, or the leasing of any incorporeal hereditaments, unless he is duly and expressly authorised under the seal of the corporation for that purpose.*

Wood v. Tate (2 Bos. & Pul. N. R. 247) and *The Ecclesiastical Commissioners v. Merrill* (L. Rep. 4 Ex. 162; 38, L. J. 93 Ex.) and other similar cases distinguished.

The Fishmongers Company v. Robertson (5 M. & Gr. 131; 12 L. J., N. S., 185, C. P.) and *The Governor and Company of the Copper Miners of England v. Fox* (16 Q. B. 229; 20 L. J. 174, Q. B.) considered and commented on.

This was an action by the Mayor and Corporation of the Borough of Kidderminster, suing as the Local Board of Health for that borough, against the defendant, to recover damages from him for an alleged breach of a contract by him to take, as the lessee thereof from the plaintiffs, at a yearly rent, the market and market tolls of the said borough.

The declaration charged that the plaintiffs, as and being the Local Board of Health for the Borough of Kidderminster, were possessed of, and entitled to, a certain public market, and to take the tolls in respect thereof and therein, and caused the said market and tolls to be put up to be let on lease by public auction on the 18th July 1872, for a certain term, to wit, from the 18th July 1872, to the 18th July 1873, upon (amongst other) conditions, that the highest bidder should be the purchaser or renter of the said tolls for the said term, and that on or before the 17th Aug. then next, the plaintiffs, as such local board, should grant and execute a lease of the said premises to the farmer or renter thereof, and that the rent to be reserved by the said lease should be paid by equal monthly payments, the first payment thereof to be made to the clerk of the lessors, or to the auctioneer, immediately on the fall of the hammer, and that the lessee must always be one quarter's rent in advance, and enter into a contract to that effect; and that if the lessee should at any time neglect to pay any or either of such monthly payments when and as the same should become due, or fail to perform the said conditions, the rent then already paid should be absolutely forfeited to the lessors, and the lease so to be granted as aforesaid, should thenceforth, at the option only of the lessors, be null and void, and the lessors in either case, should be at liberty, without suit at law or in equity, to enter immediately into the receipt of the rents then happening to be due, or to grow due, or to relet the same premises, or any part thereof, to any other tenant, as the case might be, and all losses, costs, damages, and expenses attending the nonperformance of the said conditions, &c., should be made good by the defaulter; and that the lessee of the said tolls, on the fall of the hammer, should produce two sureties, to be approved of by the lessors, or their clerk, for the due payment of the rent and performance of the covenants, to be reserved and contained in the said lease, and who should forthwith sign the said conditions and the said lease. The declaration then alleged that the defendant was the highest bidder for the said premises, and then agreed with the plaintiffs to take

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[Ex.]

the same on lease for the said term, at the yearly rent of 350*l.*, and to execute a lease containing the stipulations contained in the said conditions, &c., and then paid the first monthly payment of rent in advance; and before suit all conditions, &c., were fulfilled, &c., to entitle the plaintiffs to have the defendant produce two sureties as aforesaid, and take the premises on lease as aforesaid, and accept such lease as aforesaid; and to entitle the plaintiffs to bring and maintain this action for the breaches hereinafter mentioned, yet the defendant refused to produce such sureties, and to take the said premises on lease, and wholly dispensed with the tender of any lease, and refused to accept the same, and to pay any further rent, whereby, &c. (assignment of damages).

The defendant pleaded various pleas, namely: First, a denial of the agreement; secondly, traversing the plaintiffs' possession of the market and tolls; thirdly, denying their readiness and willingness to lease; fourthly, an equitable plea that the plaintiffs waived and dispensed with the performance of the conditions with respect to the production by the defendant of the two sureties, and notwithstanding that he did not produce them at the fall of the hammer, and that the lease was not signed by such sureties, the plaintiffs elected not to rescind the said alleged contract, but elected to go on with the same, and accepted and received from the defendant the first monthly payment of rent, &c., and afterwards let the defendant into the possession of the premises and receipt of the said tolls, and afterwards, and before any breach by the defendant, the plaintiffs refused to execute any lease, or to accept any sureties, and discharged the defendant from producing them and paying any further rent; that the defendant did not dispense with the tender of the lease, nor refuse to accept the same, nor refuse to pay any further rent; fifthly, never indebted.

At the trial of the action before Honyman, J., at the last summer assizes at Worcester, the following appeared to be the facts of the case: The plaintiffs (the mayor and corporation of the borough of Kidderminster) were, under the provisions of the Public Health Act 1848 (11 & 12 Vict. c. 63), the Local Board of Health for the said borough, and had, in the year 1869, under the Local Government Act 1858 (21 & 22 Vict. c. 98), sect. 50, and the provisions of The Markets and Fairs Clauses Act 1847 (10 & 11 Vict. c. 14) constructed and established a public market for the sale of cattle, sheep, vegetables, and other matters and things. They appointed a collector to receive and collect the tolls, and kept the market in their own hands. The collector having resigned his office in June 1872, the plaintiffs decided on putting up the market and market tolls to auction, and accordingly at a monthly meeting of the "general purposes committee" of the town council on the 17th July 1872, a resolution was duly come to, whereby it was resolved that Messrs. Downton and Sons, auctioneers, at Kidderminster, should be instructed to offer the market and market tolls and weighing-machine, &c., for sale for a term of years, on the following day. That resolution was duly entered in a minute-book kept for the purpose of and containing a record of the proceedings of the corporation, and was signed by the chairman of the meeting, and sealed with the corporation seal.

In pursuance of that resolution the market and

tolls, &c., were put up to auction by Downton and Sons on the 18th July 1872, and at that auction the defendant was the highest bidder for, and became the purchaser or renter of, the market and tolls, at the rent or sum of 350*l.* for one year, from the 18th July 1872, with power to the lessee to extend the term to three years at his option. The conditions under which the premises were put up to auction provided (amongst other things) that the highest bidder should be the purchaser or renter of the lots in question for the said term, and that the plaintiffs would, on or before the 7th Aug. 1872, execute a lease thereof to him; the rent to be reserved by such lease to be paid by equal monthly payments, the first payment thereof to be made to the clerk of the lessors, or to the auctioneers, "*immediately, at the fall of the hammer,*" and that the lessee must always be one month's rent in advance, and enter into a covenant to that effect; and if he should at any time neglect to pay any of the said monthly instalments, or fail to perform any of the said conditions, the rent then already paid should be *absolutely forfeited* to the lessors, and the lease so to be granted be thenceforth absolutely null and void, &c., and the lessors might at once re-enter or re-let the said premises, &c. And that the lessee, "*on the fall of the hammer,*" should produce two sureties, to be approved of by the lessors or their clerk, for the due payment of the rent, and performance of the covenants to be contained and reserved in the lease, and who should also forthwith sign the said conditions and the said lease.

At the conclusion of the auction the defendant signed a contract containing the above conditions, which was also signed by the town clerk, on the part of the plaintiffs, but he was not authorised or empowered by the corporation under seal so to do. The defendant then, on being required to pay the month's rent in advance, and to produce his two sureties, replied that he was not, at the moment, prepared to do either of those things, but would do so on the following day. On the next day, the 19th July, the defendant called upon the town clerk, and paid to him the first month's rent, amounting to 29*l.* 3*s.* 4*d.* He was not, however, provided with the required sureties, and a week's time was given to him to procure them. On the 27th July, the defendant wrote to the town clerk stating his continuing inability to find sureties, and that, therefore, he feared he "must necessarily fail in taking to the market." To that letter the clerk replied on the 3rd Aug., that unless the defendant at once complied with the conditions, and found the two sureties, the deposit would be forfeited, and the tolls would be re-let, and the defendant be held liable for any loss; and in answer to that letter the defendant, on the 4th Aug., wrote expressing his inability to find the sureties, his regret at having been so foolish as to bid for the market and tolls, and begging the corporation to deal as leniently with him as they possibly could do under the circumstances. The time for finding the sureties was further extended to the 9th Sept. On the 7th Aug., at a meeting of the town council, a report of the letting of the market and tolls, &c., by auction, to the defendant, and the payment by him of the month's rent in advance, and his failure hitherto to find sureties, as hereinbefore mentioned, was read, and approved and adopted; and a resolution to that effect was unanimously passed, which resolution

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was also entered in the minute book, signed by the chairman, and sealed with the corporate seal.

It appeared that the keys of the market had been handed over to the defendant under some mistake on the part of the keeper of the market, but without the sanction or express authority of the corporation; and, as a matter of fact, the defendant never obtained from the corporation the actual possession of the market buildings, and never was in the receipt of the tolls.

As the defendant finally failed to produce any sureties, the plaintiffs, as they were empowered to do by the conditions under which the defendant bid, and to which he had become subject, re-let the premises to another person at a sum less than that at which the defendant had become the purchaser. They also retained the month's rent which the defendant had paid in advance as a deposit, and at length, in November 1872, brought the present action against him to recover the loss incurred by them in consequence of the defendant's breach of contract in failing to produce his sureties and take to the market.

The defendant set up as a defence in answer to the action that the contract was void as it was not under seal, and also because there was a want of mutuality in the matter between himself and the plaintiffs. The plaintiffs, however, obtained a verdict for 45*l.*, and leave was reserved to the defendant to move to enter a nonsuit or a verdict for himself on the above ground.

A rule to that effect was accordingly obtained, against which

B. Vaughan Williams (with him were *Powell, Q.C.* and *J. O. Griffiths*) for the plaintiffs, now showed cause.—If it be conceded, for the argument's sake, that the affixing of the corporate seal was necessary to the effecting a valid contract in this case, yet nevertheless the resolution of the 17th July was a valid appointment, under seal, by the corporation, of an agent to act for them in the letting of these premises, and therefore his subsequent acts, whether under seal or not, would, it is submitted, bind the plaintiffs. [*KELLY, C.B.*—You contend that a contract by a corporation not under seal, is binding on that corporation if it be entered into by an agent on their behalf, duly appointed by the corporation for that purpose by a resolution under seal? That is the contention on the part of the plaintiffs. [*Anstie* for the defendant, *contra*.—the person who signed the contract on behalf of the corporation was *Mr. Morton* the town clerk, and not *Messrs. Downton* the auctioneers, who were the agents named in the resolution of the 17th July.] Then secondly, if that be so yet, nevertheless, the contract is still a valid and binding contract, inasmuch as it was fully adopted, ratified, and confirmed by the corporation afterwards in their resolution, also under seal, of the 7th Aug. A subsequent sealed ratification of a previous parol contract is sufficient to make such contract a binding one. If that were not so, a corporation could never sell by auction, or appoint an agent, or comply with the Statute of Frauds. It does not lie in the mouth of the party, who has committed the breach, to say that the other party cannot ratify the contract because of the breach, especially when, at the very moment, he himself was seeking for indulgence, which was granted to him. At all events it was an offer not rescinded, and continuing down to the 7th Aug.,

when it was ratified and adopted, and the Statute of Frauds was fully satisfied. But, thirdly, it is submitted that here there was such a part performance of and under the agreement as to raise an equitable obligation upon the corporation to grant a lease, and to induce a court of equity to decree specific performance against them at the suit of the defendant. There was part performance, first in the payment and acceptance of the market rent, and secondly, in the defendant having possession of the premises. He had, and kept, the keys of the market; whether they were delivered to him by the clerk or not is immaterial; he was in possession to the exclusion of the corporation, and is estopped from saying he was not. Up to the 7th Aug., though the defendant had not produced his sureties, the plaintiffs were treating the contract as partly performed. They might have ousted him at once on his first breach after the fall of the hammer, but, with full knowledge of the facts, they permitted him to sign the contract, and to pay the month's rent, and then extended the time for his finding sureties from time to time to the 10th Sept. Where a contract is varied by the conduct of the parties, equity will, where there has been part performance, enforce it as varied; and here, on the defendant producing his sureties on the 9th Sept., equity would have enforced specific performance, although, by the original contract, the sureties were to appear "on the fall of the hammer." The following cases are authorities for the proposition contended for under the third head of my argument:

The Ecclesiastical Commissioners v. Mearns, L. Rep 4 Ex. 163; 38 L. J. 93, Ex.;
Wood v. Tate, 2 Bos. & Pul. N. R. 247;
Lester v. Foxcroft (and cases there collected), 1 Wh. & Tad., L. C. in Eq. 4th edit. p. 768, (reported 1 Colles P. C. 108);
Earl of Oxford's Case, 2 Ib. 601 (reported 1 Ch. Rep. 1);
Nunn v. Fabian (before Lord Cranworth, L. C.) 13 L. T. Rep. N. S. 343; L. Rep. 1 Ch. App. 34; 35 L. J. 140, Ch.; 14 L. T. Rep. N. S. 843.

[*PICOTT, B.* referred to the judgment delivered by *Tindal, C.J.* in the case of *The Fishmongers' Company v. Robertson* (5 Man. & Gr. 131; 12 L. J., N. S., 185, C. P.)] The proposition there laid down by that learned judge that, where the persons who are parties to the contract with the corporation, have received the benefit of the consideration moving from the corporation, they are bound by the contract, and liable to be sued by the corporation, was admitted to be good law in *Doe dem. Pennington and others v. Taniers* (12 Q. B. 998; 18 L. J. 49, Q. B.). [*KELLY, C.B.*—There the corporation could not have turned the man out of possession. Nor could they have done so here. [*KELLY, C.B.*—You must not assume as a fact that which is denied by the other side, viz., that the defendant was ever let into possession. *POLLOCK, B.*—In the judgment in *The Fishmongers' Company v. Robertson*, at p. 194 of 5 Man. & Gr., and p. 198 of 12 L. J., C. P., *Tindal, C.J.* says, "It may possibly be the case that, up to the time of the corporation adopting the contract by performing the stipulations on their part, there was a want of mutuality, from the circumstance of the corporation not being compellable to perform their contract, and that the defendant might have had, during that interval, the power to retract and insist that the undertaking amounted to a *nudum pactum* only; but after the adoption of the contract by the corporation, by the performance on their

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part, on the general principles of reason, the right to set up such a defence appears altogether to fail." So it may be here that all that this defendant would have a right to would be to have the deposit returned; but not, since the sureties were never found, to have the contract carried out, and so there might be no correlative right of action by the plaintiffs to enforce their contract at law.] At the "fall of the hammer" there was a contract which was subsequently made good by part performance on both sides. The case of *The Ecclesiastical Commissioners v. Merrill* (*ubi sup.*) does away with the objection urged on the other side, of a want of mutuality, and is an authority for the proposition that there is sufficient mutuality if the obligation be legal on the one side and equitable on the other; and the other cases which I have cited support that proposition. [POLLOCK, B.—No doubt, if the conduct of the parties were such as would lead the court to hold the contract established, then the corporation could not say that they were not bound; but here the utmost that the defendant would be entitled to, looking at the facts, would be a return of the deposit. PIGOTT, B.—By the conditions, it becomes a penalty and is forfeited on the defendant's failing to perform the contract.] The present case is not within any of the cases where part performance has been held to be no ground for relief in equity. The first case is that where the payment of part of "the consideration money" is not a part performance to avoid the Statute of Frauds; but in the present case it is rent and not "consideration money." The next case is that of a void lease, and possession granted, where a continuing in possession is not enough, because it is an equivocal act; but not so the payment of rent, which was decided in *Nunn v. Fabian* (*ubi sup.*) to be sufficient; and there can be no dispute, in the present case, under what agreement the rent was paid and received. Lastly, this case comes within the class of cases which show that, where a corporation is created to do certain acts, they may do the authorised acts without a sealed contract. The plaintiffs here were acting as a board of health under the statute, by virtue of which alone they are enabled to take these tolls; and it is admitted, on both sides, that they had a statutory right to take and to lease them. [POLLOCK, B.—The principle you refer to applies solely to trading corporations.] It is submitted that there is no good reason why that should be, nor can I see any distinction between the cases. It is a general rule not confined to any particular corporation. In the most recent case on the subject, *The South of Ireland Colliery Company (Limited) v. Waddle*, in the Exchequer Chamber, on appeal from the Common Pleas, Cockburn, C.J., speaks of the rule as "a relic of barbarous antiquity." (L. Rep. 4 C. P. 617; 38 L. J. 338, C. P.; 18 L. T. Rep. N. S. 405).

Anstie (with him were *Huddleston*, Q.C. and *Mackey*) for the defendant, *contra*, was not heard in support of his rule.

KELLY, C.B.—I am of opinion that the defendant's rule should be made absolute to enter a nonsuit in this case, on the ground that the contract, not having been under the seal of the corporation, the corporation themselves have no power to enforce it; and inasmuch as it could not, for the same reason, have been enforced on the part of the defendant, therefore there is no mutuality, and the action is not maintainable. The

action was brought to recover damages for the alleged breach of an agreement by the defendant to take the market and tolls at Kidderminster. The contract appears to have been made under the following circumstances. [His Lordship stated the facts as set out above.] The defendant sets up as a defence to this action, and that is really the only defence which we are now called upon to consider, that there was no mutuality in this agreement; that it was an agreement by parol, or in writing only, and that there was no agreement under seal to which the plaintiffs were parties in the eye of the law, and consequently that there was no mutuality; and that, inasmuch as he could not have compelled them to execute the lease, which was the consideration of the contract, the plaintiffs are not entitled to maintain an action against him for breach of the contract, in the non-production of his sureties, and their non-execution of the agreement. Now, it has been contended, in a very able argument, by Mr. Vaughan Williams, in the first place, that, the authority to the auctioneers to put this market and the tolls up to auction, and to sign any agreement that might be made to carry the sale and purchase into effect, having been given by a resolution, under seal, on the part of the corporation, that is sufficient to give effect to the contract; and that thus, in contemplation of law, the plaintiffs became bound by the contract the moment that the auctioneer knocked the property down to the defendant, as the highest bidder. But, inasmuch as the agreement was not signed by Downton and Son (the auctioneers) the only persons upon whom it can be said that any authority at all was conferred by this resolution, under seal, on the part of the corporation, it appears to me that the resolution had no effect whatsoever. The agreement was signed by the Town Clerk, and the Town Clerk, doubtless for many purposes, is the agent and representative of the corporation; but he is not the agent of the corporation to make any contract for the sale or letting of lands, or the leasing of any incorporeal hereditament, unless he is duly and expressly authorised under seal of the corporation for that purpose. There is no such authority to the Town Clerk here. This agreement, therefore, is void and of no effect; and we must consider whether there is anything else to entitle the plaintiffs to maintain this action, and induce us to hold that they were parties to this contract, although they have never executed it under seal. The argument that has been offered to us is this,—and it has been said that it is supported by several authorities which have been referred to,—that, although it is true that the corporation were not expressly parties to this contract, although it is not a contract under their common seal at all, yet that it has been in part performed; and that, consequently, it would have been competent to the defendant forthwith to file his bill in equity against the corporation, to enforce the performance of their contract, and call upon the court to decree specific performance of it. That proposition is contended for, first, on the authority of a case decided in this court, *The Ecclesiastical Commissioners v. Merrill*. I will now observe at once upon that case and upon the other cases which have been cited, and to which I will hereafter advert, that, if it had appeared in the present case, as it did in that case, that the contract had been carried into effect by both parties—had been in part performed by the one

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party, that is, in this case, by the defendant, and that, consequently, the plaintiffs had had the benefit of a part performance of the contract on the part of the defendant—that would have entitled the defendant to file a bill in equity, and call for a decree for specific performance, although the contract was not under seal, and so would have put an end to the argument that there was no mutuality. But it will be found that all these cases which have been referred to are cases in which there has been, *actually* and *de facto*, a part performance of the contract, by which the corporation, who deny the contract, have themselves taken, received, and enjoyed the benefit of it. Now let us see what this case of *The Ecclesiastical Commissioners v. Merrall* was. It was there held that “one who enters upon, occupies, and pays rent for corporate property under a demise for a term of years, made on behalf of the corporation, but not sealed with their common seal, becomes tenant from year to year of the corporation, on such terms of the demise as are applicable to a yearly tenancy.” It must be observed, in the first place, that even there, it does not appear that such effect was given to the contract that it was treated as a binding contract with the corporation for the demise of the premises for twenty-one years. All that appears is, and all that was held is, that a contract had been entered into by which the corporation, though they had not put their seal to any contract at all, were bound by reason of part performance having taken place, of which they had taken the benefit. The part performance was this—they agreed to grant a lease for twenty-one years; no such lease was granted, and no such contract as a lease for twenty-one years was held to have been made by them, or to have been binding upon them. But what appeared was this: having entered into a contract to grant a lease for twenty-one years, they had delivered over possession of the premises to the intended tenant, the defendant, who had taken possession of the premises, had paid, I think it was, two or three quarters' rent, as it became due, for the premises, and had thus enjoyed the premises, and the corporation (the plaintiffs) received that rent, and thus took the entire benefit of the contract, which alone was held to have resulted from all these acts done on one side, and on the other, namely, a contract which created a tenancy from year to year. It was held that there was a tenancy from year to year, not a demise for a term of twenty-one years, but from year to year by the corporation to the defendant, there having been part performance of the contract by the payment of rent and the receipt of that rent to their own use and benefit by the corporation (the plaintiffs). On that ground it was held that they had entered into a binding contract, not indeed for the grant of a lease of twenty-one years, but for the creation of a tenancy and the demise of the premises from year to year at a certain rent, and they were consequently held entitled to recover the amount of rent due, as upon a tenancy from year to year. The sole ground of that decision was that there the corporation had themselves taken and received the benefit of a part performance of a contract for a tenancy from year to year, and that consequently it would have been competent for a tenant to say, “It is true there is no contract binding on the corporation to grant me a lease for twenty-one years, but I have entered into the possession of these premises, and I have

paid my rent in reliance upon such a contract, and upon the plaintiffs who have contracted accordingly, and, therefore, I am entitled to file a bill for specific performance of the contract,” and specific performance would have been decreed. That was what was held in that case. By way of *semble* only it was observed by the Chief Baron, “That when an individual contracts with a corporation in such a manner that the contract, though not under seal, may be enforced in equity against them, the individual is bound at law by any stipulation by him which is made in consideration of the liability so imposed upon them.” And in the case now before us, if there had been any part performance of the contract of which the plaintiffs had taken the benefit, that would have entitled the defendant to call for a decree for specific performance in a court of equity, and the plaintiffs would have been liable to that decree, and so they would have been entitled to maintain this action. But let us see what were the circumstances, and what is said to have been a part performance. It appears that upon the lot being knocked down to the defendant he was bound, under the contract, immediately to pay into the hands of the auctioneers, as representing the corporation, a certain deposit, and a month's rent in advance, and he was also bound to produce his two sureties, who were thereupon, then and there, forthwith to sign the agreement. He did pay down the deposit and a month's rent in advance, but he was unprepared with sureties, and he has never found sureties, so as to perform the contract in part by the signature of these sureties to the agreement. The question is, whether there is any part performance of the contract therefore, which would have entitled him to maintain a bill in equity for specific performance. It is said in the first place that it was part performance of the contract that he has paid the deposit and the month's rent in advance, and that the corporation (the plaintiffs) have received that deposit and month's rent. But it is perfectly clear that that is no part performance of the contract, unless it was accompanied, as it should have been, or at all events, followed up, within such time as the plaintiffs may have agreed to grant, by the signature of these sureties. He did pay the deposit and the month's rent, but it was competent for the corporation to say, “We receive this only as a deposit, and as security for the performance of the contract by you until you produce your sureties, and until they execute the conditions and the lease.” That was never done. Therefore this was no part performance of the contract. On the contrary, by the express terms of one of the conditions, if the defendant failed in the performance of his contract, the deposit and the month's rent are both forfeited. Therefore the payment of a sum which is forfeited by reason of non-performance on the part of the defendant of that stipulation in the contract, cannot be said to be part performance of the contract by him, which would be binding on the plaintiffs, and make them to be taken to have executed the contract under seal. We must look then to the question of the non-production of the sureties, and of their not having executed the agreement, because the time, at which there must have been the right of the other contracting party to enforce the performance of the contract by a bill for specific performance, is the breach of the contract for which he is sued in this action. The

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breach for which he is sued is that he failed to perform the condition of the contract, which required that he should forthwith produce his sureties, and that they should then and there immediately execute the agreement. The breach was committed then and there, and the question therefore is, whether at the time when that breach was committed, which was immediately upon or immediately after the knocking down of the lot to the defendant, there was any part performance of the contract which would enable him to maintain a bill for specific performance. There was none; he had done nothing but pay the deposit and the month's rent in advance, which, as I have already observed, was not a part performance of the contract until he had performed the other stipulation of the contract—that is entered into the contract by the signatures of the sureties. Therefore the whole matter was *in fieri* during the week or ten days, or whatever the time was, that they were disposed to allow to the defendant for the execution of the agreement by his two sureties. Still, the breach was committed at the time of the knocking down of the lot to him, and it was a continuing breach, and remained a continuing breach, and the whole contract remained *in fieri* between the parties, until the time had expired, for which they had granted the indulgence, and there was a final breach of the contract on his part in not producing his sureties. Therefore, the question is, whether either at the time of the sale and purchase at the auction, or when the time had expired which the auctioneers—or the plaintiffs we will say—had allowed to the defendant to bring forward his sureties, and for them to execute the agreement, whether at that time, when the breach was committed for which this action was brought, it was then competent to the defendant to say, "I have in part performed this agreement, you the corporation (the plaintiffs) have taken the benefit of my part performance of it, and so you cannot escape from it." It clearly was not so; because, as I have observed, the payment of the deposit and the month's rent in advance, was merely provisional, conditional; it was of no effect when the breach was committed by the defendant of the other stipulation, namely, in not bringing forward his sureties. It is clear, therefore, as far as regards the defendant in this case, that at the time of the breach committed, he was in no condition to have compelled specific performance of this contract by a bill in equity against the corporation. Now, let us look at the other cases relied upon by Mr. Vaughan Williams, in his argument. One of them, which was referred to also in the case of *The Ecclesiastical Commissioners v. Merrill*, is *Wood v. Tute* (2 Bos. & Pul. N. R. 247). In that case, a corporation had entered into an agreement for a demise, for a long term of years, of certain premises to the defendant, and the defendant had been let into possession, and had occupied and paid rent to the plaintiffs, who, upon the rent falling into arrear, brought an action in order to recover it. The very same question arose that arose in *Merrill's case* in this court, namely, whether, although there was no instrument under seal by which the corporation would be bound, and the agreement for a contract, such as to be binding, must have been under seal, being a lease for a term of years by a corporation to a tenant, although that was not so, whether there had been a part performance of the contract

because the defendant had been let into possession, he had enjoyed the land for a considerable time, and had paid rent to the corporation in respect of the demise, and the action was brought, or the distress put in upon his premises, in order to recover the arrears of that rent. It was there held, and very properly, that there was a part performance of the contract, of which the plaintiffs (the Corporation) had themselves taken the benefit, by allowing the tenant to take possession, and receiving rent from him in respect of his tenancy of the premises; and that after that they could not say that they had not taken the benefit of the contract. They would have been liable to a decree for specific performance in the court of equity. Accordingly, upon that ground, and upon that ground only, referred to by Sir James Mansfield, a judge who had practised very many years at the bar in a court of equity, and who was familiar with all its doctrines, it was decided that the plaintiffs, who would themselves have been bound by the contract on the ground that I have mentioned, and would have been liable to a decree for specific performance, were entitled to take the benefit of the contract and to sue. But there is another case which requires more attentive consideration—the case of *The Fishmongers Company v. Robertson* (5 Man. & G. 131; 12 L. J. N. S. 185, C. P.). In that case, as in this, an action was brought by a corporation against the defendant to recover a sum of money which was payable under a contract, which contract was not under the seal of the plaintiffs (the corporation), but which had been acted upon, and of which the plaintiffs had taken the benefit, and were therefore liable, and upon that ground also, were entitled to sue upon it. In a very elaborate judgment, in which Tindal, C.J. enters into the law with reference to all the authorities, his Lordship (at page 193 of 5 Man. & G., and page 198 of 12 L. J., N. S., C. P.) says: "The question, therefore, becomes this, whether, in the case of a contract, executed before action brought, where it appears that the defendants have received the whole benefit of the consideration for which they bargained, it is an answer, to an action of assumpsit by the corporation, that the corporation itself was not originally bound by such contract, the same not having been under their common seal. Upon the general ground of reason and justice no such answer can be set up. The defendants, having had the benefit of the performance by the corporation of the several stipulations into which they entered, have received the consideration for their own promise; such promise by them is, therefore, not *nudum pactum*; they never can want to sue the corporation upon the contract, in order to enforce the performance of those stipulations which have already been voluntarily performed; and, therefore, no sound reason can be suggested why they should justify their refusal to perform the stipulations made by them, on the ground of liability to sue the corporation, which suit they can never want to sustain." The learned Chief Justice goes on: "It may possibly be the case that, up to the time of the corporation adopting the contract by performing the stipulations on their part, there was a want of mutuality, from the corporation not being compellable to perform their contract; and that the defendants might, during that interval, have the power to retract, and insist that their undertaking amounted to a *nudum pactum* only." That was exactly the case

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here. At the time when this right of action is said to have arisen, that is, at the time of the breach of the contract on the part of the defendant to find two sureties, the corporation (to use the language of Chief Justice Tindal) had not "performed the stipulations of the contract," they had not put their seal to any instrument, and the consequence was that the defendant might, at any time, when called upon to pay the deposit money, when afterwards at a later period called upon to bring his two sureties to execute the agreement, have said, "I am not bound to do so—there is no mutuality. You, the corporation, the plaintiffs, have not executed any instrument under seal. I have no power to compel you to execute any such instrument. There has been no part performance of the contract, either on your part or on mine, which would enable me to maintain a suit for specific performance, and under these circumstances there is no mutuality, and I am not bound to do what you seek to enforce." If the case had rested there, and the judgment of Chief Justice Tindal had gone no further, it is a judgment clearly consistent with that which I am now pronouncing, and with all the authorities, and the defence set up in this action. But we find that the learned Chief Justice undoubtedly did use language which, upon considering the very high authority of that very learned judge, although it was a mere *obiter dictum*, induced me to pause and contemplate calling on the other side and hearing the argument out, before I should seem to doubt or dispute anything, as matter of law, which had fallen from so high an authority. He says (5 M. & Gr. p. 192; 12 L. J., N. S. C. P. p. 198): "Even if the contract put in suit by the corporation had been on their part, executory only, not executed"—that is, if there had been no part performance on one side or the other, if there had been merely the contract not executed, "we feel little doubt that their suing upon the contract would amount to an admission on record by them that such contract was duly entered into on their part, so as to be obligatory on themselves; and that such admission on the record would estop them from setting up, as an objection, in a cross action, that it was not sealed with their common seal." His Lordship then refers to the case of *The Mayor of Thetford*, (in Salkeld's Reports, p. 192; Lord Raym. 848; Lord Holt, 171) as an authority for the principle upon which he founded these observations, and seems to have thought that such was the law. Now, when we refer to that case of *The Mayor of Thetford*, it does not, with all respect to the high authority of Chief Justice Tindal, support this in any way whatever. That was a case in which there had been a *mandamus* to a corporation, and the corporation were to return certain facts on the *mandamus*. An objection was made that the return ought to have been sealed. The court held that it was quite unnecessary; that a return to a *mandamus* by a corporation was itself a matter of record, and needs no seal. But, surely, there is a difference between a return to a *mandamus* which, upon the principles of common law, is a matter of record of itself, and therefore requires no seal to give higher authority or greater effect to it, and the mere allegation in a declaration like this—an allegation by a corporation that they have entered into certain contracts. If it were not so, we should be placed in some difficulty—if

there were a declaration in a case like this, consisting of two counts, in one of which the corporation alleged that they had entered into a certain contract, and had put their seal to it; and then, in another count of the declaration, they alleged that they had entered into the very same contract (there being but one contract in the case), not under seal, but by writing and mere signature only. The truth is, that there is really no authority but this for saying that a mere allegation in a declaration by a corporation, or single individual, is matter of record binding on them. I am glad, indeed, to find, with the assistance of my brother Pigott, who, like myself, was a good deal staggered by this sentence in the judgment of Lord Chief Justice Tindal, that, in another case, upon a higher authority than mine, this doctrine propounded by Chief Justice Tindal has been completely, directly, and expressly overruled. I allude to the case of *The Governor and Company of the Copper Miners of England v. Fox* 16 Q. B. 229; 20 L. J. 174, Q. B. There the action was, like this, an action by a corporation upon an agreement entered into between them and the defendant for the purchase and sale of a quantity of iron; it was a contract in writing only, and not under seal. The objection was made that, not being under seal, the corporation were not bound, that there was no mutuality, and therefore the defendant was not liable; and it was held, that there was no mutuality, that the corporation were not bound by the instrument, as it was not under seal, and that the defendant could set up the objection, which he did set up, and had the judgment of the court thereupon in his favour. Upon this judgment of Lord Chief Justice Tindal, and the observation to which I have last adverted, being quoted before Lord Campbell, C.J., and commented upon, and of course very strongly relied upon by the counsel for the corporation, Lord Campbell says (at p. 233 of 16 Q. B.): "These observations are entitled to very great respect, but they were not part of the decision in that case. Tindal, C.J., adds, 'But it is unnecessary to determine this point on the present occasion.'" In truth the observation is entirely an *obiter dictum*. It has been also urged before us to-day, that there was a part performance of the present contract by reason of the defendant having been let into possession: but really, when we look into the evidence, we find that that allegation is entirely unsupported. All that took place was this: while the matter was *in fieri*, that is, after he had paid his deposit, the rent in advance, and while he was taking advantage of the indulgence of the few days that had been granted him by the plaintiffs for the bringing forward of his sureties, although it appears that the town clerk, the officer of the corporation, had forbidden the keys to be delivered to the defendant, the keys of the market-place were, by some mistake, delivered to him, and he had them in his possession and kept them for some time. That is said to be a part performance of the contract. Had he been let into possession by the deliberate act of the corporation it would have been a different thing; but the truth is, it was by a mere mistake, without their authority at all, and although he may be said to have had virtual possession of the market-place, it was only a *constructive* possession. He never entered into actual possession of the market-place; but, above all, he never occupied to his own profit or advantage; he never attempted to

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receive, and never received a shilling in respect of tolls; therefore it was in no respect a part performance of the contract, the benefit of which passed to him or the benefit of which passed to the corporation. Upon all these grounds I think the several authorities cited have failed to show that the defendant would have been entitled to maintain a suit for the specific performance of this contract, and consequently that there was no mutuality, and that the plaintiffs were not bound by a contract which they are said to have entered into, but to which their seal was not affixed, and that, consequently, so far as the points to which I have now adverted are concerned, the action is not maintainable. Then, finally the argument is submitted to us that there was a ratification or adoption of this contract at a subsequent period, on the 7th Aug. 1872; and that the corporation then did, by a resolution under seal, so far adopt this contract which was supposed to be entered into, that they received and adopted the report of their committee, which stated the exact facts which had taken place. But supposing this to amount to a ratification, which may be doubtful—assuming that the resolution under seal, expressly affirming this contract, would have been a ratification and adoption of the contract, which would have made them entitled to the performance of it—supposing that to be so, it came too late. If it had come before breach, then it would have been competent for the plaintiffs probably to have insisted, “You have broken this contract. You cannot say there is no mutuality between us, and that you were justified in breaking it, because you were under no obligation to perform it, inasmuch as we have ratified the contract under seal, and we could have had a bill for specific performance filed against us.” That would have been the case if this ratification had taken place before breach, but it came only after breach. The time which we are to look to, is the time when this cause of action on the part of the plaintiffs came into existence, and at that time there was no ratification under seal—no contract under seal, and no mutuality, consequently the defendant could have maintained no action against the plaintiffs, and the plaintiffs, therefore, could maintain no action against him. On all these grounds I am of opinion that the rule must be made absolute.

PIGOTT, B.—I agree with my Lord that there must be a nonsuit in this case. I do not propose to travel over again all the ground which my lord has so ably taken as the ground for his judgment. He has reviewed all the authorities, and I will simply say that I think the nonsuit must be entered, on the ground that there is no mutuality between these parties for want of a seal to the contract between them. There being a contract by a corporation which, in the ordinary state of things, requires a seal, we find that there is no seal; and what my lord said, as to the confirmation at a later period, I agree with—that that comes too late, for in fact, upon the dates, the seal is not put to the document of the 7th Aug. 1872, until after the defendant had withdrawn from the contract altogether, as the correspondence shows. Therefore there is no seal to a contract between the plaintiffs and defendant at any time when both parties were concurring in a contract. Then there being no seal, is there anything to show that this case comes within any of the exceptions which are allowed by law, and of which there

are three or four instances to be found in the books? It seems to me that it does not come within any of the exceptions. Mr. Vaughan Williams has argued that it comes within this exception: that there was a part performance, and that, therefore, it was not, what it would be without a seal, *nudum pactum*; that it was not *nudum pactum* because there was part performance. But where is the part performance on which he relies? He says, first of all, there was a deposit, and payment of the first month's rent; that the plaintiffs received that, and that so far there had been a part performance. But it seems to me that, when the conditions of sale are looked at, that is not a part performance in fact. It was neither paid nor received as a performance of the contract. It was required to be paid as in the nature of a security, that the defendant would observe and perform the conditions under which the auctioneer was selling, and under which his bidding was accepted. The language of the conditions under which that payment is made is this: “That the rent, which shall be reserved and made payable by the lessee, shall be paid by equal monthly payments, the first payment to be made to the clerk of the lessors, or the auctioneers, in advance, immediately on the fall of the hammer, and the lessee must always be one month's rent in advance and enter into a covenant in the lease to that effect.” There are other conditions binding on him, and then it says, “If the lessee shall, at any time, neglect to pay any or either of such monthly payments, when the same shall become due, or fail to perform these conditions, or any of them, the rent already paid to be absolutely forfeited to the lessors,” and so on. Therefore it seems to me that the sum of money, so deposited as payment of rent in advance, was in the first instance to be paid down before the contract could be signed or executed between them, because it was to be “at the fall of the hammer.” The mere fall of the hammer would not make the contract, as in the case of selling lands by auction, until there be a signature under the Statute of Frauds. This sum of money was deposited as a security that the bidder would not withdraw from any of the conditions. It became a penalty when he withdrew, and was not a part performance in any sense—not in the sense of giving a right to a bill in equity, nor as being a part performance which would exempt the contract from the necessity of being sealed. Well, then, is there any other matter which can be relied upon as showing that there was a part performance? Mr. Williams has argued, and upon the note of the trial it did look, at one time, as though there had been a possession given by the plaintiffs to the defendant and a taking possession by him, or, at all events, a taking possession by him in such a way as might have operated by estoppel, as precluding him from saying that he had not had part performance on the part of the plaintiffs, and so setting the want of a seal up as a defence. But we find from the note that there was an order from the town clerk to the market superintendent and receiver not to give possession to the defendant; that the only thing that person did was to give up the keys to the defendant when he came and asked for them. “But,” says the witness Powell, “I went on collecting the tolls until the Thursday,” so that it is quite certain that the witness first of all had no authority to give possession; secondly, that he

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did not give possession; and, thirdly, that the defendant did not take possession in the sense of taking possession as a part performance. He got the keys, whether that might have been for the purpose of looking at the market-house and premises does not appear, and it was not found by the jury, nor was it left to the jury, nor was the learned judge asked to put this to the jury, "Was this a part performance of the contract?" Therefore I do not think we can, on the bare statement of that which was perfectly ambiguous on the note, say that there was a part performance in any sense which can be relied on as being a ground of bringing this within the exception which may save the necessity for a seal. That seems to me to dispose of those matters, and to bring us to the only thing in the case which has really during the argument given me any trouble, and that is what my Lord has stated also affected his mind for a time, namely, the *dictum* of Chief Justice Tindal in the case of *The Fishmongers' Company v. Robertson*; because the Chief Justice there does use clear and explicit language, which would comprehend a case like the present. But, when we find that Lord Campbell, in the case which has been adverted to by my lord (*The Copper Miners Company v. Fox*), has commented on that *dictum*, and refused to be bound by it, and made observations to show that it is not accurate, and cannot be acted on in practice, I am no longer troubled with any difficulty on the subject, but am bound by the decision of the Court of Queen's Bench. On the whole, therefore, though I confess I look upon this as more of a technicality than anything else, and am sorry to give the benefit of the judgment to the defendant, who is the person in fault, and regret that he should be at liberty to set up this want of seal as his defence to this action, it seems to me that the law is, as my Lord has laid it down, and that we are bound to give effect to the law as it stands. To a certain extent the plaintiffs have brought this matter on themselves. There was the money in their hands as a penalty. The defendant said, "I cannot go on;" but they chose to persist, in spite of authorities, and perhaps of advice, in going on litigating this matter, and in the end, after a long, expensive, and troublesome lawsuit, we are bound to give effect to a technical defence. The result, however, is that the nonsuit must be entered.

POLLOCK, B.—I am of the same opinion. This action is brought by the plaintiffs, who are a corporation, for a breach of an executory contract, and it is open, under these circumstances, to the defendant to show that, although the contract was executed, as he admitted it was, by himself, there was no mutuality by reason of the plaintiffs not being bound. That proposition is very clearly stated in one of the early cases on this subject (*The Mayor of Stafford v. Till*, 4 Bing. 75; 5 L. J. 77, C. P.), in which Chief Justice Best says this: "In an executory contract the plaintiff must raise his case upon an express promise; and where that is so, if one of the parties is not in a condition to enter into a promise, he cannot take advantage of a promise by the other, because there would be no mutuality in the contract. We do not decide, therefore, that a corporation could sue *in assumption* on every express promise, because if the contract were executory there might be no mutuality of benefit, and consequently no consideration." These parties (the plaintiffs) are a corporation, and it has been said from all time not only that

corporations must act under seal, but that it is necessary for them to appoint agents or attorneys for the transaction of their business, as they cannot act for themselves in person. It is said in Story on Agency (7th edit. sect. 16) "they are an artificial being, and they cannot act except through the instrumentality of an agent or attorney, either specially pointed out by the act of incorporation, or specially authorised by the corporation to act in its behalf, and, therefore, such a corporation cannot levy a fine, or acknowledge a deed, or appear in a suit except by an attorney or agent;" and Story there refers, as authority for that position, to Co. Litt. 66, C., and Com. Dig. "Attorney," c. 2. It is open, therefore, to every corporation to get rid of the whole of the difficulty, as in this case it would have been to the plaintiffs, by appointing their agent to act for them under seal. That seems to me to be something more than a mere technical objection. I should be inclined to adopt the language used in this court, in their considered judgment, in the case of *The Mayor of Ludlow v. Charlton* (6 M. & W. 815, at p. 823; 10 L. J., N. S., 75, Ex., at p. 79): "We feel ourselves called upon to say that the rule of law requiring contracts entered into by corporations to be generally entered into under seal, and not by parol, appears to us to be one by no means of a merely technical nature, or which it would be at all safe to relax, except in cases warranted by the principles to which we have already adverted. The seal is required as authenticating the concurrence of the whole body corporate." I cannot imagine a case in which it is more clear that that rule ought to be upheld than the present, when we are asked, and forcibly asked, by the learned counsel for the plaintiffs, to assume against the defendant a great deal from facts which consist really of acts and conduct on the part of officers of the corporation. When once we are asked to make that assumption, I am inclined to fall back on the ancient rule, and say, they are a corporate body, and if I am dealing with a corporate body I must see that they have acted under their common seal. That being admitted up to this part of the case, what is said further on behalf of the plaintiffs? It is said this case is brought within two exceptions that have been adduced by the learned counsel for the plaintiffs, one of which he very properly did not rest upon very strongly, namely, that this was an ordinary act that might be done by a corporation, as in the case of a trading corporation who are selling goods, which by the very act of incorporation they are intended to sell, or that it is an every-day matter in which it would be inconvenient that an agent should be created under seal. I cannot think this is one of those cases. The other is a more important consideration. It is this, whether there has been anything like enjoyment on the part of the defendant which would estop him from saying, having actually enjoyed that for which he bargained, that there was no bargain at all? This case cannot be brought within the exception. It fails, in fact, because here the defendant never did occupy or enjoy; and more than that, I see no circumstances in this case that would entitle him, if he had filed a bill in equity against the plaintiffs, to have enforced the contract upon which they are now suing. I do see ground for saying that, if he had filed a bill in equity to recover his deposit he might have succeeded; but that would have been on the ground,

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Re VICAR OF NETHER STOWEY—REG. v. CHRISTIAN.

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not that the contract was a good one and could be enforced, but that the contract had failed and fallen through on account of some conduct by one party or the other. On all these grounds, it seems to me that we are deciding, not only according to all the decisions that have gone before on this point, but we are deciding on a very safe rule for the guidance of people in dealings of this kind between individuals and corporations.

Rule absolute to enter a nonsuit.

Attorneys for the plaintiffs, *Robinson and Preston*, 35, Lincoln's-inn-fields, W.C., agents for *Moreton*, town clerk, Kidderminster.

Attorneys for the defendant, *Prior, Bigg, Church, and Adams*, 61, Lincoln's-inn-fields, W.C., agents for *A. W. Knott*, Worcester.

ROLLS COURT.

Reported by G. WELBY KING and H. GODEFROI, Esqrs.,
Barristers-at-Law.

Saturday, Dec. 13, 1873.

Re VICAR OF NETHER STOWEY.

Payment out of court.—Land Tax Acts—Repair of Vicarage—Purchase of "lands" to be settled to "like uses," 42 Geo. 3, c. 116, s. 100.

By s. 100 of 42 Geo. 3, s. 100, surplus stock in court arising from the sale of land for the redemption of land tax may be laid out in manors, messuages, lands, tenements and hereditaments, to be settled and conveyed to like uses to those upon which the lands taken were settled. A petition by a vicar for the repayment to him out of the fund in court of money disbursed by him for repairs to the vicarage house, was dismissed as an unauthorised investment under the Act, decisions allowing such an investment under the Lands Clauses Act not being held binding on the court in a case under this Act.

THIS was a petition praying that a sum of 300*l.* laid out by Dr. Langford, the present vicar of Nether Stowey, in repairing the vicarage house and in increasing the accommodation thereof, might be repaid to him out of a sum of 397*l.* 13*s.* 4*d.* representing a fund paid into court in 1799, as the purchase-money for part of the glebe lands for the purpose of redeeming the land-tax charged on the vicarage. The sale had been effected under the Land Tax Acts of 38 Geo. 3, and 39 Geo. 3.

By s. 100 of 42 Geo. 3, c. 116, it is enacted, that whenever there shall be any surplus of stock transferred as the consideration for, or purchased with the money arising from any sale, mortgage, or grant made by virtue of the Act, after reserving so much of such stock as should be agreed to be transferred as the consideration for the land tax redeemed, the said surplus stock, where the manors, messuages, lands, tenements, or hereditaments sold, mortgaged, or charged, are situate in England, shall be placed in the books of the bank in the name and with the privity of the Accountant-General of the Court of Chancery, to the intent that such surplus stock may be applied under the direction and with the approbation of the court in the discharge of any debt or debts, or parts thereof, affecting the manors, messuages, lands, tenements, or hereditaments, the land-tax charged whereon shall have been so redeemed, or where the same shall not be so applied, that then the same shall be laid out and

invested under the like description and approbation in the purchase of other manors, messuages, lands, tenements, and hereditaments, which shall be set, conveyed, and settled to, for, and upon, such and the like uses, trusts, intents, and purposes, and in the same manner as the manors, messuages, lands, tenements, and hereditaments, which shall be so sold, mortgaged, or charged as aforesaid, stood settled and limited, or such of them as at the time of making such conveyance and settlement shall be subsisting, and determined, and capable of taking effect, and in the meantime the dividends and annual produce of such surplus stock shall from time to time go and belong to the person or persons who would for the time being have been entitled to the rents and profits of the said manors, messuages, lands, tenements, and hereditaments, in case such last-mentioned purchase and settlement had been made.

The dividends of the fund in court had from time to time been paid to the vicar for the time being of Nether Stowey. The sum now asked to be repaid was part of a larger sum paid for repairs; the remainder being money received for dilapidations from the last vicar. Evidence was adduced that the improvements were greatly for the benefit of the property and the persons interested in it.

Badcock for the petitioner argued that though not expressly provided for by the Act, the court would be justified in such a case in making the order. Such order had been made in several cases under the 69th section of the Lands Clauses Act:

Re Wigan Glebe Act, 3 W. R. 41;

Ex parte Rector of Skipton-under-Wythwood, 19 W. R. 549.

These repairs are in part rebuilding, and that has been authorized:

Re Drummer, 2 De G., J. & S. 615;

Ex parte Rector of Holywell, 2 Dr. & Sm. 463.

Fischer, Q.C., for the patron of the living, consented to the prayer of the petition.

Sir G. JESSEL.—Even if I were inclined to follow the cases under the Lands Clauses Act, which I am not, I should not do so in a case coming under a different Act altogether. The money is to be invested in "land to be settled to the like uses." Repairs and rebuilding are not in any sense authorized by the Act. The petition must be dismissed, but as the petitioner has been misled by the decisions on the point, without costs, which will come out of the fund.

Solicitors for all parties, *Vizard, Crowder, and Co.*

CROWN CASES RESERVED.

Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

Saturday, Nov. 15, 1873.

(Before KELLY, C.B., BLACKBURN and LUSH, JJ.,
POLLOCK, B., and HONYMAN, J.)

REG. v. CHRISTIAN.

*Agent—Fraudulent conversion of money—Direction to apply to given purpose—*24 & 25 Vict. c. 96, s. 75.
*A stock and share dealer was in the habit of buying for S. gratuitously, and receiving cheques on account. On the 27th Nov. he wrote informing S. that 300*l.* Japanese bonds had been offered to him*

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in one lot, and that he had secured them for her, and that he had no doubt of her ratifying what he had done, and inclosing her a sold note for 336l., signed in his own name. S. wrote in reply, "that she had received the contract note for Japan shares, and inclosing a cheque for 336l. in payment, and that she was perfectly satisfied that he had purchased the shares for her." In fact, the bonds had not been offered to the dealer in one lot, but he applied to a stock jobber and agreed to buy three at 112l. each, but never completed the purchase:

Held, that S.'s letter was a sufficient written direction, within the meaning of 24 & 25 Vict. c. 96, s. 75, to apply the cheque to a particular purpose, viz., in payment for the bonds.

THE prisoner was tried before me at the October Sessions of the Central Criminal Court 1873, for converting to his own use or benefit the proceeds of a cheque for 336l., with which he had been entrusted as the agent of one Mary Anne Spooner, contrary to the statute 24 & 25 Vict. c. 96, s. 75. (a)

The prisoner was a stock and share dealer, carrying on business at 11, Royal Exchange.

In the year 1872 a Mrs. Spooner, a widow, was introduced to the prisoner, and the prisoner offered to make any investments for her that she might wish, and told her that out of respect for her late husband he would not make her any charge for so doing.

Between this time and the 1st Nov. 1872, the prisoner purchased for her at different times a variety of securities, amounting in the whole to 1326l. 17s. 6d., for doing which he made no charge, and on the other hand Mrs. Spooner from time to time made payments to the prisoner amounting in the whole to 1886l. 2s. 6d., such payments not being made specifically against any particular items, but in cheques for round sums.

On the 12th Nov. 1872, the prisoner made the following suggestion to Mrs. Spooner:—

11, Royal Exchange, London, E.C., Nov. 12, 1872.

Amended scheme of investment.

Argentine 6 per Cent. price (say) 97 (2 bonds) ..	£194
Austrian Silver Rentes, 5 per Cent. 67 (2) ..	134
Chilian 6 per Cent. 103 (3) ..	206
" 7 per Cent. 108 (1) ..	108
Japanese 9 per Cent. 111 (2) ..	222
United States 5.20 6 per Cent. 93 (5) ..	465

Producing 89l. per annum. 1329

Dear Madam,—The above is an amended scheme of investment, which I trust you will find in accordance with your wishes. No doubt it will be better to take advantage of present lower quotations wherever prices have been affected by late events, and I will proceed to act immediately on receiving your instructions to that effect.—I remain, dear madam, yours truly, Y. CHRISTIAN.

Mrs. Spooner, &c.

Mrs. Spooner assented to this, and on the 14th Nov. 1872 the prisoner purchased on her account, but in his own name, from one Wrenn, a jobber on the Stock Exchange, the three sets of securities mentioned in the contract note of the 14th Nov. 1872, hereinafter set out, and sent to Mrs. Spooner the following letter and contract note:—

(a) The 24 & 25 Vict. c. 96, s. 75. enacts that whosoever having been entrusted as a banker or other agent with any money or security for the payment of money, with any direction in writing to apply such money or security, or the proceeds of such security, for any purpose, shall, contrary to the terms of such direction, convert to his own use or benefit such money, security, or the proceeds thereof, shall be guilty of a misdemeanor.

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11, Royal Exchange, London, E.C., Nov. 14, 1872.
Dear Madam,—I have much pleasure in inclosing contract note for

200l. Argentine 68	at 96
200l. Austrian Silver	65½
2500 dols. 5.20, 1867	93½

which I have every reason to believe will pay you very well, taking into consideration their stability. I hope to get the Japanese to-morrow. Railways (Great Northern, Great Western, and Caledonian) are all expected to give good dividends, and I think you will do well to procure a few. The markets are on the rise, in consequence of the Bank rate not having been altered.—I beg to remain, dear madam, your most obediently,

Mrs. Spooner.

Y. CHRISTIAN.

London, Nov. 14, 1872.

Sold to Mrs. Spooner,		£	s.	d.
200l. Argentine 1868	at 96 net	192	0	0
200l. Austrian Silver	at 65½	131	0	0
2500 dols. 5.20 1867	at 93½	525	18	9

Stock and Share Dealer, £248 18 9

11, Royal Exchange, E.C.
Bankers: Bank of England.

Recd.
Y. Christian
Stamp

The prices mentioned in this note were the same as those agreed between the prisoner and the vendor of the bonds, &c. The prisoner did not disclose his principal, but said he was buying for a widow lady.

On the 15th Nov. 1872, Mrs. Spooner sent to the prisoner the following statement of account between herself and the prisoner:—

Statement of Account.

Feb. 3, 200l. New South Wales Government Stock, at 104½	209	5	0
Feb. 3, 200l. Victoria Six per Cent. Government Stock, at 114½	228	15	0
April 10, 25 Western Gas (A., B., or C.), at 17½	448	16	0
April 10, 7 Imperial Gas (12½ issue), 10l. paid, at 4 premium	98	0	0
April 10, 8 Reuter's Tel. at 11½, and stamp fee	90	10	0
April 17, 13 Imperial Gas (12½ issue), 10l. paid, at 4 premium	182	0	0
April 17, Stamp and fee	1	2	6
April 17, Stamp and fee, 7 Imperial Gas, April 10	0	12	6
April 17, Stamp and fee, 25 Western Gas, April 10	2	7	6
April 22, 5 Imperial Gas, at 14	70	0	0
April 22, Stamp and fee	0	10	0
Nov. 14, 200l. Argentine 1868, at 96	192	0	0
Nov. 14, 200l. Austrian Silver, at 65½	131	0	0
Nov. 14, \$2500 5.20 1867, at 93½	525	18	9
	2175	16	3

Feb. 3, By cheque	500	0	0
April 10, Ditto	600	0	0
April 11, Ditto	100	0	0
April 18, Ditto	186	2	6
April 23, Ditto	500	0	0

1886 2 6
Balance..... 289 13 9

£2175 16 3

accompanied by the following letter:—

2, Pemberton-terrace, St. John's Park,
Nov. 15, 1872.

My dear Sir,—I inclose a statement of account, with a cheque for the balance, which I hope you will find correct. When I know the amount of the Japanese I will immediately forward you a cheque for the same. With my best thanks for all your kindness,—I am, yours faithfully,

Y. Christian, Esq.

M. A. SPOONER.

and also by a cheque for 289l. 13s. 9d., payable to the prisoner or order; and the prisoner on the

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REG. v. CHRISTIAN.

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16th Nov. acknowledged the receipt of the cheque and account, and obtained payment of the former.

On the 27th Nov. 1872 the prisoner wrote the following letter to Mrs. Spooner:—

Y. Christian,
Stock and Share Dealer.
Bankers:
Bank of England.

11, Royal Exchange,
London, E.C.
Nov. 27, 1872.

Dear Madam,—I inclose a contract note for 300*l*. Japanese Bonds at 112—336*l*. This 300*l*. was offered to me in one lot, and I thought myself fortunate in securing them for you, and had no doubt of your ratifying what I have done. These Japanese securities are really a first-rate investment, and will pay 8 per cent. I have got them at the lowest price of the day, and, indeed, my apparent dilatoriness in the matter has been caused solely by my anxiety to get them cheaper if I could.—Yours truly,

Y. CHRISTIAN.

Mrs. Spooner, &c.

and inclosed in it the following contract note:—

London, Nov. 27, 1872.

Sold to Mrs. M. A. Spooner,
300*l*. Japanese at 112.

£336 : 0 : 0

Stock and Share Dealer,
11, Royal Exchange, E.C.
Bankers: Bank of England.

Recd.
Y. Christian
Stamp

The prisoner had on the same day bought in his own name from Mr. Wrenn three Japanese bonds at 112*l*.

It was not true that the 300*l*. was offered to the prisoner in one lot, but the prisoner asked Mr. Wrenn for three bonds.

On the same day Mrs. Spooner sent to the prisoner the following letter:—

2, Pemberton-terrace, St. John's Park,
Nov. 27, 1872.

My dear Sir,—I have just received your note and contract note for 3 Japan shares, and inclose a cheque for 336*l*. in payment. I am much obliged to you, and perfectly satisfied that you have purchased the three shares for me. My son Frank will be the bearer of this, and I shall feel obliged if you will kindly give him any information you can about the Nicholas Railway and the "Share Investment Trust."—Again thanking you; in haste, believe me, yours faithfully,

M. A. SPOONER.

and also a cheque for 336*l*., payable to the prisoner or order, and the prisoner received and indorsed the cheque, and received the proceeds thereof.

On the 29th Nov. 1872, the prisoner wrote the following letter to Mrs. Spooner:—

Y. Christian,
Stock and Share Dealer.
Bankers:
Bank of England.

11, Royal Exchange,
London, E.C.,
Nov. 27, 1872.

Dear Madam,—I have to acknowledge the receipt of your cheque for 336*l*. value for three Japanese Bonds, which I shall have the pleasure to forward you immediately on their being delivered. I now inclose two 100*l*. Argentine Bonds of the Six per Cent. Loan of 1868, Nos. B 12,309 and 1572, and two bonds for 1000 florins each of the Austrian Currency Loan, Nos. 495,402 and 495,408. With reference to the latter portion of your note, I will at once say I do not recommend either the Nicholas Railway or the Share Investment Trust. But turning the matter over, I consider, for safety and profit, a sum laid out on Great Western or North London Railway shares will do good. For that purpose, however, we must watch the market, and take advantage of a day or week when prices have declined. But of course I shall do nothing till I have your sanction for proceeding.—Yours truly,

Y. CHRISTIAN.

Mrs. Spooner, &c.

Mrs. Spooner never received either the 2500 United States Bonds or the Japanese, though she repeat-

edly applied to the prisoner for them, and the prisoner on one occasion told her that the broker or jobber was in his debt, and that the broker or jobber knew that when he delivered the bonds the prisoner would deduct from the price the amount of such debt.

On the 8th Aug. 1873 the prisoner offered Mrs. Spooner a composition, and informed her he was filing a petition for liquidation.

Ultimately the United States Bonds and the Japanese Bonds having been carried over from time to time, by order of the prisoner, without the knowledge of Mrs. Spooner, were sold by the orders of the prisoner.

The prisoner never paid the person from whom he bought the United States and Japanese Bonds for the same, and the cheques for 289*l*. 13*s*. 9*d*. and 336*l*. were paid into the prisoner's account, and the proceeds of such cheques applied by the prisoner to his own purposes.

At the close of the case for the prosecution, it was submitted, on behalf of the prisoner, that Mrs. Spooner's letter of the 27th Nov. 1872 did not constitute a sufficient direction in writing to apply, pay, or deliver the cheque or its proceeds for any purpose, or to any person specified in such direction, within the meaning of the statute.

I left the case to the jury, but reserved the aforesaid question for the opinion of the Court of Criminal Appeal.

The jury found the prisoner guilty, and I admitted him to bail.

The question for the opinion of the Court of Criminal Appeal is, whether Mrs. Spooner's letter of the 27th Nov. 1872, coupled with the prisoner's letter of that date, and the contract note for the Japanese Bonds, was under all the circumstances of the case a sufficient direction in writing within the statute.

(Signed) GEORGE E. HONTMAN.

Metcalfe, Q.C. (*Collins* with him), for the prisoner.—There was no specific direction in writing to apply the cheque for 336*l*. to any particular purpose, as required by the statute 24 & 25 Vict. c. 96, s. 75. The prisoner is described as a dealer in stock and shares, and it is found that he bought the Japanese Bonds in his own name, and contracted to sell them to the prosecutrix in his own name. [HONTMAN, J.—At the trial it was admitted that the prisoner acted as an agent for the prosecutrix, and it was never pretended that he sold to her on his own account.] The previous dealings between the prisoner and the prosecutrix also show that the prisoner was not acting as her agent but on his own account. The bonds were sold to him, and he recommended them to her, and she sent her cheque to pay himself, and not to invest the proceeds for her. The fair construction of the letter of the 27th Nov. is, that it was not a direction specifically to apply the cheque to the payment for the bonds, but to apply it to repay himself for money previously paid on her account, or against a liability he had incurred on her account. The case of *Rees v. Golde* (2 Moo. & Rob. 425) was cited. [POLLOCK, B.—That was an indictment for misapplying the security itself. LUSH, J.—And the words of the 7 & 8 Geo. 4, c. 29, were held not large enough to include the conversion of a security, but the present statute cures that difficulty.]

Mead, for the prosecution, was not called upon to argue.

KELLY, C.B.—The statute upon which the pri-

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soner is indicted makes it a misdemeanor for any banker or other agent entrusted with money, or any security for the payment of money, who having received any direction in writing to apply such money or security, or the proceeds of such security, for any purpose, shall, contrary to the terms of such direction, convert to his own use or benefit, such money, security, or the proceeds thereof. And the question is, whether the direction to the prisoner contained in the letter of the prosecutrix of the 27th Nov., is a direction within the meaning of the statute, and what is its real meaning. There is no precise statement in the letter as the purpose to which the cheque was to be applied. Now it appears that the prisoner had been in the habit of purchasing securities for the prosecutrix, and of receiving cheques in payment from her. It is not very material whether he purchased them in his own name or not. He says in his letter of 27th Nov. what turned out to be untrue, that this 300*l.* Japanese bonds was offered to him in one lot, and that he thought himself fortunate in securing them for the prosecutrix. That letter is some evidence that the prisoner acted fraudulently. The words of that letter are open words, and it inclosed a contract with the prosecutrix in his own name. That contract note and the letter in which it was contained are no doubt ambiguous, and it might be contended that the import was that he had actually purchased the bonds in his own name, and that he had received them, and that nothing remained to be done but to deliver them over, and for her to send her cheque on account of them. If that were so, the construction of the prosecutrix's letter of the 27th Nov. would be, "Whereas, you have purchased bonds and are about to deliver them to me, now to enable you to do so, I send you a cheque." If that were the construction, then there would be nothing in this case in contravention of the statute. But it may also be contended that the construction of the letter is that he had purchased the bonds for her in his own name for 336*l.*, but that they had not been delivered, and that in order to get them delivered he would have to pay that amount; and if so the prosecutrix's letter in reply would mean this, "Whereas you have purchased the bonds in your own name, and have not paid for them; and whereas you have purchased them for me, I send you a cheque, which you will please to pay over to the person who has sold them, that he may deliver them." That construction of the letter would amount to a direction within the meaning of the statute. As either meaning may be attached to the letter, it may be read as containing a direction in the alternative, "Whereas you have purchased by my instructions these bonds, and you do not tell me whether you have paid for them or not, I inclose you a cheque to repay yourself, if you have paid for them; but if you have not, and have still to pay for them, be good enough to apply the cheque in payment thereof." Reading the letter of the prosecutrix so, it operates as a direction to the prisoner, who knew the facts, to apply the cheque to the payment of the seller of the bonds, in order to obtain possession of them for her. I therefore think the conviction should be affirmed.

BLACKBURN, J.—I also think that the conviction should be affirmed. At first I supposed it was disputed on the facts whether the prisoner acted as an agent for the prosecutrix, but it is admitted that he did in some way so act. The prisoner then

being her agent, acts for the prosecutrix as her agent to buy stocks and shares for her, and buys various securities by her directions. It may well be that he was acting as her agent in so buying, although without establishing privity between her and the sellers of the stocks and shares, for in cases in which he made himself liable to the persons from whom he bought he would have the right to call on her to pay him. Now his letter of the 27th Nov. incloses a contract for 300*l.* Japanese, and expresses it as "Sold to Mrs. Spooner by himself;" and it is probable, therefore, that he had made himself personally liable to the seller. But that does not show that he was not acting as her agent. In many cases a broker makes himself personally liable to both sides, and yet is still an agent. In this case the defendant notified to the prosecutrix that he had bought the bonds and secured them for her, and he had no doubt she would ratify what he had done, and inclosed the sold note for 336*l.*, and upon that the prosecutrix wrote the letter in reply. The question is, what is the meaning of her letter? I have no doubt that it means, "Inasmuch as the sum of 336*l.* is to be paid before I can get the bonds, here is my cheque, get the proceeds and with them take up the bonds in the most convenient way." If he had honestly paid the cheque into his bankers, all would have been right and proper, and although some unfortunate occurrence might have prevented his applying it as directed, it would not have been in violation of good faith. The prosecutrix's letter amounts to a direction to apply the proceeds of the cheque for a particular object, viz., the taking up of the Japanese bonds, so as to leave the prosecutrix free from all claim. Was that a direction within the statute? I think it was, for the defendant, an agent of some sort as a broker, bought the bonds and wrote that he had secured them for the prosecutrix, and she sent her cheque with a written direction to take them up with the proceeds of the cheque. The question was left to the jury, whether the prisoner applied the proceeds of the cheque in violation of good faith and contrary to the purpose for which he received it, and they found that he did. The conviction must therefore be affirmed.

LUSH, J.—The only question reserved for this court is, whether Mrs. Spooner's letter of the 27th Nov., coupled with the prisoner's letter of that date and the contract note for the Japanese bonds, was a sufficient direction within the meaning of the statute. The question of *mala fides* is not open, and it must be taken as a fact by us that the conversion of the proceeds of the cheque was such as to make the defendant criminally liable, if it was contrary to a sufficient direction within the meaning of the statute. It seems to me that the question is free from much doubt. The prisoner's letter is in substance, "I have bought for you three Japanese bonds, and inclose the contract note for 336*l.*" Her letter in reply clearly means, "If you have not paid for them, apply the proceeds of the cheque in payment of them; if you have, apply them in repaying yourself." This was a quite sufficient direction within the statute.

POLLOCK, B.—I am of the same opinion.

HONYMAN, J.—No point was raised at the trial as to the agency. The defendant was a gratuitous agent, buying shares, &c., for the prosecutrix in his own name. The question depends on the meaning of the word "payment," in the prosecu-

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trix's letter of the 27th Nov. It means that if the defendant had paid for the bonds he was to put the proceeds of the cheque into his own pocket; and if he had not paid for them, he was to pay for them with the proceeds of the cheque, and deliver the bonds to her. The letter comes to that, and is therefore a written direction within the statute.

Conviction affirmed.

COURT OF QUEEN'S BENCH.

Reported by J. SHORTT and M. W. MCKELLAR, Esqrs.,
Barristers-at-Law.

Monday, Nov. 17, 1873.

REG. v. ROBERTS.

Payment of costs of prosecution out of money found on prisoner—Prisoner adjudicated bankrupt before conviction—Right of trustee in bankruptcy to money found on prisoner—Act for Abolition of Forfeiture for Treason and Felony 1870 (33 & 34 Vict. c. 23) s. 3—Bankruptcy Act 1869 (32 & 33 Vict. c. 71) s. 17.

After the conviction of a prisoner for felony the Central Criminal Court made an order, under sect. 3 of 33 & 34 Vict. c. 23, for the payment of the costs of the prosecution out of the moneys found on the prisoner at the time of his apprehension. The validity of this order being questioned by the trustee in bankruptcy of the prisoner's estate on the ground that the prisoner had been adjudicated a bankrupt between the dates of his apprehension and conviction, and that on such adjudication all his property vested in the trustee:

Held, that the order was rightly made, the trustee on adjudication of bankruptcy, taking the property of the bankrupt prisoner, subject to the possibility of the criminal court making the order in question.

Quære, whether such an order would be valid if the prisoner were adjudicated bankrupt in respect of an act of bankruptcy committed before his apprehension.

In this case a rule *nisi* had been obtained, calling upon the justices of the Central Criminal Court to show cause why a writ of *certiorari* should not issue to remove into this court an order made at the general session of the delivery of the Queen's gaol of Newgate, holden on the 5th May 1873, whereby it was ordered that the costs incurred in the prosecution of one William Alexander Roberts, for feloniously forging an order for the payment of 11,500*l.*, should be paid out of moneys found on Roberts upon his apprehension, as far as such moneys should extend.

From the affidavits filed in the matter it appeared that Roberts was taken into custody on the 4th April 1873, on a charge of having forged and altered a cheque for 11,500*l.* After several remands he was finally committed for trial at the Central Criminal Court. On the 24th April he was adjudicated a bankrupt by the London Bankruptcy Court, and on the 8th May a trustee of the bankrupt's estate was appointed. On the same day on which the trustee was appointed, but later on that day, Roberts was found guilty of felony at the Central Criminal Court, and sentenced to twelve years' penal servitude. On the 9th June an application was made on the part of the prosecution, to the Central Criminal Court, for an order for the payment of the costs of the prosecution out of the moneys found upon the prisoner, on his apprehension, and then taken from him, under

sect. 3 of the Act for the Abolition of Forfeiture for Treason and Felony (33 & 34 Vict. c. 23), and the court made the order asked for.

It did not appear when the act of bankruptcy was committed, on which the prisoner was adjudicated a bankrupt.

Giffard, Q.C. and *Poland*, now showed cause against the rule.—Sect. 3 of the Act to abolish forfeitures for treason and felony, and to otherwise amend the law relating thereto (33 & 34 Vict. c. 23), provides that it shall be lawful for any court by which judgment shall be pronounced or recorded upon the conviction of any person for treason or felony, in addition to such sentence as may otherwise by law be passed, to condemn such person to the payment of the whole or any part of the costs or expenses incurred in or about the prosecution and conviction for the offence of which he shall be convicted, if to such court it shall seem fit so to do; and the payment of such costs and expenses, or any part thereof, may be ordered to be made by the court out of any moneys taken from such person on his apprehension. This section clearly gave the Central Criminal Court power to make the order now sought to be quashed.

Metcalf, Q.C. (with whom was *Graham*) was here called on to support the rule.—From the date of the adjudication of bankruptcy, *i.e.*, the 24th April, the prisoner was divested of all his property, which from that date became the property (1) of the registrar and (2) of the trustee. Sect. 17 of the Bankruptcy Act 1869 (32 & 33 Vict. c. 71) enacts that "until a trustee is appointed the registrar shall be the trustee for the purposes of this Act, and immediately upon the order of adjudication being made, the property of the bankrupt shall vest in the registrar. On the appointment of a trustee the property shall forthwith pass to and vest in the trustee appointed." [BLACKBURN, J.—So far as any interest in the prisoner himself was concerned, he could not, by voluntarily assigning it, get rid of its liability under the Treason and Felony Act, and if that be so, I do not see how a compulsory assignment of his property under the Bankruptcy Act can make a difference.] The prisoner could up to the time of his conviction, dispose of his property as he liked. In *Whitaker v. Wishey* (12 C. B. 44) it was held that an assignment of a felon's goods, *bonâ fide* made for a good consideration, after the commission day of the assizes, but before the day on which he was actually tried and convicted, will pass the property. At the time of the prisoner's apprehension the money was his, but subject to the right of the Central Criminal Court to make an order after his conviction, for the payment of the costs of the prosecution out of it. But before any such order is made the Bankruptcy Act steps in and vests all the property of the prisoner absolutely in the trustee; the prisoner, therefore, had no longer any property which the Criminal Court can lay hold of by its order. [BLACKBURN, J.—The trustee takes only that property which is the bankrupt's, and if that property is subject to any lien in favour of another person, the trustee must take it subject to that lien. QUAIN, J.—The Act says expressly that the court may order the costs to be paid out of whatever moneys are "taken from such person on his apprehension." That must mean moneys belonging to him—not moneys belonging to another person which might be found on his person

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at the time of apprehension. [BLACKBURN, J.—Perhaps that is so. If the act of bankruptcy had taken place before the prisoner's apprehension the point might be more doubtful; but that point does not arise in the present case.] The prisoner at the time of his apprehension was legal owner of the moneys, subject only to a contingency which might never arise. [BLACKBURN, J.—And the trustee holds them exactly as the bankrupt did. His right to them is neither greater nor less. Roberts held the moneys subject to the contingency of an order being made after his conviction for the payment of the costs of the prosecution out of them. After his bankruptcy the trustee held them subject to the same contingency.] Suppose the prisoner handed over to his attorney some of the money in his possession at the time of his apprehension, to pay the costs of his defence, could the criminal court, subsequently to his conviction, make an order on the attorney for the payment of the costs of the prosecution out of the same money? This would place attorneys in a very awkward position. [BLACKBURN, J.—I do not think that there is any likelihood that the court would make any order having such an effect as that.] In any case notice should have been given to the trustee to show cause why the costs of the proceedings should not be paid out of the moneys taken from the person of the bankrupt; and on this ground also it is submitted the order was wrong.

BLACKBURN, J.—In this case I think the rule should be discharged. I wish to guard against being supposed to say that simply because money is found on the person of a prisoner at the time of his apprehension, the Criminal Court may make an order for the payment of the costs of the prosecution out of it. I am inclined to think that if moneys belonging to someone else are found in his possession, e.g., if the person arrested is a banker's clerk carrying a bag of gold to the bank, the banker who is the owner of the money would have a right to interfere in such a case against any order being made. I also wish to guard myself against being supposed to decide that if the prisoner was adjudicated bankrupt by reason of an act of bankruptcy committed before his arrest, the trustee might not have a right to intervene. Nothing appears in the present case to raise this point. So far as appears the prisoner at the time of his arrest was in possession of moneys which he might have disposed of in any way he pleased. Then sect. 3 of the Act for Abolishing Forfeitures for Treason and Felony provides that such moneys shall be subject to the power of the criminal court to make an order for the payment out of them of the costs of the prosecution. That power may be exercised by the court notwithstanding every effort which the prisoner may make, whilst *sui juris*, to make away with the moneys. In case of bankruptcy intervening—not a bankruptcy by reason of an act of bankruptcy antecedent to the arrest—the trustee takes what was the property of the bankrupt, and subject to all the rights of third parties previously existing. I think there did exist in the present case, at the time of the adjudication of bankruptcy, a vested right, or lien, or hold, by virtue of the statute, on the moneys found on the person of the prisoner at the time of his arrest, and that consequently the order was rightly made.

QUAIN, J.—I am of the same opinion. Sect. 3 of 33 & 34 Vict. c. 23 expressly enacts that

"the payment of such costs and expenses, or any part thereof, may be ordered by the court to be made out of any moneys taken from such person on his apprehension." The facts of this case show that the moneys, out of which the order for paying the costs of the prosecution was made, were taken from the prisoner on his apprehension. The money, when so taken, became from that time liable to have an order made for the payment of the costs of the prosecution out of it. It has been argued that that liability was done away with by the subsequent bankruptcy of the prisoner—a bankruptcy taking place subsequently to the apprehension of the prisoner. I am of opinion that it was not, and that the property taken by the trustee was subject to whatever contingency it was subject to before the bankruptcy. Whatever lien or hold on the property existed before the bankruptcy cannot be affected by the bankruptcy in the slightest degree. It would be a very different thing, as observed by my brother Blackburn, to hold that the same would be the case as to the property of a stranger found on the prisoner at the time of his arrest. I think the rule should be discharged. *Rule discharged with costs.*

Attorneys for the prosecution: *Humphreys and Morgan.*

Attorneys for the trustee: *Lewis and Lewis.*

COURT OF COMMON PLEAS.

Reported by JOHN ROSE and R. A. KINSLAKE, Esqrs.,
Barristers-at-Law.

REGISTRATION APPEALS.

Tuesday, Nov. 18, 1873.

NOSEWORTHY (app.) v. THE OVERSEERS OF BUCKLAND-IN-THE-MOOR (resps.)

Lists—Unauthorized alteration of—Notice of objection directed according to altered list—6 Vict. c. 18.

In the copy of the register of voters for the county, sent by the clerk of the peace to the overseers, the appellant, a voter, was described as of a particular place. The overseers, knowing that he had ceased to reside there, struck out the name of the place, inserted that of the place where the voter actually did reside, and published the list so altered. Previously to the annual revision of the lists, a notice of objection was sent by post to the voter, directed to his true address, as described in the list when altered. The revising barrister deemed the notice sufficient, and expunged the voter's name:

Held, that the alteration of the list being beyond the powers given to the overseers by 6 Vict. c. 8, s. 5, the list so altered could not be "deemed to be the list of voters," within sect. 6, and, therefore, that the notice, not having been directed to the appellant, "at his place of abode, as described in the said list of voters," according to the provisions of sect. 100, was improperly served, and the barrister's decision erroneous.

APPEAL from the revising barrister for the Eastern Division of the County of Devon. Robert Tucker objected to the name of Robert Noseworthy being retained on the list of voters for the parish of Buckland-in-the-Moor, in the said division.

The barrister called on the objector to prove his notice of objection to the voter, when the following facts appeared:

On the copy of the list of voters for the Eastern

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Division of the County of Devon, relating to the said parish of Buckland-in-the-Moor, sent by the clerk of the peace of the said county, to the overseers of the poor for the said parish, the name of the said voter appeared as follows :

Robert Noseworthy	Boddacleave, in this parish	house and land as occupier	Boddacleave
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The overseer, knowing that the said Robert Noseworthy had ceased to occupy or reside at the farm called Boddacleave, and was now occupying and residing at a farm called Bowden, in the same parish, before publishing the list, erased the words Boddacleave, in the second column, and Boddacleave in the fourth column, and inserted the word Bowden in each column, and they duly signed and published the list so altered.

In the list published by the overseers, therefore, the name appears as follows :

Robert Noseworthy	in this parish, Bowden	house and land as occupier	Bowden
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The original copy of the register sent to the overseers was printed, and the alteration was in writing.

The objector duly sent by post to the voter a notice of objection, founded on the third and fourth columns of the register, which was in all respects in the form given by 28 & 29 Vict. c. 36, s. A., No. 2, unless it was defective in the matters hereinafter mentioned, and such notice of objection was posted in due time by the objector.

The notice of objection was addressed as follows : "To Mr. Robert Noseworthy, of Bowden Farm, Buckland-in-the-Moor." This was the correct address of the voter at the time the notice was sent.

On behalf of the voter, it was objected that the notice was insufficient, and the barrister had no power to erase the voter's name :—First, because the alteration made by the overseers in the copy of the register sent to them was unauthorised and void, and the notice ought therefore to have been addressed to Boddacleave, and not Bowden Farm ; secondly, because the said notice should have, at any rate, been addressed *ipsis verbis* of the list, as published by the overseers the second time, should therefore have been "this parish, Bowden," instead of Bowden Farm ; thirdly, it was further contended, on behalf of the voter, that the barrister had no power to expunge his name from the register, inasmuch as the alteration was a mistake of the overseers, within the meaning of 6 Vict. c. 18, s. 40, which the barrister was bound to amend, and that, having made such amendment, and restored the list to its original condition, no person of the name of Robert Noseworthy living at Bowden, and qualified in respect of the occupation of a farm called Bowden, would appear on the list, and the notice of objection would, for this reason, be null and void.

Arguments were heard in support of the objections, but the revising barrister held that the notice of objection was sufficient, and that he ought not to exercise his jurisdiction, if any, to amend the list, till after he had decided upon the notice of objection, and that no alteration, if made by him in the said list, would affect the validity of the notice. He therefore called on the voter to support his qualification, which was not done even in respect of the qualification appearing on the list or as altered by the overseer. The barrister, there-

fore, expunged the name of the voter, who gave due notice of appeal.

The question for the opinion of the court was, whether the notice of objection was good, and whether the barrister had power to expunge the name of the said Robert Noseworthy from the register of voters. The lists were to remain unaltered, or to be altered according to the opinion of the Court.

The objector declined to support the decision appealed against. The overseers were made respondents (a).

George Lewis, for the appellant.—The question is, whether the notice of objection was good, and the barrister had power to expunge the name :—First, the notice was badly served. It was sent by post, but was not properly directed to the appellant, "at his place of abode as described in the said list of voters," within the meaning of 6 & 7 Vict. c. 118, s. 100. In *Allen v. Greensill* (4 C. B. 100), a notice of objection, addressed to the voter at A., described as his place of abode in the borough list, was left at his office at B. The office in B. was not the voter's place of abode, and he had no residence in it. It was held that the notice was insufficient, because it had not been given to or left at the place of abode of the voter, as stated in the list. [BRETT, J.—There they did not prove that it was delivered to the voter, nor that it was properly addressed.] Yet he evidently got the notice, for it appears he was actually present before the revising barrister. [BRETT, J.—Sect. 17 provides for three modes of service, and if it is shown

(a) 6 Vict. c. 18, s. 5, enacts that the overseers of every parish shall, in every year, make out a list of claimants to vote, and if the overseers "shall have reasonable cause to believe that any person whose name shall appear in such list of claimants, or in the copy of the register relating to their parish or township, and received by them from the clerk of the peace, is not entitled to have his name upon the register then next to be made, shall add the word "objected" before the name of every such person on the margin of every such list of claimants or the said copy of the register; and the said overseers shall also add the word "dead" before the name of any person in the said copy of the register whom they shall have reasonable cause to believe to be dead; and the overseers shall cause a sufficient number of copies of such list of claimants, and of the said copy of the register, with all such marginal additions as aforesaid, to be written or printed, and shall, on or before the 1st August, sign and publish the same.

Sect. 6. That the list of claimants (if any) so to be made out by the overseers of every parish or township, together with the said copy of the register, with the marginal additions respectively as aforesaid, for the time being, relating to the same parish or township, shall be deemed to be the list of voters of such parish or township for the county.

Sect. 17. That every person whose name shall have been inserted in any list of voters for any city or borough may object to any other person, as not having been entitled, on the last day of July next preceeding, to have his name inserted in the list, and shall give notice to the overseers; and also "give or cause to be left at the place of abode of the person objected to, as stated in the said list," a notice in a certain form.

Sect. 27. That in case no list of voters shall have been made out for any parish . . . in any year, or in case such list shall not have been affixed in any place hereinafter mentioned in that behalf, the register of voters for that parish . . . shall be taken to be the list of voters.

Sect. 100. That it shall be sufficient . . . if the notice so required to be given as aforesaid "shall be sent by post . . . directed to the person to whom the same shall be sent, at his place of abode, as described in the said list of voters" . . .

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that the notice came to the voter's hands, that is personal service. But the revising barrister does not seem to have found the fact as to the service.] There was no evidence that it came to the voter's hands. Sects 17 and 100 provide for service by post. [DENMAN, J.—By saying that it shall be sufficient, but, of course, the service may still be personal.] The notice, though posted, was not good, because not properly directed to his abode, as described in the list, for the overseer had altered the list. In *Bishop v. Helps* (2 C. B. 45), to the argument, Suppose this notice had been sent by post, directed to the voter's actual place of abode, and yet had never reached him? Maule, J., answers (p. 52):—"That clearly would not do; there is no provision for that." The overseer's first duty is prescribed by sect. 4 as to the publication of a notice, requiring claims to be sent in. And by 28 & 29 Vict. c. 36, s. 3, they are required, at the same time with the publication of the notice, to publish a copy of the register. They must now publish the precept and a copy of the register, "just as they receive it from the clerk of the peace." Rogers on Elections (11th edit. p. 129). [DENMAN, J.—Have they not published the list, although they have altered it? the Act says, "A copy of the said list:" what list?] The list sent by the clerk of the peace, not the list published in an altered form. [BRETT, J.—Suppose the overseers omitted to publish a list?] Then it is enacted that the old list shall be in force (s. 27). The powers of the overseers to alter the list of claimants is strictly confined to the additions prescribed by 6 Vict. c. 18, s. 5. They may write the word "objected" in the margin, or the word "dead," but nothing else. [GROVE, J.—What is the argument *contra*?] It is said to be founded on sect. 6. [GROVE, J.—But that section speaks of the list "so to be made out." Yes; but the contrary argument is that the list "is that which the overseers publish," not what they ought to publish. [BRETT, J.—Are they to publish what they like?] Certainly not. The other side also rely on *Davis v. Hopkins* (3 C. B., N. S., 376), deciding that the sufficiency of a notice of claim under 6 & 7 Vict. c. 18, s. 4, is for the overseers; and where they have acted upon it, by inserting the claimant's name in their list, pursuant to sect. 5, it is not competent to the revising barrister to inquire whether its form is in compliance with the statute. [BRETT, J.—That case decided a point long in controversy. There the claim was not signed by the man himself, but, being apparently good, it was held the revising barrister could not look behind it to see if the man had signed personally.] No counsel appeared for the respondents.

KEATING, J.—You have said enough. The duties of the revising barrister are prescribed by 6 Vict. c. 18, s. 40, and very precise directions are given on that head, as well as indeed for all steps to be taken with respect to the revision. The Legislature probably wished to leave as little as possible to discretion in such matters, and to prescribe distinct rules on which all parties might be bound to act. Sect. 40 provides for corrections which may be made by the barrister on the register. [His Lordship read the section.] Therefore, as a condition precedent to calling on the party objected to at all to prove his qualification, the party objecting must appear by himself, or some one acting on his behalf, and prove he gave the notice or notices respectively required by the Act

to be given. In this case the objector did appear before the revising barrister and objected to the name of a voter, and proved he had sent by post certain notices of objection. Now the statute says that the notice must be such a notice as is required by the Act to be given. Let us inquire what that notice is. First, what is to be done by the overseer with respect to the preparation of the list is prescribed by 28 Vict. c. 36, s. 3, which provides that "The clerk of the peace of every county shall, together with the precept, transmit to the overseers of every parish or township within such county a sufficient number of copies of the part or parts of the register relating to such parish or township," and then it states that "The overseers of the poor of every parish and township shall, on or before the twentieth day of June in every year, and at the same time with the publication of the notice mentioned in the fourth section of the principal Act, publish a copy of the register then in force relating to their parish or township; . . ." Therefore it is perfectly clear that the duty of the overseer is to publish that which is sent to him by the clerk of the peace, viz., a copy of the register. That being published, the voter may be objected to either by the overseer, in the proper way (not material here, because no objection was made by the overseer), or by any person entitled to vote; and the manner in which the notice is to be given is prescribed by the Act, which provides that he shall send a notice to the voter according to the form in No. 11, and according to that form in No. 11 (6 Vict. c. 18), he is to address the notice to the abode of the voter as described in the list. What is the list? The Act provides that the list is that which is sent by the clerk of the peace to the overseer, and the overseer is bound to publish; and I apprehend it to be clear that the overseer must publish that in its integrity. He must publish it as he receives it. The matter giving rise to difficulty in the present case results from the act of the overseer who did not publish a copy of the register he received, but took on himself to alter both the qualification of the party, and also his place of abode as described in the register. The objector was no doubt misled by that, and adopted the alteration made by the overseer, and drew up his notice addressed to the place of abode as altered by the overseer, and not the place of abode on the register transmitted by the clerk of the peace. The objector appeared before the revising barrister, and the Act provides that the party appearing may prove he gave notice of objection in one of three ways, viz., either that he served it personally on the voter, or left it at his place of abode as described in the list, or sent it by post to his address as described in the list. The objector here adopted the last of the three methods, and the only proof before the revising barrister was, that he sent the notice by post addressed to the abode as altered, and not to the abode as in the register. The simple question is, whether that is in compliance with the statute. We are not embarrassed here by any question which might arise if, supposing he had failed to prove the notice sent through the post, he had resorted to any of the other two modes of service; my impression is that it would be competent to him to prove either of them, if he could, having failed to prove one. But here we must take it that the objector relied on the notice sent by post alone. That appears to

me not to be a compliance with the statute. It is to be observed that, before the voter could be even called upon to prove his qualification, proof of service of notice of objection must be given, and I think the meaning of the Act of Parliament when it speaks of the list with respect to notice of objection, is the list which ought to be published by the overseer, and if he takes on himself to alter the list, any person acting on the alteration does so at his peril. One can quite understand the revising barrister acting on the abstract justice of the case, and taking the other view, because the objector was misled, and therefore it is not surprising the revising barrister put the construction which he did on the statute; and on the right of the case I should perhaps be disposed also to take that view. But it seems to me that the words of the Act are express, and not capable of alteration, and that here there was not such a notice given as the statute requires; therefore that the voter was not called upon to prove his qualification, and the revising barrister was in error in striking him off, and the decision must be reversed.

BRETT, J.—The mere question in this case seems to be whether the revising barrister was in a position to call on the person objected to to prove his right to be on the register. The revising barrister has not jurisdiction or authority to call on every person to prove his right to vote, and has only limited jurisdiction and authority to call on certain persons. The authority is contained in sect. 40 of 6 Vict. c. 18, and it depends on this condition precedent, viz.: that the objector shall appear by himself or some one on his behalf, and shall prove he has given the notice or notices respectively by that Act required to be given by him. That is shown to be a condition precedent by the following words, viz.: "Every such barrister shall then require it to be proved that the person so objected to was entitled on the last day of July then next preceding, to have his name inserted in the list of voters in respect of the qualification described in such list." The condition precedent is that the objector shall prove that he gave the notice or notices required by this Act. Since the passing of that Act there have been other Acts which we must take to be incorporated therewith. Therefore it means the notices under that Act and the Acts to be made in conjunction therewith. Now the notices required by this Act in case of counties are in sect. 7; the objector must prove a notice to the overseer, and then a notice to the voter himself; he must prove the service of the notices in one of two ways, viz.: he must on or before a certain day "give, or cause to be given to the person so objected to, or leave or cause to be left at his place of abode, as described in such list, a notice, according to the form numbered 5" in the schedule. But a further mode of proving he gave the notice is reserved to the objector by sect. 100. He may prove the notice to have been "sent by post, directed to the person to whom the same shall be sent, at his place of abode as described in the said list of voters." The objector, therefore, may satisfy the 40th section in one of three ways. He may prove personal service of the notice, or service of the notice at the place of abode, or avail himself of the further privilege (and one which is a great privilege) given to him, viz., of proving the service of notice by showing it to have been sent by post.

The manner of proving it is the proof adopted for notices sent by post which, according to *Allen v. Greenall* (4 C. B. 100), is to be conclusive proof that the notice was delivered, and delivered in time, and it is not open to the voter to show in point of fact that the notice was never received by him, or received after due time. This power is therefore a great privilege given to the objector, and we think, therefore, the notice must be strictly proved. If the objector does assume to prove the delivery of the notice by post, under sect. 100, the point is raised as to what is to be the direction; the notice is to be "directed to the person to whom the same shall be sent, at his place of abode as described in the said list of voters." What is the list of voters? Under the old Act, 6 Vict. c. 18, after having shown, in another section, that a copy of the old register is sent to the overseer of the parish, and a list of claimants to vote made out, section 6 provides, "That the list of claimants (if any) so to be made out by the overseers of every parish or township, together with the said copy of the register, with the marginal additions respectively as aforesaid, for the time being, relating to the same parish or township, shall be deemed to be the list of voters of such parish or township for the county within which such parish or township may be situate." The list of voters, therefore, is the copy of the old register and the list of new claimants. Then by 28 Vict. c. 36, we see that in counties now the overseers are bound to publish a copy of the register then in force. Therefore the list of the parish is the copy of the register in force at the time the overseer is called on to publish the list of claimants and the list of occupiers in counties. These together form the list. Therefore, although an objector proves his notice by proving delivery to the post office, he must take care to prove he has addressed the voter according to the list delivered by the clerk of the peace to the overseer. He must take care he does it correctly. It may be that the overseer has wholly failed to publish any copy of the old list. Then there are sections in the Act which say the list is "still" to be the old register, and, if that be the case, the objector must take care to have obtained a correct copy of the old list. It may be the overseer by not publishing a copy of the register has committed a breach of the Act; whether he could be punished therefor is immaterial, but it does not relieve the objector from following the plain enactment of the Act, which is, that he should serve a copy according to the list which is to be kept and the existing register. Then we come to see if the objector has proved in this case what he is bound to prove. If we are to take it, as I think we must assume in this case, that the only evidence of service of notice offered before the revising barrister was service by post, it seems to me the objector here failed to comply with that condition precedent. He did not prove he paid postage, or that the notice was addressed according to the list, because his notice was directed not according to the list, but according to something which the overseer had imprudently and negligently published on the church door, and was not the list. I think there is an authority for saying that after the objector had failed to prove this service, he might have gone on to prove personal service, or service at the place of abode. We are not, however, called upon, nor is it necessary to decide this point. I doubt

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much if this case is so stated as to enable us to see whether that was done or not, but we must assume no such service of notice of objection was attempted to be proved, and that the revising barrister did not put the voter in a position to sustain his vote.

GROVE, J.—I am of the same opinion. The main point in question seems to me to be the construction to be put on sect. 100, and the words "in such respective lists as aforesaid," and the subsequent word "described in the said list of voters." Now, *prima facie*, on looking at that sentence, and there having been a provision for the overseers publishing a list, it would not improbably convey to ordinary minds that it referred to the list published by the overseer, but on reading through all the marginal notes attached to the intervening sections up to sect. 5, I cannot find that there is any provision making the list published by the overseer the only authorized list, so that if the overseer had entered a name wrongly, that being the published list would become the only authorized list which might be regarded. The Legislature could have so provided and made the published list the only authorized one, but I find no provision in the statute, and Mr. Lewis says there is none, and he is confirmed by the statement of the objections in the present case, which merely refers to sect. 6. We must therefore fall back upon sect. 5, whereby overseers are directed to prepare lists of claimants. [His Lordship read parts of the section.] Now if it be the proper construction of the words in sect. 100 to read them as referring to "such list as is directed by sect. 5 to be published by the overseer," this list in question is not such list, as it was not a copy of the register or list of claimants. It was a list amended by the overseers, who had no power of making such amendment as they did make in exercise of any power given by the statute. Then has the objector complied with the conditions of sect. 100, which gives him a privilege of sending notice by post? He must send it directed to the person to whom it is sent, "at his place of abode as described in the said list of voters." He does not, however, do so, but sends it to some other place of abode, which may be his true place of abode, but is not prescribed by the list of voters. No doubt there are hardships on both sides. On the one hand it may be hard that the objector should lose his objection, and possibly an unqualified person remain on the register through mistake of the overseers, but the hardship on the other hand is much greater, viz., that the voter should be disfranchised by the unauthorized changes on the list by the overseer. I am of opinion that the service of the notice did not comply with sect. 100, not having been addressed to the person's place of abode as described on the list of voters, and was therefore insufficient.

DENMAN, J.—I am of the same opinion. I must say that during the argument I was a good deal struck with the deduction which might be drawn from the subsequent statute and its requirements, and it seems to me hard that the objector should be deprived of the benefit of his objection from the laches of the overseer who published this altered list. But we have only to put a construction on sect. 100, and I entirely concur in that given to it by the other members of the court. I think the words "said list," mean the list published in the register, except so far as it may be

legally altered by the overseer; and, inasmuch as this was a totally unauthorized act of the overseer in altering the list, I consider that it was still incumbent on the objector sending the notice by post to send it to the address on the old register. Therefore, I agree with the rest of the court; but should have preferred to have heard argument on the other side, although the learned counsel for the appellant stated the objections *contra* fairly enough. It is impossible to decide satisfactorily where counsel are heard on one side only.

Judgment for the appellant.

Attorneys for the appellant, *Coots, Kingdon, and Coots*, for *Daw, jun., Exeter*.

Wednesday, Nov. 19, 1873.

LORD RENDLESHAM v. TABOR.

Parliamentary elections—Irish peer—Right to vote. An Irish peer, who is not a member of the House of Commons, is not entitled to have his name kept on the register so as to be able to vote, in the event of his being elected to the House of Commons at a future time.

APPEAL from the decision of the revising barrister for East Suffolk.

The case stated that Lord Rendlesham had been upon the register of voters for East Suffolk for several years in respect of his estate in Rendlesham Hall, in the county of Suffolk, which is his freehold. He is, and was during the qualifying period, an Irish peer, and was not, nor ever had been, a representative peer or a member of Parliament. He was duly qualified to be on the register, unless he was disqualified by reason of his being an Irish peer. It was contended by the objector that the voter was not entitled to be upon the register, because he was an Irish peer; and on the appellant's behalf it was contended that a peer of Ireland, who should be elected as member of the House of Commons, and should not decline to serve as such member, would be entitled to vote for the election of knights of the shire, and that he was entitled to be upon the register, so as to enable him to exercise his right to vote, in the event of his being elected to the House of Commons, and not declining to serve there. The revising barrister was of opinion that Lord Rendlesham, not being at that time a member of the House of Commons was not then entitled to vote at the election of members for that county, and he expunged his name from the list of voters.

O'Malley, Q.C., for the appellant.—After the decision of this court in *Lord Beauchamp v. Madresfield* (L. Rep. 8, C. P. 245; 27 L. T. Rep. N. S. 606), I cannot contend for the broad principle that a peer is entitled to vote for members of the House of Commons; but I submit that an Irish peer is an exception to the general rule. One of the sessional orders of the House of Commons states that no peer except an Irish peer, who should for the time being have been actually elected, and should not decline to serve as a member of the House of Commons, shall have any right to vote for a member of Parliament. There is no statute which disqualifies the appellant from voting for members of the House of Commons, and, in accordance with the resolutions of that House, he might at any time, by becoming a member, be entitled to vote for any other mem-

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ber. He cannot, however, exercise that right unless his name is allowed to remain on the register, and the revising barrister should therefore have allowed the appellant's name to remain, so as to meet any contingency may occur.

George Browne, for the respondent, was not called upon.

COLERIDGE, C.J.—In this case the decision of the revising barrister was right, and must be affirmed. It has been decided in *Earl Beauchamp v. Madresfield* (L. Rep. 8 C. P. 245; 27 L. T. Rep. N. S. 606) that peers of Parliament are by immemorial custom disentitled to vote at the election of members of Parliament. The question is, therefore, whether Lord Rendlesham, who is an Irish peer, comes within the case of *Earl Beauchamp v. Madresfield*. I think it does. By the 4th article of the Act of Union (39 & 40 Geo. 3, c. 67) it is enacted that any person holding any peerage of Ireland now subsisting or hereafter to be created shall not thereby be disqualified from being elected to serve, if he shall think fit, or from serving or continuing to serve for any county, city, or borough of Great Britain in the House of Commons of the United Kingdom unless he shall have been previously elected as above to sit in the House of Lords of the United Kingdom; but that so long as such peer of Ireland shall so continue to be a member of the House of Commons, he shall not be entitled to the privilege of peerage nor be capable of being elected to serve as a peer on the part of Ireland, or of voting at any such election; and that he shall be liable to be sued, indicted, proceeded against, and tried as a commoner for any offence with which he may be charged." The effect of this is to reduce him from the status of a peer to that of a commoner. This appears to show that any peer of Ireland is in the same position as a peer of England, unless he chooses to avail himself of this special Act; and the question is, whether the revising barrister was right in expunging his name under sect. 40 of the 8 Vict. c. 18. I think, for the reasons given, Lord Rendlesham was incapacitated by law from voting. If I am right that the incapacity of Lord Rendlesham was created by law, then it existed at the day of registration, and the revising barrister was not only right, but bound to strike him off the register. It had been argued that Lord Rendlesham was entitled to be put on the register of voters, although for the time being he was incapacitated from voting, because, should he be elected, as was possible, a member of the House of Commons, he would acquire the status of an English commoner, and, in that capacity, have a right to vote. That argument, however, does not appear to me to be sound, as may be seen by the analogous cases to which it might equally be applied—take, for instance, the case of a minor, who, on reaching full age, would cease to be incapacitated; or of a policeman, who is only disqualified so long as he remains in the force. The decision of the revising barrister must be affirmed, and with costs.

KRATING, J.—I am of the same opinion, and for the same reasons.

BRETT and GROVE, JJ., concurred.

Decision affirmed.

Attorney for the appellant, Wood.

Attorneys for the respondent, Aldridge and Thorne, for Jennings, Ipswich.

SHERWIN v. WHYMAN.

Registration—Borough vote—Nature of qualification—"Rentcharge on a freehold house."

The qualification of a person on the list of voters for the borough of Derby was described as "rentcharge on a freehold house." The revising barrister disallowed the vote, thinking he could not prefix the word "freehold" before "rentcharge," the case not being one of misnomer or inaccurate description within sect. 101 of the Registration Act 1843 (6 Vict. c. 18):

Held, that "a rentcharge on a freehold house" was a sufficient description; and, also, even if it were not, the revising barrister had power and ought to have amended the qualification.

At the court held for the revision of the list of voters for the parish of St. Alkmund, Derby, in the southern division of the county of Derby, before the barrister duly appointed for the said southern division of the county of Derby, in which the said parish of St. Alkmund is comprised, Robert Whyman, of London-street, Litchurch, attended the said court on this day, when the revising barrister declared that Samuel Sherwin, of Cherry-street, Derby, was not entitled to have his name inserted in the register of voters for the said parish, and, before the rising of the said Court, delivered a notice in writing that he is desirous to appeal against the decision.

1. The respondent duly objected to the name of the appellant being retained upon the list of voters for the parish of St. Alkmund, Derby, and grounded his objection on the third column of the register, in respect of the nature of appellant's interest in the qualifying property.

2. The entry on the list of voters was as follows:—

2410	Sherwin, Samuel.	Cherry-street, Derby.	Rentcharge on freehold house.	Parker-street W. B. Sherwin, owner.
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3. It was contended on behalf of the objector that the qualification of the said appellant, as stated in the said list of voters, was insufficient in law to entitle him to vote, on the ground that the rentcharge was not stated in the third column to be a freehold rentcharge.

4. It was contended on behalf of the appellant that the qualification, as stated, was sufficient; that a freehold rentcharge was the only rentcharge which could confer a vote; and that, therefore, the omission of the word "freehold" was immaterial, and at most a misnomer or inaccurate description; and further, that I had power to amend, by adding the word "freehold," if amendment was necessary.

5. I was of opinion that, under 8 Hen. 6 c. 7, a freehold tenure was of the very essence of this qualification, and that this did not appear on the face of the list, either by absolute statement or by necessary implication. From this it followed that in my opinion the case was not one of misnomer nor inaccurate description within sect. 101 of the Registration Act 1843, and that there was no power to amend under sect. 40 of the same Act; I consequently expunged the name from the list.

6. The names of fourteen other persons, contained in a schedule annexed to this case, and all in like manner duly objected to by the said respondent, Robert Whyman, were expunged on the same grounds from the list of voters for the several parishes of St. Alkmund, Derby, Litchurch and Littleover, in the said southern divi-

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sion of the county of Derby. Their several cases depended on the same point of law as his case, and ought to be considered therewith.

If the court should be of opinion that the decision was wrong, then the names of the appellant and the said several other persons are to be restored to the said several lists of voters, with or without amendment, as the court may think fit.

The *Attorney-General* (Henry James, Q.C.), with him *Edwards*, for the appellant.—The qualification here is a “rentcharge on a freehold house.” It does not require an amendment as it is a mere mis-description—no rentcharge but a freehold rentcharge can give a qualification: (*Warburton v. Denton*, L. Rep. 6, C. P. 267; 23 L. T. Rep. N. S. 729.) Unless there were some words to show it was other than a freehold, no objector could be mistaken. [BRETT, J.—It is alleged that it may or may not confer a vote, can that be sufficient?] If you read it so that it can or cannot give a qualification, then I submit the court must read for the benefit of the voter, to give a qualification. He referred to:

Longfield v. O'Connor, cited in *Rogers on Elections*, 11th edit., p. 141;

West v. Robson, *Keen and Grant's Rep.* 14;

Nicholls v. Bulwer, 40 L. J. 83, C. P.; 23 L. T. Rep. N. S. 542;

6 Vict. c. 18 (Sch. A.), No. 6.

H. Giffard, Q.C. (*Gorst* with him), for the respondent.—The Legislature intended that the nature of the tenure should be put in the third column, and if the nature of the qualification is insufficient in law, the revising barrister is bound to expunge it. This is a description of something which may or may not be a qualification, and if it be not a qualification the revising barrister was right in disallowing the vote.

COLERIDGE, O.J.—In this case I am of opinion the appeal should be allowed, and the decision of the revising barrister reversed. It seems we have to decide two questions, first, whether the qualification was sufficiently described, and, secondly, if it was not, whether the revising barrister had power to amend. He thought the qualification insufficient, and that he could not amend under the statute. It is a similar case to *Howitt v. Stephens* (28 L. J. 105, C. P.), and either the qualification is described, or nothing is described; we ought, therefore, to answer that the qualification is described rightly; but even if it was not, the revising barrister was wrong on the second point, for it was clearly within his power to amend. If the matter of the rentcharge was not clear, the Registration Act gave him power to make the necessary amendment.

KEATING, J.—I am of the same opinion. I think the revising barrister was mistaken in both points. A rentcharge on a freehold house was sufficient to entitle the name to be placed on the register. If one rentcharge will give a vote, why it should be read as a rentcharge which does not give a vote I cannot understand. It was sufficient as it stood, and if not it was the duty of the revising barrister to make it sufficient. The decision ought to be reversed.

BRETT, J.—I take it to be clear that the description in the third column need not be strictly accurate. It is enough if so described as to be capable of identification. If this had been equally applicable to two qualifications I should have been in some doubt, as I was in the case of *Townsend*

v. The Overseers of St. Marylebone (L. Rep. 7 Q. B. 143). But it is to be noticed that in *Townsend v. St. Marylebone*, the description was applicable to two qualifications, which is not the case here, as the only rentcharge that can confer the franchise is a freehold rentcharge. *Howitt v. Stephens* is a sufficient authority to show that the revising barrister might have made the alteration. He says, in the case, that the rentcharge did not appear, either by absolute statement or necessary implication, to be freehold; and that the case not being one of misnomer or inaccurate description, he had no power to amend. This is absolutely wrong in point of law. It was sufficient for the purpose of identification, and he ought to have gone on and taken evidence as to whether the voter had a freehold rentcharge. He leaves to us the question, “Was my decision right in point of law?” My answer is, No.

GROVE, J.—In this case the revising barrister should have looked at the objects of the Act, and the real nature of the voter's qualification, whether the rentcharge be freehold, copyhold, or otherwise. It is necessary to put down the qualification to enable persons to know on what grounds the applicant claims to be put on the register, when a party claims for a freehold rentcharge, I cannot conceive any person being misled; and the nature of the qualification need not be so logically expressed as to exclude any imaginary qualification; nor do I agree that a barrister's power is so limited that he cannot alter the qualification and add the word “freehold.”

Decision reversed.

Attorney for appellant, *Greenfield*, for *Leach*, Derby.

Attorneys for respondent, *Somerville and Holland*.

Friday, Nov. 21, 1873.

DURANT v. CARTER.

Parliamentary elections—Absence without intention to return; 2 & 3 Will. 4. c. 45; 30 & 31 Vict. c. 102.

A clergyman who goes abroad, having placed a curate in his house, and having locked up three rooms for his own use, without an animus reverendi for six months previous to the 31st of July, is not entitled to a vote under either 2 & 3 Will. 4. c. 45, or the Representation of the People Act 1870 (30 & 31 Vict. c. 102).

At a court held by the revising barrister appointed to revise the list of voters for the borough of New Windsor, Benjamin Chandler Durant duly objected to the name of Thomas Thellusson Carter being retained in the list of persons entitled to vote in respect of property occupied within the parish of Clewer, at the election of a member for the borough of New Windsor. The name of Thomas Thellusson Carter appeared in the list.

The following facts were established by the evidence:—

Mr. Carter is and has been for some years the rector of Clewer. In the year 1871 he petitioned the bishop of the diocese to be absent from his benefice. On the 17th of May 1871, the bishop granted a license as follows: “John Fielder, by Divine permission, Lord Bishop of Oxford, to our beloved in Christ, Canon Thomas Thellusson Carter, clerk in holy orders, rector of Clewer, in

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the county of Berks, within our diocese, greeting—We do hereby license you to be absent from your said benefice until the 31st day of Dec., 1872, on account of illness, as medically certified unto us, you having provided for the due and proper performance of the duties of your benefice to our satisfaction. Given under our hand this 17th day of May, in the year of our Lord 1871."

N.B.—The Act directs that a copy of this licence shall be transmitted by the incumbent to the churchwardens within one month from the granting thereof, to be by them deposited in the parish chest, and that a copy of the same shall be produced by the churchwardens, and publicly read at the visitation of the archdeacon. Upon the certified copy of this licence produced in evidence was the following endorsement:—

Diocese of Oxford.

The Rev. T. T. Carter, Clewer.

(Copy) Licence of non-Residence,
Under 1 & 2 Vict. c. 106, sect. 43, &c.

On the 18th of May 1871, the bishop granted a licence to Mr. Edward Dunkin Harrison, which was as follows:—

John Fielder, by Divine permission, Lord Bishop of Oxford, to our beloved in Christ, Edward Dunkin Harrison, clerk in holy orders, M.A., greeting—We do by these presents give and grant unto you, in whose fidelity, morals, learning, sound doctrine, and diligence we do fully confide, our licence and authority to perform the duty of stipendiary clerk, in the parish of Clewer, in the county of Berks, and within our diocese and jurisdiction, in reading the common prayers and performing other ecclesiastical duties belonging to the said office, according to the form prescribed in the Book of Common Prayer, made and published by authority of Parliament and the canons and constitutions in that behalf lawfully established and promulgated, and not otherwise or in any other manner (you having first in the presence of our commissary duly appointed, made, and subscribed the declaration of absence, and taken the oath of canonical obedience to the bishop, as required by law to be made, subscribed, and taken). And we do by these presents assign unto you the yearly stipend of £100, to be paid quarterly, for serving the said cure. And we require you to reside in the parish. In witness whereof we have caused our episcopal seal to be hereto affixed.—Dated the 18th day of May, in the year of our Lord 1871, and in the second year of our consecration. (Stipendiary Curates' Licences.)

Upon the certified copy of this licence produced in evidence was the following endorsement:—

(Copy.)

Stipendiary Curates' Licence.

On the 7th Sept. 1871, the bishop granted a licence to Sydney Malet Scroggs, which was as follows:

John Fielder, by Divine permission Lord Bishop of Oxford, to our beloved in Christ, Sydney Malet Scroggs, clerk in Holy Orders, M.A., greeting.

We do by these presents give and grant unto you, in whose fidelity, morals, learning, sound doctrine, and diligence we do fully confide our licence and authority to perform the office of stipendiary curate in the parish of Clewer, in the county of Berks, and within our diocese and jurisdiction, in reading the Common Prayers, and performing other ecclesiastical duties belonging to the said office, according to the form prescribed in the Book of Common Prayer, made and published by authority of Parliament and the canons and constitutions in that behalf lawfully established and promulgated, and not otherwise or in any other manner (you having first, in the presence of our commissary duly appointed, made and subscribed the declaration of assent and taken the oath of canonical obedience to the bishop as required by law to be made, subscribed and taken); and we do by these presents assign you the yearly stipend of £75, to be paid quarterly for serving the said cure, together with the use of the glebe house (wherein we require you to reside), garden,

and offices, free from payment of any rent or taxes in respect of the same.

In witness whereof we have caused our episcopal seal to be hereto affixed.

Dated the 7th Sept., 1871, and in the second year of our consecration.

Upon the certified copy of this licence produced in evidence, was the following indorsement:

(Copy.)

[Stipendiary Curate's Licence.]

Mr. Carter remained in possession of his house until some day in the early part of Oct. 1872, when he left the house and went abroad for the winter, with the intention of returning in the spring. Before leaving he arranged with the bishop that Mr. Scroggs should be in the parish as an additional helper, and before the licence to Mr. Scroggs, hereinbefore set out, was obtained, he had made an arrangement with Mr. Scroggs that he should be there as an additional helper. Mr. Carter had nothing to do with the application of Mr. Scroggs to the bishop for the licence. Before leaving, Mr. Carter arranged with Mr. Scroggs that three rooms in the house should be retained by Mr. Carter, for his own use. Those three rooms in the house were locked up, and the key left in the possession of a servant who had been employed by Mr. Carter, but who was paid by Mr. Scroggs after Mr. Carter had left the house. Mr. Carter having left the house, Mr. Scroggs went to reside in it, and remained there till the month of June 1873. It was asserted by Mr. Carter that Mr. Scroggs so resided in the house by his permission, and if he had returned from abroad before the month of June 1873, he could not have required Mr. Scroggs to leave the house unless he had provided some accommodation for him elsewhere. There was no evidence before me to show that Mr. Scroggs did not so reside in the house by the permission of Mr. Carter, except such evidence as is supplied by the documents set out in this case. Mr. Carter did not return to the house until the month of June 1873, when he resumed possession of the house. Mr. Carter was rated for the house, and paid the rates.

It was contended on behalf of Mr. Carter that the residence and occupation was sufficient to entitle him to have his name retained on the list of voters.

It was contended on behalf of the objector that the question rested entirely on 1 & 2 Vict. c. 106, that the licence hereinbefore set out were founded upon the said Act, and that under the said Act it was not possible to make any reservation of rooms in the house. The revising barrister was of opinion that there was proof that Mr. Carter had occupied the house and resided therein sufficiently to entitle him to vote in respect thereof, and that the provisions of the statute above referred to did not prevent him from being so entitled. He was also of opinion that inasmuch as the licence granted to Mr. Scroggs was not shown to have been granted under the provisions of the said statute, and did not on the face of it or by reference appear to have been made under the provisions thereof, and did not appear to be according to the terms of the said statute that he ought not to hold that the residence of Mr. Scroggs in the house was not, as alleged by Mr. Carter, by his permission, and he retained the name upon the said list of voters.

If the court should be of opinion that the

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decision was wrong, the list of voters is to be amended by expunging the name of Thomas Thellusson Carter from the said list.

Gorst for the appellant.—I shall have to satisfy the court that Mr. Carter either resided in his house or was an inhabitant occupier. The licence under which Mr. Carter was absent had expired, and therefore he was bound to be present during the last seven months. In the case of *R. v. St. Mary Kalendar* (9 A. & E. 626), where a pauper took a house at a yearly rent, payable quarterly, the tenancy to be determined at any time; ten days before the end of the year the pauper quitted the premises with his family, locked up the house, leaving only a few things in it, Lord Denman said "It cannot have been meant that no occupation could take place without a personal residence. A man might occupy by sales of goods." And in the same case, Coleridge, J., says (at p. 631) "Suppose he had gone away without any *animus revertendi*, but had left a person on the premises, would not that have been an occupation? and, if so, may not he occupy in the same manner by his goods?" [BRETT, J.—Did not the curate occupy?] Not in law. The occupation was permissive. If the appellant had the intention and the power of returning he is still legally entitled to vote. He referred to

Daniel v. Coulsting, 7 M. & G. 122; 1 Lutw. El. Cas. 250;

R. v. Inhabitants of Great Bentley, 10 B. & C. 520;

R. v. Mayor of Eves, 9 A. & E. 670;

Lee's Cases, Bar. & Aus. El. Cas. 12;

Robinson's Case, Bar. & Aus. El. Cas. 335.

Counsel for the respondent was not called upon, COLERIDGE, C.J.—I am of opinion the decision of the revising barrister should be reversed. The circumstances appear to be that Mr. Carter, the incumbent, had obtained a licence from the bishop to be absent for a year from May 1871, to Dec. 31, 1872. It is not found that he took any advantage of the licence until the autumn of 1872, and previous to leaving he made an arrangement with Mr. Scroggs to do the work while he was absent. Mr. Carter then went away, intending to be absent and spend the winter in foreign parts. During the winter Mr. Scroggs occupied part of the house under a licence granted by the bishop. It is said on the part of the appellant that it is not stated Carter knew anything of the licence, but there can be no doubt he knew of it. Scroggs remained in occupation until June 1873, and the question is whether Carter was the occupier of the residence under the Act of Will. 4, or whether under the Representation of the People Act 1867, he was an inhabitant occupier. Under the Act of Will. 4 he might have occupied in another sense than by residing, but he must have resided within seven miles of the borough; there was then no vote gained, for although there might be occupation there was no residence, for it is quite clear he was not an occupier for the seven months preceding June 1873, during which the bishop had given power to the curate to occupy the house, and during which time he would have been obliged to find another house for the curate who was in legal occupation, if he had desired to return; it is therefore impossible to say that under either Act of Parliament there was sufficient qualification. Whether he claims under the early or under the later Act it is impossible to say he had the necessary residence to give him a vote, and the decision of the revising barrister must be reversed.

KEATING, J.—I am of the same opinion. Carter might claim a vote in two ways, as an inhabitant occupier under the Act of Will. 4. As an inhabitant occupier he could not support his vote, for he must have resided for twelve months, while during six months of the time he was in Rome, and never resided at all. Mr. Gorst, therefore, seems to prefer to put the claim under the earlier Act; but the difference pointed out by the Lord Chief Justice meets him—he must establish an occupation within seven miles. It is well understood a man may have more residences than one—a corporal residence in one county and a business residence in the other. It is sought to bring this case within the rule by saying he could have returned within six months if he had liked; but he did not like, and the curate was the whole time in legal possession of the house. The curate was living in the house by the authority of the bishop, and I think there was no occupation during that time by Carter to entitle him to a vote.

BRETT, J.—I have no doubt that the qualification before the revising barrister was made to rest solely on the Representation of the People Act 1867, and I think it highly inconvenient, although I cannot call it illegal, that where a case is stated under one statute the qualification which is relied on before this court should be on another. Mr. Carter had occupied the house and resided there sufficiently long to entitle him to vote, and there is no statement of the value of the house, which there would have been if the qualification had been under the Act of Will. 4. I do not say Mr. Gorst should not be allowed to support the decision of the revising barrister if he could have done so, but I object to the practice. In the Revision Court the barristers act upon the existing facts. Mr. Carter could not have gone abroad without leave of the bishop. It is then stated that he arranged with the curate that he should serve the church, and that three rooms should be retained for his own use. He thereupon locks up three rooms, goes away, and transfers the care of the parish to the curate. It is obvious that he knew he was giving up his house. I apprehend that the curate resided there in such a manner that Mr. Carter could not turn him out at any moment. Mr. Carter must have known of the licence from the bishop, for he says, "He could not turn the curate out unless he got him another house," so he must have considered it was done by virtue of the Pluralities Act and the licence from the bishop. Can Mr. Carter then say that for twelve months before July 1873 he was an inhabitant occupier? He must be not only an occupier, but an inhabitant occupier. It is not necessary to determine whether he was an occupier. When a person goes away from a house for an uncertain period with an *animus revertendi* it is one thing, but when he goes for six months without any intention of returning, and someone else is put in his house on the ground that he could not reside, who had legal possession for the time, the claim is no qualification under the Representation of the People Act 1867. As regards the Act of Will. 4, he might be an occupier without being an inhabitant occupier I decline to say whether he was such an occupier; but it is necessary to prove an inhabiting within the borough or seven miles therefrom. It is not contended that he had any other habitation than this, and under neither statute do I think his qualification can be allowed.

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GROVE, J.—If we held this was a residence we should in fact convert non-residence into residence; and in deciding this case except in the way we have done we should be going an absurd length in the way of constructive residence.

Decision reversed.

Attorney for appellant, *Durant, Windsor.*

Attorney for respondent, *A. S. Lawson, for Phillips, 7, Gray's-inn-square.*

Friday, Nov. 21, 1873.

FORD v. PYE.

Borough vote—Residence—Exchange of house.

A man has not resided within the borough for six calendar months previous to the last day of July, within the 27th section of 2 Will. 4, c. 45, when he has for a portion of that time exchanged houses with a friend in another part of England, and has no intention of returning, and does not return until the expiration of the time agreed upon between them.

At a court held by the Revising Barrister appointed to revise the list of voters for the city of Exeter, Brutton John Ford duly objected to the name of William Pye Pye being retained in the list of voters for the said city.

The following facts were proved: The said William Pye Pye is a clergyman, residing within the said city of Exeter, and is incumbent of the district parish of Countess Weir, near the said city, and he has for some years past, except as hereinafter mentioned, continuously occupied and resided in a house on the Topsham-road, within the said city and district parish.

The said house does not belong to him as such incumbent as aforesaid, but is rented by him, and is of greater value than 10*l.* a year.

In June 1873, a clergyman named Tordiffe, who was vicar of Southbroom, near Devizes, in the county of Wilts (more than seven miles from the said city of Exeter), wrote to Mr. Pye offering to exchange duties with him for the months of July and August 1873, in order that they might each obtain for themselves and families change of air and relaxation in their duties.

The said William Pye Pye and the said Rev. S. Tordiffe knew one another previously as brother clergymen who had at one time resided in neighbouring parishes, but there was no evidence to show whether they were otherwise acquainted.

The said William Pye Pye assented to this proposal, and a correspondence of some length ensued, by which it was arranged that Mr. Pye and his family should, during the said two months, reside in Mr. Tordiffe's vicarage, and Mr. Tordiffe and his family should reside at Mr. Pye's said house in the Topsham-road.

It was further arranged that Mr. Pye should take one servant with him, and leave the remainder in his house to wait upon Mr. Tordiffe and his family, and Mr. Pye at Mr. Tordiffe's request engaged a boy to attend to a carriage which he took with him to Exeter. Similarly Mr. Tordiffe agreed to leave his servants to wait on Mr. Pye. It was also arranged that each party should use the vegetables and fruit in the garden of the house to which they went, except potatoes and wall fruit.

There was no agreement between the parties other than was contained in the said correspon-

dence, and no payment was to be made by either of them to the other. Mr. Pye paid the wages of his servants during the two said months, although they waited on Mr. Tordiffe, and wrote once or twice during his absence giving directions to his servants as to their conduct. Mr. Pye's house being larger than was required by Mr. Tordiffe, Mr. Pye retained two rooms (a bedroom and dressing room), these either being locked up or occupied by one of Mr. Pye's servants during Mr. Pye's absence.

These rooms were not retained by Mr. Pye with any intention of his using them while Mr. Tordiffe was staying in his house, but because they were usually occupied by an invalid sister, who resided with him, and he was desirous that they should not be disturbed.

There was nothing to prevent Mr. Pye sleeping in those rooms if he had in law a right to return to his house during the said two months, but he did not in fact do so, and never contemplated or intended using them for that purpose.

The arrangement between Mr. Pye and Mr. Tordiffe was fully carried out, and Mr. Pye returned to Exeter at the beginning of September 1873. Mr. Pye had no residence apart from the said house in the Topsham-road within seven miles of Exeter.

It was submitted on the part of the objector—First, that the said William Pye Pye had not occupied the whole of his said house in the Topsham-road during the month of July 1873, and that he had not resided within seven miles of the city of Exeter during the said month of July 1873, and in support of these propositions the objector contended—first, that the agreement entered into by Mr. Pye with Mr. Tordiffe amounted in law to a demise of the said house (or at any rate the part of it not retained by him) to Mr. Tordiffe, in consideration of the similar demise to him by the said Mr. Tordiffe of his said vicarage: second, that the said Mr. Tordiffe was at least tenant at will of the said house or the part of it retained by Mr. Pye during the said month of July, and that Mr. Pye not residing in the house, Mr. Tordiffe had complete control over the part occupied by him, and was not a lodger, so as to make his occupation in law the occupation of Mr. Pye; third, that Mr. Pye's servants became, during the said two months, in law the servants of Mr. Tordiffe, and were bound to obey his orders, and therefore did not occupy the house on behalf of Mr. Pye; fourth, that the legal effect of the agreement between Mr. Pye and Mr. Tordiffe was that Mr. Pye was not entitled to return to or live in his said house in the Topsham-road during the months of July and August 1873, without Mr. Tordiffe's consent, the rooms retained by him not having been retained for the purpose of residence, and not being capable of being so used by him without the use of other parts of the house; fifth, that Mr. Pye, whether or not he had a legal right to return, having, in fact, abandoned all intention of returning to the said house during the said months, and having allotted it to another purpose, did not reside there during the said months within the meaning of the Acts relating to the franchise, even if in law he was entitled to sleep there.

On the part of the voter it was contended—first, that the said Mr. Tordiffe was during the said two months, in the position of a visitor to the said Mr. Pye, and not of a tenant, and that his occupation was

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in law the occupation of Mr. Pye; second, that the servants of Mr. Pye continued his servants, and had such a control over the house as agents for Mr. Pye as prevented the residence in the house of Mr. Tordiffe amounting to an independent occupation in point of law, but that it was at most an occupation as lodger; third, that the occupation of the house being Mr. Pye's occupation, the house still remained his residence, and that he had never abandoned his intention of returning to it, and that his mere temporary absence for change of air was no such abandonment; fourth, that notwithstanding the said agreement, Mr. Pye had a legal right to return to his house at any time during the said months, and that it was consistent with residence within the meaning of the Acts relating to the franchise that he should have formed the intention of living elsewhere for a time for the sake of change of air and relaxation, and made arrangements by which his return during such time was not contemplated, if he had a legal right to return at any time, and intended to return after a short interval.

The revising barrister expressed great doubt as to the correct legal inferences to be drawn from the facts of this case, but, after some hesitation, held, and, as far as it is consistent with the facts above stated, found as a fact that Mr. Pye did not demise his house to the said Mr. Tordiffe, but only gave him a permission to remain with his family in the said house during the said months. He held further, as a matter of law, that under the circumstances hereinbefore stated, the servants of Mr. Pye continued his servants, and that the occupation of the house by Mr. Tordiffe and by Mr. Pye's servants was in law an occupation of the house by Mr. Pye. He held, further, that the true effect in law of the said agreement between Mr. Pye and Mr. Tordiffe, and the facts hereinbefore stated, was to enable Mr. Tordiffe and his family to reside in the said house in the Topsham-road, but not to prevent Mr. Pye from returning to his said house in the Topsham-road at any times during the said month of July 1873, and occupying it in any way which was consistent with the residence therein of the said Mr. Tordiffe and his family, and that Mr. Pye could, in fact, have returned and slept in the rooms retained by him without interfering with the residence of the said Mr. Tordiffe and his family in the said house. He held further that when a voter has a legal right to return and sleep in a house when he pleases, and an intention to return after a time to such house, the fact that he has no intention of returning during a given short period, it being then used for another purpose not physically inconsistent with his returning and sleeping therein, is not a break of his residence in the said house within the meaning of the Act relating to the franchise. He therefore held that Mr. Pye had occupied his house in the Topsham-road for twelve calendar months previously to the 31st July 1873, and had resided within seven miles of the city of Exeter during six calendar months preceding the same date, and allowed the vote.

The questions for the opinion of the court were: first, whether the said William Pye resided in his house in the Topsham-road during the month of July 1873. If the court shall be of opinion on both questions in the affirmative, the list is to remain unaltered. If the court should be of opinion on either question in the negative, the list

of voters for the said city of Exeter is to be amended by erasing the name of the said William Pye.

Kingdon, Q.C. for the appellant.—If there was a non-residence in July of a legal kind, that puts an end to the vote. There was a consideration for the exchange, viz., that the voter should live in his friend's house. It was in fact equivalent to a demise for two months. He could not have maintained ejectment against his friend. Any agreement by which one man agrees to take a house for a fixed time, even without rent, amounts to a demise. If Mr. Pye had returned he would have been liable to an action of trespass, or for breach of agreement. He referred to

Powell v. Guest, 18 C. B., N. S., 72.

No counsel appeared for the respondent.

KEATING, J.—I this case the revising barrister entertained considerable doubt whether the person was entitled to a vote. I am of opinion the vote cannot be sustained, for there was a clear breach of residence. Mr. Pye had for a good consideration given up his residence; whether he let it or constituted his friend tenant by strict demise it is not necessary to decide, for it is found distinctly in the case that he never contemplated returning during the term of two months. The very high authority of *Erle, C.J.* states the definition of residence, and it is clear by such a definition Mr. Pye would be excluded. He says in *Powell v. Guest* (18 C. B. N. S. 72), "In order to constitute residence, a party must possess at the least a sleeping apartment, but that an uninterrupted abiding at such dwelling is not requisite. Absence, no matter how, if there be the liberty of returning at any time, and no abandonment of the intention to return whenever it may suit the parties' pleasure or convenience to do so, will not prevent a constructive legal residence. But if he has debarred himself of the liberty of returning to such dwelling, by letting it for a period, however short, or has abandoned his intention of returning, he cannot any longer be said to have even a legal residence there." It seems to me therefore to be clear law, and the decision of the revising barrister must be reversed.

BRETT, J.—It seems here the voter had given up his intention of returning for two months. It is not as if he had reserved the liberty of returning in a certain event, but as he had abandoned the intention of returning he could not have his vote.

GROVE, J.—I cannot help thinking the revising barrister adopted the principle of leaning towards the franchise, but his own finding makes the case clear.

DENMAN, J.—I am of the same opinion. It is, however, most unsatisfactory that these cases should be argued without the court having the assistance of counsel on the other side.

Decision reversed.

Attorneys for the appellant, *Ooode, Kingdon, and Cotton*, for *Floud*, Exeter.

Friday, Nov. 21, 1873.

FORD v. HART.

Parliamentary election—Officer in army—Animus revertendi.

An officer in the army was in the habit of always living with his mother when on leave from his regiment, and had actually resided three months previous to the 31st of July with her.

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Held, that as he could not return at his own option, and only with the permission of his commanding officer he was not entitled to vote.

At a court held on the 22nd Sept. 1873, before the revising barrister for the city of Exeter, Bruton John Ford duly objected to the name of John Hart being retained in the list of persons entitled to vote in the election of members for the said city of Exeter.

The following facts were proved:—

The said John Hart is a duly admitted freeman of the city of Exeter.

The said John Hart is and has been for several years an officer in the army, and except when on leave of absence is stationed with his regiment more than seven miles from the city of Exeter.

The mother of the said John Hart (a widow), lives within seven miles of the city of Exeter, and previously to entering the army and since he has been in the army, whenever he has obtained leave of absence from his regiment he has lived with his said mother in her said house.

The said John Hart has usually obtained leave of absence three months in each year, and was in fact living in Exeter with his mother during the three months of January, February, and March in the present year, 1873.

The mother of the said John Hart has set apart two rooms in her house (one being a sleeping apartment) for the use of the said John Hart, in which some of his clothes and other property remain while he is with his regiment, and no other person sleeps in or makes any use of the said rooms while the said John Hart is away.

The said rooms were so set apart for the exclusive use of the said John Hart during the whole of the six months preceding the 31st July 1873, and the said John Hart had during the whole of such time, his mother's permission to occupy the said rooms whenever he wished.

The said John Hart is not married, and has no home except the said house of his mother, and his rooms in the barracks at which his regiment is stationed for the time being.

On behalf of the objector it was urged, that the voter had no residence within the borough, or seven miles thereof: first, because the room which he used at his mother's house was used by him as her guest, and to which he had no power in himself to return unless she pleased, as there was no hiring of such rooms or consideration for its retention; secondly, because being an officer in the army, he had no power of going home or anywhere without having first obtained leave, and that he had no power as a voter claimed, of throwing up his commission in the army at any time and returning home; thirdly, because according to the evidence, he had only three months' leave every year, and therefore there could be no six months' residence as required by the statute; fourthly, because the case of *Reg. v. Mitchell* (10 East 511) did not apply, as that was held to be an inhabitancy by means of the family, and [the voter in this case was unmarried; and further that a militiaman was only occasionally called out for duty.

On behalf of the voter it was urged that during the whole of the six months previously to the 31st July 1873, he did reside within seven miles of the said borough. That the arrangements with his mother not having been revoked, the voter had liberty to use the rooms set apart for him in her house, and that such house was *bona fide* his home

and residence. That he had never abandoned such residence or the intention of returning to it, and that his occasional absence on the duties of his profession was no abandonment. That the circumstances of an officer in the regular army are the same as those of a militia officer on active service, and that the case of *Reg. v. Mitchell* (10 East, 511) as affirmed by *Powell v. Guest* (1 Hop. & Ph. 149), is an authority for the voter's contention that he had a continuing residence at his mother's house. The revising barrister decided that the said voter continued to form part of his mother's family, and that he resided with her the whole of the six months preceding the 31st July 1873. That as the mother had not revoked her permission to him so to reside with her, the fact that she might have revoked it was immaterial. That the fact of his absence on his professional duties with the army did not, according to the authority of *Reg. v. Mitchell* (10 East, 511), as explained by *Powell v. Guest* (1 Hop. & Ph. 149), prevent his mother's house being his residence during the whole of the aforesaid period of six months, and allowed his vote.

The question for the opinion of the court was, whether, consistently with the facts above stated, the revising barrister could legally find the said John Hart to have resided within seven miles of Exeter during the six months preceding the 31st July 1873.

If the court are of opinion in the affirmative, the list is to remain unaltered.

If the court are of opinion in the negative, the list of freemen for the said city of Exeter is to be amended by erasing the name of the said John Hart.

Kingdon, Q.C., for the appellant.—The voter has no settled home, and can only return by permission of his commanding officer. He had only three months leave, and therefore could not satisfy the statute by residing six months. He referred to *Reg. v. Mitchell*, 10 East, 511.

No counsel appeared for the respondent.

KRATING, J.—In this case I am of opinion the vote is not established. It seems to me according to the rules and decisions as to what constitutes residence that the voter did not reside in the city, or within a distance of seven miles from it, during six months previous to the 31st July. I do not mean to say that in the case of a freeman who is in the habit of living with his mother, this could not be his residence within the meaning of the statute, so as to give him a vote. But the position of the voter in this case is peculiar; he is an officer in the army, and is therefore under Her Majesty's commands, and is no longer a free agent. He cannot leave his barracks and go home without first obtaining the leave of his commanding officer. It is said that he usually resided with his mother for three months in every year, and that his absence on the duties of his profession was no abandonment; and from the case it does not appear whether he might not have had more or less leave. But he is not *sui juris*—he cannot return to his mother's at his free will and pleasure. The case of *Reg. v. Mitchell* (10 East, 511) seems at first sight in favour of the vote; but that was decided on a question of inhabitancy. There, freemen of Norwich, in the militia quartered at Colchester, but having dwelling houses in Norwich, in which their families resided, and to which they at times resorted on furlough, and who paid

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the rent for their houses, and rates and taxes, were thought by the court to be inhabitants. The question here is a question of residence, and I am not aware that constructive residence can take place where a party has voluntarily incapacitated himself from residence in the borough. The case finds he had only resided continually for three months, which was clearly insufficient, and the decision of the revising barrister must be reversed.

BRETT, J.—I am of the same opinion. What is the application of the rule in *Powell v. Guest* (18 C. B., N. S., 72)? Why, that there must be a power of returning, and also an intention to return. For the last four months before the 31st July he was sleeping more than seven miles from Exeter, and in barracks. Can he, then, be said constructively to reside at Exeter? It is said that he had the liberty of returning by the licence of his mother at any time. Can it be properly said that an officer of the army, who cannot leave his regiment without first obtaining the permission of his commanding officer, or can leave the army without permission of Her Majesty, is residing with the intention of returning at Exeter? We have this gentleman who is unable to return to Exeter whenever he pleased, and it is therefore impossible to say he had the intention of returning when he pleased. The case of *Powell v. Guest* proves that a man who commits an act whereby he is put into prison, and therefore prevented from returning, cannot be said to have an intention of returning. *Rez v. Mitchell* is the only case that raises a difficulty, but that was decided under a different statute, and involved the proper construction of the Charter of the city of Norwich, and it was decided that under that charter a person may constructively live in Norwich without dwelling there. That being the construction of a particular charter, does not affect the present case; and in this case I think it cannot be said that this gentleman dwelt for six months within the city of Exeter.

DENMAN, J.—My brother Grove, who has been obliged to leave the court, requests me to state he agrees, and he endorses the remark I made in the last case (*Ford v. Pye*), that the court should have the assistance of counsel on both sides. The question is whether the residence of the voter is made out. The revising barrister has decided in favour of the franchise, and has held a residence was constituted. The case, however, shows an absence of residence, and that the voter could not return when he pleased. There is such a thing as constructive residence, but that cannot be shown in the present case, and in my opinion there is not enough here to constitute legal residence.

Decision reversed.

Attorney for appellant, Coope, Kingdon, and Cotton, for Floud, Exeter.

Thursday, Nov. 20, 1873.

HOBBS AND OTHERS (apps.) v. DANCE (resp.)

"New building"—21 & 22 Vict. c. 98. s. 34—Bye-law of local board—Re-erection—Case stated (20 & 21 Vict. c. 43)—Question of law.

21 & 22 Vict. c. 98, s. 34, empowers every local board to make bye-laws (inter alia), "with respect to the structure of walls of new buildings for securing stability and the prevention of fires," and to "provide for the observance of the same by enact-

ing therein such provisions as they think necessary as to the giving of notices."

The appellants, a local board, acting under the above section, passed a bye-law requiring notice to be given to them before the commencement of any new building.

The respondent possessed a stable within the district of the local board. The back of the stable was formed by a wall of the yard in which it stood; the other three sides were of wood.

Without giving notice to the appellants, he pulled the stable down and rebuilt it in another part of the yard, so that two of the yard walls formed two sides of the erection, and the other two sides were reconstructed with the old materials. He put on a fresh roof. The respondent having been summoned before justices for the breach of the above-mentioned bye-law, they stated a case, under 20 & 21 Vict. c. 43, wherein they minutely described the nature of the restored stable, and decided that the building was not a "new building," within the meaning of the first-mentioned statute and bye-law, but reserved the question as one of law upon which they desired the opinion of the court:

Held, that the stable in question was a "new building," and the justices were wrong in their judgment, but were right in remitting the question for the court.

CASE stated by justices under 20 & 21 Vict. c. 43.

The question for the opinion of the court was, whether a certain building erected by the respondent was a "new building," within sect. 34 of the Local Government Act 1858 and the 32nd bye-law of the local board.

The material statement in the case was as follows:

The respondent is the occupier of premises in Tonbridge, in the rear of which is a small yard in which lately stood a small building used as a stable. The back of this building was formed of a wall which forms the boundary of the yard on the north side; the other three sides of the building were constructed of wood. The dimensions of the building were about 11ft. 6in. by 8ft., and the height about 7ft. 8in. In Feb. 1872, the appellant, upon inspecting the premises, found that the old building, with the exception of the wall which joined the back of it, had been removed bodily, and a portion of it re-erected in another part of the yard, but one side of the present building being placed on part of the foundation of the previous building. The size of the new building, as altered, is 8ft. 6in. by 7ft. 6in. The back of this building is formed of another wall (the west wall of the yard), which was at a right angle to the north wall, which, as already mentioned, formed the back of the old building; a second side is formed of the southern boundary wall of the respondent's premises; and the other two sides of the present building are constructed of the materials used in the previous building, which has simply been removed, having an end cut off, and thereby also shortening the frontage. The walls forming two sides of the new building have been raised by additional tiers of bricks—the west wall to the extent of 3ft. 1in. The roof has also been raised to the additional height of 11in.; and the two sides (one constructed of wood and the other formed of the raised wall on the south side) are also proportionably higher, so that the roof of the present building is somewhat higher than that of the previous one. The roofing of the present building is of felt, laid on the old

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roof. The present building covers a smaller superficial space than the previous one did.

The justices decided that the building was not a "new building," within the statute and bye-laws, but reserved the question, as one of law, upon which they desired the opinion of the court(a).

F. M. White, for the appellants.—This is a new building within the meaning of the Act and bye-law. It cannot be described by any other term than "new," and the justices themselves have used that adjective in describing it. [He was stopped.]

W. G. Harrison, for the respondent.—The question is one of fact. [BRETT, J.—The justices say it is one of law.] The court will not entertain an appeal from a decision of a magistrate under 20 & 21 Vict. c. 43, upon a question of fact: (*Newman v. Baker*, 8 C. B., N. S., 260.) There the magistrate having, upon the construction of the fifth rule of sect. 26 of the Metropolitan Building Act 1855 (18 & 19 Vict. c. 122), decided that a certain place, being a row of houses forming part of a line of thoroughfare, was a street, the Court of Common Pleas declined to interfere with his decision. Erle, C.J. said (p. 208): "There clearly is no question of law presented for our decision in this case. The decision of the magistrate must be affirmed." [BRETT, J.—Suppose a stable, &c., taken down and erected with the same materials in another corner of the same yard? It would be an old building. [BRETT, J.—Suppose it rebuilt in the next yard? Then the case of *Tucker v. Rees* (7 Jur. N. S. 629) applies, where, under the same statute and section, a local board made a bye-law that wherever any open space had been left belonging to any building, such space should never afterwards be built upon without the consent of, &c., and without leaving an open space belonging to such building of a specified size and dimensions. The Court of Queen's Bench held, that if the bye-laws applied to open spaces belonging to old buildings, it was bad, as exceeding the powers conferred by sect. 34, Blackburn, J. saying: "It could not be intended that buildings might not be erected on such open

(a) 21 & 22 Vict. c. 89, s. 34, enacts that "Every local board may make bye-laws with respect to the following matters (that is to say), (2), With respect to the structure of walls of new buildings for securing stability and the prevention of fires. . . . And they may further provide for the observance of the same by enacting therein such provisions as they think necessary as to the giving of notices," &c.

But for the purposes of this Act the re-erecting of any building pulled down to or below the ground floor, or of any frame building, of which only the frame work shall be left down to the ground floor, or the conversion of a dwelling-house of any building not originally constructed for human habitations or the conversion into more than one dwelling-house of a building originally constructed as one dwelling-house only, shall be considered the erection of a new building.

Bye-law 32 provided, "that every person who should intend to erect a new building, should give a fortnight's notice of such intention."

20 & 21 Vict. c. 43, s. 2, enacts, "that after the hearing and determination by a justice or justices of the peace of any information or complaint which he or they have power to determine in a summary way . . . either party . . . may, if dissatisfied with the said determination as being erroneous in point of law . . . apply to the justices to state and sign a case, setting forth the facts and the grounds of such determination," &c.

Sect. 6 provides that "the court to which a case is transmitted under this Act, shall hear and determine the question or questions of law arising thereon. . . ."

spaces as have been left around Lansdowne House and Chesterfield House, without the consent of the local board." And Crompton, J.: "Such a bye-law, if convenient with reference to new streets which are being made, is not reasonable when applied to old buildings." Sect. 34 is limited to new buildings; it is for the prevention of fire, and does not cast new burthens on lessees of property. Here the justices have carefully avoided finding, as they ought to have done, whether this was a "new building." The respondent is entitled to their finding upon this question of fact.

F. M. White, in reply.—The same point was taken in *Shield v. The Mayor of Sunderland* (6 H. & N. 796), and *Newman v. Baker* (sup.), was there cited as ousting the jurisdiction of the court; but Bramwell, B. said (p. 896): "As to the 11th bye-law, it appears to me that this building is a dwelling-house, that being a matter of fact which the justices have found. But is it a new dwelling-house or part of an old one? If the justices had found this distinctly, upon the authority of *Newman v. Baker* (sup.) I think we could not have reviewed their decision; but I think the justices have not determined this as a question of fact, but have referred it to us, because they say, 'We were of opinion that the building erected in the yard being a new building, built up and adjoining the old one, must either be considered with the old building as one house, or that the old house and the new erection must be considered as two erections.'"

COLERIDGE, C.J.—This is a case stated by the justices of Tunbridge, where a person had erected a building in his yard. He was brought before the magistrate under an information laid by the local board under the 32nd bye-law passed by the board, which enacted "that every person who shall intend to erect a new building shall give a fortnight's notice of such intention," and in this case the respondent, in whose favour the justices at the sessions have found, erected the building without such notice. He was brought before them, and they determined in his favour, but remitted the case to us, after setting out the facts found by them as to what he had done, and then they give the arguments used for and against the appellants and respondent, and say they decided for the latter, the ground of their determination being that the building was not a "new building," within the meaning of the Act and bye-law. The question of law on which the case is stated, and the question for the opinion of the court is, whether this building is "new" within the meaning of the Act and bye-law. [His Lordship read the section.] Certainly I am of opinion that if this matter could be left for us to determine on the facts before us, there can be no doubt that this is a new building, and a "new building" within the meaning of the Act and bye-law, and the appellants would be entitled to succeed, and the respondent fail because he has not given notice. But Mr. Harrison (who does not much argue the facts or dispute that it is a new building) says we are precluded from inquiring into that question; that it is a question of fact which the justices ought to have found, and we cannot find for them. For that proposition he cited *Tucker v. Reeves* (sup.), but when that case is examined it is seen to be altogether different from the present one. It has nothing to do with "new" buildings, and the Court of Queen's Bench held, that if a bye-law in-

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terfered with the right of a man to build in "any open space belonging to any building," the bye-law was bad, for exceeding the power given by sect. 34. But there is a case which Mr. White has sent up to us, viz., *Shield v. The Mayor of Sunderland (sup.)*, directly in point, where the question raised was whether to bring a man within the provisions of the Act of Parliament he had or had not erected a new building. All the facts are set out in the report, and the judgment of the court proceeded on the question whether the erection was or was not a new building, and the attention of the court was directed to the consideration of the very question which Mr. Harrison asserts we cannot consider. I think, therefore, we are not precluded from entertaining it. We think the justices ask us, "Under these circumstances, do you think it or do you not think it a new building?" Now the facts found are these: [His Lordship stated them.] No doubt, in making that new stable, a good deal of the old materials had been used. It stands in a different place. Two of the walls are different. All four are different, inasmuch as different parts of the old walls had been used. Except one small portion of one side all is new. Now if we are asked on these facts, found with great elaboration by the justices, if that is a new building, we cannot but come to one conclusion. It would be playing with language if we doubted whether this was a "new building," and every person, but one struggling against the Act, would say it was. If so, it seems a very reasonable thing on behalf of Tunbridge that the local board should have some kind of control over the building. They can only have control by receiving previous notice. This gentleman has not given notice; he has, therefore, broken the bye-law, and the judgment below was wrong.

KEATING, J.—I am of the same opinion. If Mr. Harrison could have established that the justices were referring to us merely a question of fact, no doubt, as the statute of 20 & 21 Vict. c. 43, confines them to referring to us questions of law, he might have succeeded. But it seems to me the justices did not intend to refer to us a question of fact at all. They intended to ask us whether, looking at the construction of the Act of Parliament, this was a new building within the meaning of the Act. That is, referring to us for what is our view of that Act, and I entirely agree with the Lord Chief Justice, that this is quite within the mischief contemplated by the statute, and that the facts stated in the case with respect to this building do constitute it a new building within the Act.

BRETT, J.—It seems to me that what the justices have stated is this. The respondent had a stable in his own back yard, leaning against a wall, and that stable has been taken down and set up again on the other side of the yard against two of the walls of the yard. Some new materials have been used in setting it up again, but in a great measure the old materials have been used, and one small part of the stable so set up is on the same foundation as the old, but substantially the stable is set up again on a new site, although in the same back yard. The justices say, that being the state of things, "We think the term 'new building' in the bye-laws does not apply to that stable which is set up, although it is substantially on a new site, because the stable set up is built in a great part of the materials which formed the old

stable, and were merely removed from one side of the yard to the other, and advantage was taken of the two old walls of the garden to assist in the setting up of the new stable." They say, "We interpret the Act to be inapplicable to the new state of facts; we ask you, are we right or wrong in so interpreting the Act?" It is the same question as in *Shield v. The Mayor of Sunderland (sup.)*, viz., what is the interpretation of the Act with respect to the facts in dispute? This is a question of law, and properly left to the court, and the answer is, that on the true interpretation of the Act the term "new building" does apply to the state of facts found. I am of opinion that the adjudication of the justices should be reversed.

DENMAN, J.—I am of the same opinion. My only doubt is owing to the form in which the justices left the question to us; and if they mean to say, "We find this is not a new building on the facts, unless the court tell us in point of law that it is," I should be disinclined to interfere with their decision, believing it to be purely a question of fact, even though difficult. But I should have differed had I been a justice myself, for I incline to think that what they meant to say was, "We find in point of law this could not be a new building, and it is for the court to say if it could." I certainly think it *could*, and the justices having submitted that point, we are bound to find it the contrary way to that they have found it.

Judgment reversed.

Attorney for the appellants, Sole and Turner, for Palmer.

Attorneys for the respondent, Prior, Bigg, and Co., for Gorham and Warner.

Saturday, Jan. 17, 1874.

AUSTIN v. THE BOARD OF GUARDIANS OF ST. MATTHEW, BETHNAL GREEN.

Appointment of servant by board of guardians—Corporation—Appointment not under seal—Inferior servant—Po r Law Orders.

The appointment of a clerk to the master of a workhouse by the guardians of a union must to bind them be under the seal of the corporation.

A clerk to the master of a workhouse is not such an inferior servant as that his appointment comes within the recognized exceptions to the general rule of law that a corporation can only bind itself by seal.

The sanction of the Local Government Board, required by No. 153 of the Poor Law Orders to be given to certain appointments by the guardians of assistants that they think necessary is a sanction of the office, and not of the individual nominated to fill it.

THIS was an action tried before Denman, J., brought for wrongful dismissal by the next friend of a young man who claimed to have been duly appointed by the Guardians of St. Matthew's, Bethnal Green, as clerk to the master of the workhouse, at a salary of 52*l.* per annum and certain allowances.

The plea stated that at the time of making the promise alleged in the declaration, there was an agreement between the defendants and the plaintiff that the plaintiff should produce testimonials from the Guardians of the City of London, in whose service he was at the time of making the alleged

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promise, and that upon his failing to produce such testimonials, the defendants should dismiss him without notice.

Averment, that the plaintiff failed to produce the testimonials, and that therefore the defendants dismissed him.

The facts were shortly as follows:

The guardians advertised for some one to fill the position of clerk to the master of the workhouse, and the plaintiff became one of the applicants. At a meeting of the board held for the purpose, a ballot took place of the various candidates, and their numbers, by eliminating at each successive ballot the names of those who had the fewest votes, were at length reduced to two, of whom the plaintiff was one. The final ballot gave the plaintiff a majority of two votes, and he was, as appeared by the minutes signed by the chairman, declared "duly elected."

There was no mention in the minutes of any condition of producing testimonials, but at the trial the members of the board who were called swore that the plaintiff was informed that his appointment was subject to that condition, though it was denied by the plaintiff that he ever had any such notice.

The meeting was on the 15th Oct., but the plaintiff received verbal permission to wait before entering upon his new duties, until he could be set free from the service he was in at the date of his appointment, and as a fact he did not therefore come until the 28th Oct.

On the 28th Oct. the clerk to the guardians wrote to the Local Government Board announcing the election of the plaintiff, and asking for their sanction, but made no allusion to any condition precedent to the plaintiff's assumption of the office.

No testimonial was produced by the plaintiff from the City of London Guardians, and certain rumours affecting his conduct while in that service came to the knowledge of the St. Matthew's Guardians, whereupon they summarily dismissed him. The duties of the office had been to keep the workhouse books, including those referring to the outdoor relief, and it was admitted that the accounts were of a somewhat intricate nature.

The verdict was for the plaintiff, but the learned judge stayed execution, and reserved leave to the defendants to move to enter a nonsuit, on the ground, first, that the appointment of the plaintiff was not under seal; and, secondly, that the appointment was a contract not to be performed within a year, and that there was no memorandum sufficient to satisfy the Statute of Frauds, and also to move for a new trial on the ground that the verdict was against the weight of evidence.

Accordingly, a rule was obtained last term on all these points, against which

Warton and Poulter now showed cause.—First, it was not necessary that the appointment should be under seal. In Comyn's Digest, tit. "Franchise F., No. 13," it is laid down that a corporation that has a head may do small acts without deed, as retain a servant, a cook, a butler; and in 1 Ventris 47, there is authority for the employment of one in ordinary services by a corporation without the formality of a seal. Admitting the general rule, this shows that there have always been acknowledged exceptions to it; and such exceptions are in furtherance of general convenience in respect of small matters. The appointment in the

present case is exactly one of such small matters and comes within the words of Comyn's Digest, "retaining a servant." In *Church v. The Imperial Gas Company* (6 A. & E. 846), Lord Denman, in delivering judgment, says that the general rule of law that a corporation can contract only under its common seal, "has been from the earliest traceable periods subject to exceptions, the decisions as to which furnish the principle on which they have been established. This principle appears to be convenience amounting to necessity." These words of Lord Denman are repeated and adopted by the Court of Exchequer in the *Mayor of Ludlow v. Charlton* (8 M. & W. 815). [Lord COLERIDGE, C.J. called attention to *Dyde v. The St. Pancras Guardians* (27 L. T. Rep. N. S. 342, not elsewhere reported), where it was held that a medical officer to a workhouse appointed by a board of guardians must be appointed under seal.] The case of a medical officer is different; he is a far more important official. Here the plaintiff is only clerk to the master of the workhouse; he is the servant of a servant, and must therefore be considered an inferior servant, and be within the exception. With this view the fact of his salary being only 52l. per year agrees; in *Dyde v. St. Pancras Guardians*, the plaintiff's salary was 400l. The emancipation of trading companies from the necessity of always contracting under seal, recognised by Cockburn, C.J. in *The South of Ireland Colliery Company v. Waddle* (18 L. T. Rep. N. S. 405), shows that the abolition of the restrictions, which are mere relics of barbarous antiquity, is based upon convenience. [Lord COLERIDGE, C.J.—There is a great difference between trading and municipal corporations. Does not a board of guardians partake of the character of the latter more than of the former?] Secondly, the minutes of the proceedings at the meeting of the 15th Oct., wherein the plaintiff was declared duly elected, and which were signed by the chairman, constituted a sufficient memorandum to satisfy the Statute of Frauds. Then the appointment was really of that date, and it was only after the election was complete that he received permission to come for the purpose of beginning his regular work on a later day.

Cawthorn v. Cordrey, 13 C. B., N. S., 406.

The judgment given on the first point renders it unnecessary to quote further the argument on the second and third points.

Dixon, in support of the rule.—It is true that a corporation may, if it has a head, do small things without the formality of a seal, the reason for this being, doubtless, the inconvenience of delay in trifles. Here, however, there is no head to the corporation; the guardians can only act together, and the chairman for the time being is not such a head as is contemplated in the authorities cited. *Ludlow v. Charlton* shows that the matter must be one of "immediate importance" to enable the seal to be dispensed with. From *Diggle v. The London and Blackwall Railway Company* (5 Ex. 442), we gather the principle to be that of an "overruling necessity;" and in *Finlay v. The Bristol and Exeter Railway Company* (7 Ex. 409), Parke, B., in defining the exceptions, says they must be "small matters." These restrictions on the exceptions are all upheld in the judgment of Martin, B. in *Dyde v. The St. Pancras Guardians* (*ubi sup.*), and this case is certainly not one of immediate necessity, as was shown by the deliberate nature of the proceedings. Then as to the

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character of the office in question. Assuming that if the plaintiff were an inferior servant, he might be brought within the exception, can he be said to be proved to be merely an inferior servant? His duties consisted in the keeping of intricate accounts and the regulation of various books connected with the workhouse management. And it is to be noticed that the sanction of the Local Government Board was requisite to his appointment, and it was applied for and obtained. [DENMAN, J.—The Local Government Board sanction the office, not the individual.] True; but that is what shows the character of the office. No. 153 of the Poor Law Orders says that the guardians may appoint fit persons to certain posts, enumerating thirteen, among which is master of the workhouse, and all such assistants as they, with the consent of the Local Government Board, may think necessary for the performance of those offices. In this category is the plaintiff's office. [He was stopped by the court.]

Lord COLERIDGE, C.J. — This was an action, brought by his next friend, by a young man who had acted as assistant to the master of a workhouse, and his duties seem to have consisted in keeping the accounts and books. The jury gave a verdict for the plaintiff, and leave was given by the learned judge to the defendants to move to enter the verdict for them on various grounds. The first ground is that there was no appointment of the plaintiff under seal; and our decision upon this will render the consideration of the others unnecessary in this case. The defendants are without doubt a corporation, and have a seal by which their will can be expressed, and it is contended that they are not bound by a parol contract. As a *prima facie* and general rule of law corporations can be bound only by seal, and though there are exceptions, it is argued that there is no exception here. Now certain exceptions have from ancient times been grafted on to the general rule, which may be found stated conveniently for the purposes of this case in *Church v. The Imperial Gas Company* (*ubi sup.*), and in the *Mayor of Ludlow v. Charlton* (*ubi sup.*), and their limitation is recognised in the judgments in *Dyke v. The St. Pancras Board of Guardians* (*ubi sup.*). This is a case of a man occupying an office not so important, no doubt, as that of a medical man at a salary of 400*l.* a year; he is the assistant to the master of the workhouse; but the employment is of such a character that the office has to be communicated to the Local Government Board before it can be created by the guardians, and that is an element to be taken into account in estimating its importance. It is very difficult to lay down any specific rule as to what is on one side of the line and what on the other; but upon the question whether this is within the general rule, or is covered by the exception, we feel that each case must be judged of by its own circumstances. This particular case has never before been the subject matter of decision; but finding, as we do, the rule, and finding also the recognised exceptions, and that they do not include this specifically, I am not bound to say that this case is within them.

KEATING, J. — I agree in thinking that this rule should be made absolute. I shall simply refer to the rule in the *Mayor of Ludlow v. Charlton*, as found stated in the notes to Saunders' Reports, by Sir E. V. Williams, the last edit., p. 616: "The Court of Exchequer laid down that the exceptions

to the general rule that a corporation can only bind itself by deed are confined to (1.) cases so constantly recurring, or of so small importance, or so little admitting of delay, that to require in every such case the previous affixing of the seal, would be greatly to obstruct the every-day ordinary convenience of the body corporate, without any adequate object; in which instances the head of the corporation is considered as delegated by the rest of the members to act for them. (2.) The instances mentioned above of trading corporations." This case is, in my opinion, not brought within the exception.

DENMAN, J. — I should have nonsuited on this point, but the counsel at the trial thought he was safe in going to the jury, who, however, found against him. It is not necessary to decide whether that finding was against the weight of evidence, as I agree that the rule must be made absolute on the first point, as to which leave was reserved.

Rule absolute.

Attorney for plaintiff, T. J. Holmes.

Attorney for defendants, W. T. Howard.

Saturday, Jan. 17, 1874.

NIELD v. BATTY.

Corrupt Practices Municipal Elections Act 1872 (35 & 36 Vict. c. 60)—*Delivery of list of objections by petitioners—Power of the court under No. 7 Regules Generales, Michaelmas Term 1868. Where the parties required by No. 7 of the Regules Generales of Michaelmas Term 1868 to deliver a list of objections six days before the day appointed for the hearing of a petition under 35 & 36 Vict. c. 60, have failed to do so within that time, the court has no power to allow the list to be delivered subsequently, the discretionary power given by the rule having reference only to the amendment of a list that has been duly delivered.*

A RULE was obtained by Ambrose on 16th Jan. ordering the respondent in a petition under the Corrupt Practices Municipal Elections Act 1872 to show cause on the morrow "why the petitioners should not be at liberty upon the trial of this petition to give evidence against the validity of the several votes specified in the list which was offered at the rule office and to the respondent's, William Batty's, agents, on the 13th Jan. inst., upon the several heads of objections specified in such list, in the same way as if such list of objections had been duly filed and delivered within the time required by the 7th rule, and why the said list of objections should not be now duly filed and delivered *nunc pro tunc*."

The petition was in respect of the municipal election at Manchester, and the hearing had been appointed for the 20th Jan. On the evening of the 13th Jan., at 6 p.m., the petitioners tendered at the Rule Office, and also to the respondent's agents, a list of the votes intended to be objected to, and the heads of objection to each vote, as required by the seventh of the rules as to proceedings on election petitions in England, but the officer refused receive the list, on the ground that it was too late, and it was not pressed, nor was any protest made on its being taken away. The next morning, the 14th, it was delivered to and received by the respondent's agents.

The petitioners now wished to make use of the

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list so tendered as having been delivered in time within the meaning of Rule 7 above referred to, or supposing the delivery to be too late, to induce the court to make an order permitting it to be now filed and delivered.

Herschell, Q.C. (Lanyon with him) showed cause:—The list was offered too late. The Seventh Rule says that "the party complaining of or defending the election or return shall, six days before the day appointed for trial, deliver to the Master, and also at the address, if any, given by the petitioners and respondents, as the case may be, a list, &c," and sect. 25 of the Corrupt Practices Municipal Elections Act 1872, enacts that in reckoning time for the purposes of this Act, Sundays shall be excluded. The agents of the respondent did not receive the list till the 14th, and consequently did not have the notice required by the Act. The tender on the 13th was null, the officer refused the list as being then too late, and the respondent had the list delivered to him for the first time on the morning of the 14th. When times are specifically limited for the various steps to be taken by the parties, as is the case on the proceedings on election petitions, strict compliance with the Act is necessary. But as no list has been delivered, the latter part of Rule 7 does not apply, and the court has no power under it to permit the delivery of the list now. The petitioners not having complied with the Act, cannot now file their list of objections; that must be done within the time prescribed by the Act, or not at all. The rule in question giving discretion to the court in respect of the list is only to allow of amendments that parties may not be prejudiced by not being able to make use of information subsequently obtained which the court may think reasonable and just. There is no other section giving the court any jurisdiction in the matter, and the clear meaning of this rule is: You shall deliver a list six days before the hearing. If there is any error it shall be in the discretion of the court to allow addition or amendment. Here, however, there is nothing to amend or add to, because no list has been delivered.

Ambrose in support of the rule.—The construction contended for would make six days really equivalent to eight days. In the Act and rules wherever the exclusion of the first day is intended, it is specified as in rules 13, 21, 26, and 52, and as in the six other instances in which time is mentioned, nothing is said about excluding the day of service, it must be taken that it is not excluded. [Lord COLERIDGE, C.J.—We are not considering whether if you delivered on the 13th, you were in time. There was no delivery on that day.] To enable the court to exercise their discretionary power, why need a list have been delivered at all? The addition of new names, which is admitted to be allowable under rule 7, makes the list to be, so far as it goes, just as new as if no list had been delivered, and then these names given, and so the interference of the court under rule 7 is thus substantially the furnishing of a new list. [Lord COLERIDGE, C.J.—The discretion is wholly as to the amendment of an existing list. Is there any other rule or section giving the court power?] The 84th rule says that all interlocutory questions and matters shall be heard and disposed of before a judge.

Lord COLERIDGE, C.J.—On the true construction of the 7th rule we have no power to make the

order. The list was not delivered six days before the day appointed for trial, and we need not intimate any opinion as to what might have been had the facts been different. The court has no jurisdiction to allow the list to be delivered after the time prescribed. The words in rule 7 respecting the interference of the court are, "Upon such terms as to amendment of the list," which clearly contemplate the existence of a list. I should not encourage such applications, because the petitioners have had since the 22nd Nov., ample time to prepare their case. The Act gives twenty-one days after the day of election for the presentation of the petition, and then there is the necessary interval before the day of the trial.

KEATING, J.—I agree with my lord, and for the reasons given by him. I particularly coincide with reference to the necessity of keeping the parties to the times specified in the Act. The object of the parties is doubtless to give as little notice as possible to their opponents, and as little opportunity as possible for inquiry. This decision will have the effect of rendering such a proceeding perilous.

DENMAN, J.—Supposing delivery of the list had been effected on the 13th, and it had been accepted at the office, I might have thought, if the court had the power, that it might have made the order; but the list was delivered on the 14th, which was confessedly too late. The rule does not apply to a case in which no list was delivered within the time specified. The power of amendment given to the court is in furtherance of the strictness of the time, and not a power to extend the time for the delivery of the list. The discretionary power vested in the court to amend the list makes it the more unreasonable to put off delivering it till the last moment.

Rule discharged with costs.

Attorneys for petitioners, *Dangerfield and Fraser.*

Attorneys for respondent, *Cooke and Talbot.*

COURT OF QUEEN'S BENCH.

Reported by J. SHORTT and M. W. MCKELLAR, Esqrs.,
Barristers-at-Law.

Nov. 13, 1873, and Jan. 14, 1874.

REG. v. LOCAL GOVERNMENT BOARD.

Officer of parish—Salaried solicitor—Right to compensation—Metropolitan Poor Act 1867 (30 & 31 Vict. c. 6, s. 76).

In 1857 the trustees of a parish who, under a local Act, managed the relief of the poor, appointed a solicitor to assist their clerk in the arrangement of legal matters, at 100l. per annum. By the Metropolitan Poor Act 1867, the management of the poor in this parish was transferred to guardians; and officers and persons appointed, or acting under any local Act for any purpose of the relief of the poor, or otherwise in the service of the guardians, were entitled to continue in office, provided that in case any officer of a union or a parish should be deprived of his office by reason of the operation of this Act, the Poor Law Board might award to him compensation for the loss of his office and its emoluments. The Poor Law Board refused to sanction the continuance of the solicitor's appointment, or to allow him compensation, on the ground that the appointment was not authorised by this enactment;

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Held, upon a rule obtained by the solicitor for a mandamus to the defendants, to whom the Poor Law Board's duties had been transferred, that he was an officer of a parish within the meaning of the Act; that he was deprived of his office by reason of the operation of the Act: and that he was entitled to compensation.

This was a rule for a *mandamus* to the Local Government Board. The following facts appeared from the affidavit of the prosecutor, Mr. William Sparling, attorney-at-law:—

Under the 4th and 5th sections of the local Act for the parish of St. Mary, Islington (being 5 Geo. 4. c. cxxv.), trustees were appointed, and afterwards, up to the year 1857, were elected triennially, for the management of all the parochial affairs of the said parish, as by the said Act may appear.

By the 14th section of the said local Act, the trustees so appointed were empowered to appoint certain officers, therein specifically mentioned, including a clerk or clerks, and such other "officers and servants" as they should think necessary for the purpose of the said Act, and to pay them such salaries and gratuities as they should think reasonable, as by the said Act may also appear.

In the year 1852 Mr. Sparling was, under the aforesaid power, and by a resolution of the trustees, elected as clerk to the trustees at a salary of 250*l.* a year, on the condition that in addition to the duties of clerk, he should act as solicitor for the trustees, and conduct all the legal business arising under the Act, without any charges except for disbursements.

He held the said twofold or mixed appointment of clerk and solicitor to the said board of trustees from the said year of 1852 until the year 1857.

In the said year 1857, by virtue of an Act intitled, "An Act for the better Local Management of the Metropolis" (being the 18 & 19 Vict. c. 120), all the powers and duties of the said trustees, under the above mentioned local Act, except those relating to the management or relief of the poor, were transferred to and became vested in the vestry of the said parish of St. Mary, Islington.

On the 18th Feb., in the said year 1857, the said board of trustees (to whom the management of the poor and the administration of the poor rates for their relief had been so reserved), at a special meeting then held, passed a resolution in the following terms, viz.:

"That the board having fully considered the duties of the clerk and assistant clerk, resolve that on and after Lady-day next, the business of the board may be conducted by one clerk, at a salary of 250*l.* per annum, with the aid of a solicitor for the arrangement of legal matters at 100*l.* per annum, and that the office of solicitor be offered to Mr. Sparling."

The office of solicitor to the board of trustees at 100*l.* a year so offered by the said resolution was accepted and held by Mr. Sparling from the said Lady-day 1857 until after the passing of the Metropolitan Poor Act 1867 (being the 13 Vict. c. 6), until the 29th Sept. 1867, as hereinafter mentioned.

By the last mentioned Act, the Poor Law Board were empowered to order and direct, and by an order of the 4th June 1867 did order and direct, that the laws for the relief of the poor in the said parish of St. Mary, Islington, should from and after the 8th July then next, be governed and administered by a board of guardians, to be elected

in manner therein described, and such guardians were afterwards duly elected accordingly.

By sect. 76 of the last mentioned Act, it is provided that in case any officer of a union or parish shall be deprived of his office by reason of the operation of this Act, the Poor Law Board may award to him such compensation for the loss of his office and its emoluments, either by way of gross sum or of annuity, as to them shall seem reasonable.

On the 8th July 1867, the board of guardians, pursuant to the last-mentioned Act, elected for the said parish of St. Mary, Islington, passed resolutions appointing all the old officers to their places (including the appointment of this deponent to the office of solicitor, at his former salary of 100*l.* a year); and they also appointed a public accountant and a surveyor at salaries subject to the approbation of the Poor Law Board.

Upon these appointments being notified to the Poor Law Board, the said board of guardians, in July 1867, received a communication from the Secretary of the Poor Law Board, of which an extract is in the following terms, viz.:—"As regards the proposed appointments of solicitor, public accountant, and surveyor, I am directed to point out that there is no authority for the appointment of such officers by the guardians, under the order of the 4th inst. If the guardians should find it necessary to employ persons to act in those capacities, the proper course will be to pay them from time to time, according to the services rendered."

In consequence of this communication, the said board of guardians, on the 30th July 1867, gave notice that Mr. Sparling's appointment as their solicitor, not being sanctioned by the Poor Law Board, would be determined on the 29th Sept. then next.

Shortly after the receipt, and in consequence of such last-mentioned notice, he applied to the Poor Law Board, setting forth the circumstances of his appointment, and of its determination as hereinbefore mentioned, and inquiring whether, under such circumstances, they would entertain any application by him for compensation for the loss of his office, and a lengthened correspondence took place between the said Poor Law Board and the said board of guardians, and between the said Poor Law Board and Mr. Sparling in reference to his case.

Certain opinions of counsel referred to in the said correspondence were obtained by Mr. Sparling and submitted to the said Poor Law Board for their satisfaction; but the said board declined to entertain his claim, on the ground that his case was not one for compensation, within the terms or meaning of the 76th section of the said Metropolitan Poor Act 1867.

The powers and functions of the Poor Law Board having, by the Local Government Board Act 1871 (being the 34 & 35 Vict. c. 70), been transferred to and become vested in the Local Government Board, as constituted by the last-mentioned Act, Mr. Sparling renewed his application to the said last-mentioned board, setting forth the grounds on which, under the circumstances hereinbefore stated, he claimed compensation for the loss of his said office of solicitor to the said trustees, and a correspondence took place between the said Local Government Board and Mr. Sparling on the subject of this claim. All the said correspondence was part of the case, but is not material to the decision.

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The said Local Government Board have also refused to entertain or make any decision or award upon this said claim to compensation for the loss of this said office, on the same ground as that relied on by the said Poor Law Board; but the said Local Government Board have expressed their willingness to abide by the decision of this court in respect thereof, as by the said last-mentioned correspondence will appear.

Since Mr. Sparling's said dismissal in 1867 from his said office of solicitor, at a fixed annual salary, the said board of guardians have employed him in such legal matters as required the services of an attorney or solicitor, and have paid him his ordinary professional charges, as taxed, in respect thereof.

Mr. Sparling was, as he said, advised, and humbly submitted, that under the circumstances hereinbefore appearing, his claim to compensation was within the meaning of the several Acts hereinbefore mentioned or referred to, and was not thereby or by an Act excluded from the jurisdiction of the said Local Government Board; and that the said board were lawfully entitled and in duty bound to exercise such jurisdiction.

On the 24th April last, *Bond Coze*, on behalf of the said William Sparling, and upon the facts alleged in this said affidavit, obtained a rule *nisi*, calling upon the Local Government Board to show cause why a writ of *mandamus* should not issue, commanding them to inquire into, assess, and make an award for such compensation, either by way of gross sum or of annuity, as the said board should deem it reasonable to award to the said William Sparling for the loss of his office as an officer of the parish of St. Mary, Islington, in the county of Middlesex, and of the emoluments thereof, by reason of the operation of an Act of Parliament passed in the thirtieth year of her present Majesty, and shortly intitled, "The Metropolitan Poor Act 1867."

The rule was twice enlarged, and

On the 13th Nov., the *Attorney-General* (Sir J. D. Coleridge, Q.C.) (with him the *Solicitor-General* (H. James, Q.C.), and *Lumley*), showed cause.—The two points which arise under sect. 76 of the Metropolitan Poor Act 1867, are, first, whether this gentleman was an officer of a parish; and, secondly, whether he was deprived of his office by reason of the operation of that Act. The Local Government Board are willing to abide by the decision of this court upon this writ, without any further proceedings.

Coze supported the rule.—As to the first point, the word "office" is defined by Dr. Johnson to be "a public charge or employment;" and an "officer" a man employed by the public. There can be no reason why these definitions should not include the office of a solicitor. In *Reg. v. The Justices of Cambridgeshire* (7 A. & E. 480), the court had to consider the effect of an interpretation clause by which the word "overseer" was to be construed to mean and include "assistant overseer, or any other subordinate officer, whether paid or unpaid, in any parish or union, who shall be employed therein in carrying this Act or the laws for the relief of the poor into execution." Lord Denman held, at p. 491, that an interpretation clause was not to receive a rigid construction. "We rather think (he said) that it merely declares what persons may be comprehended within that term, where the circumstances require that they should." The ordinary

sense of the word "office" includes the employment of a solicitor; and, according to *Dwarris on Statutes*, p. 573: "The words of a statute are to be taken in their ordinary and familiar signification and import, and regard is to be had to their general and popular use." The words in the Municipal Act, in sect. 66, which gives compensation on removal, are "Every officer of any borough or county, who shall be in any office of profit;" and in *R. v. Mayor of Bridgwater* (6 A. & E. 339), it was held that a clerk to the justices was such an officer. [BLACKBURN, J.—Those words are more extensive than the provision of this Act.] In *Reg. v. Poor Law Board* (L. Rep. 6 Q. B. 785; 26 L. T. Rep. N. S. 304), it was held that the board had not exceeded their jurisdiction in assessing profits obtained by proceedings under the Lands Clauses Act by a clerk to guardians in the amount of his compensation under 30 & 31 Vict. c. 106, s. 20, [BLACKBURN, J.—There the words are "deprived of any office or employment." The proviso here merely relates to an office.] The words "office" and "officer" were also considered in

R. v. Cambridge Union, 9 A. & E. 911;

R. v. Corporation of Warwick, 10 A. & E. 386.

[BLACKBURN, J.—We will not trouble you to argue the second point, but we will take time to consider the first.]

Cur. adv. vult.

Jan. 14.—BLACKBURN, J., delivered the judgment of the court (Blackburn, Quain, and Archibald, JJ.)—In this case a rule has been obtained for a *mandamus* to the defendants to assess the reasonable compensation to William Sparling. Cause was shown by the late Attorney-General (the present Chief Justice of the Common Pleas), who stated that the Board were contented to abide by the decision of this court as final. We have, therefore, to determine, not merely whether there is enough doubt to make it proper to let a writ go, but whether we think that the applicant is entitled to have compensation, the amount of compensation not being a question before us. It was agreed that the facts were all accurately stated in the affidavit of Mr. Sparling. The material facts are as follows. The parish of St. Mary's, Islington, was managed by trustees under a local Act (5 Geo. 4. c. cxxv.) On the 1st Jan. 1856, the Act for the better Local Management of the Metropolis (18 & 19 Vict. c. 120), came into operation, and by the 90th section of that Act all the powers of the trustees (except such duties, &c., as relate to the affairs of the church, or the management or relief of the poor) ceased, and were transferred to the vestry. The trustees, however, continued as a body, having the management and relief of the poor. On the 18th Feb. 1857, a resolution was passed by the trustees, which was in the following terms: "That the board, having fully considered the duties of the clerk and assistant clerk, resolve that, on and after Lady-day next, the business of the board may be conducted by one clerk, at a salary of 250*l.* per annum, with the aid of a solicitor for the arrangement of legal matters, at 100*l.* per annum; and that the office of solicitor be offered to Mr. Sparling." Mr. Sparling accepted this offer, and we apprehend that it is clear, on the one hand, that he did not thereby acquire any freehold office during life or good behaviour, but also clear on the other that he did become possessed of a situation or place or employment under the trus-

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tees, and that if he had been dismissed without sufficient cause, and without reasonable notice to terminate his employment, he would have had a remedy for such dismissal. On the passing of the Metropolitan Poor Act 1867 (30 Vict. c. 6), the Poor Law Board, under the 73rd section, directed that, from and after the 7th July 1867, the relief of the poor in the parish of St. Mary, Islington, should be managed by a board of guardians, elected according to the Poor Law Acts; and by the 74th section of that Act, the guardians constituted under this Act are subject to the same regulations as guardians elected under the Poor Law Acts. The 76th section provides that "Officers and persons appointed or acting under any such local Act, for any purpose of the relief of the poor or otherwise in the service of the guardians and superintendent registrars of births, deaths, and marriages, and registrars of births and deaths, and registrars of marriages, shall be entitled to continue in office after the institution of the new board of guardians under this Act, to the same extent as if this Act had not been passed; and their service before the constitution of that board shall be reckoned in the computation of any superannuation allowance to which they may become entitled. Provided that in case any officer of a union or a parish shall be deprived of his office by reason of the operation of this Act, the Poor Law Board may award to him such compensation for the loss of his office and its emoluments, either by way of gross sum or by way of annuity, as to them shall seem reasonable." It is on the proper construction of this section that our judgment in the present case depends. Before, however, proceeding to discuss the construction of that section, it is convenient to state the remaining facts. The board of guardians, on their first meeting, continued the appointment of the applicant as solicitor, but the Poor Law Board refused to sanction this appointment, as it was not authorised by the regulations to which the guardians were subject by virtue of the 74th section above quoted. The board of guardians, on the 30th July 1867, gave notice to Mr. Sparling that his appointment, not being sanctioned by the Poor Law Board, would be determined on the 29th Sept. then next. Mr. Sparling made application to the Poor Law Board to award him compensation for the loss of his office, as to them should seem reasonable. They declined to entertain his claim. Subsequent to the passing of the Local Government Board Act 1871 (34 & 35 Vict. c. 70), the application was renewed to the now defendants, and they also refused to entertain the application. This rule was then obtained. Two points were made for the defendants:—First, It was said that the applicant was not deprived of his situation by reason of the operation of the Act. But we expressed our opinion on the argument that, as the effect of the Act was to subject his employers to the regulations which rendered it illegal in them to continue his employment, he had been deprived of it by reason of the operation of the Act. The second objection was, that this employment was not an office within the meaning of the Act. On this question we took time to consider. We agree that the word "office," in its strictly legal meaning, would not include such an employment as this. We doubt very much whether there was any person employed for any purpose connected with the relief under a local Act, whose employment could be called an office in

the strict legal sense of the word; if there were such persons they must be very few, and to give the word this strict legal sense would be to render the Act nugatory. But we think that we must construe the words of this Act with reference to the subject-matter of the context. The Municipal Corporation Act (6 & 7 Will. 4, c. 76), s. 66, gave compensation to those who had lost "an office of profit." In *R. v. Mayor, &c. of Bridgewater* (6 A. & E. 339), the person claiming compensation was clerk to the justices of the borough, and it was argued that this was not an "office;" but Williams, J., there says—"This may in some sense possibly be considered no office, but not in the sense used in the Act. The effect of the 66th section, especially that part of it in which the party claiming is directed to distinguish the office, place, situation, employment, or appointment, seems to be that a reasonable interpretation is to be given, and that the word office must be understood in a greater latitude than office strictly legal." And this was, we think, the ground of the decision in that case. And we think that we ought to apply the principle to this case. Now, when we find in the enacting part of the section, that "officers and persons appointed or acting under any such local Act, for any purpose of the relief of the poor" . . . "shall be entitled to continue in office after the new constitution of the board;" and that then, in the proviso immediately following the words "officer" and "office" are again used, we think that the word office must be understood in a greater latitude than an office strictly legal, and must be construed to include the situation of those persons appointed or acting for the relief of the poor, who, under the earlier part of the section, would be entitled to continue in office. And we are the more induced to put this construction on the Act because we think that to put the strict legal construction on the word office would render the Act nugatory, and give compensation to very few, if any, persons. This we cannot believe to have been the object of the Legislature. It was argued that in the 2nd section of the Act it was enacted that "words shall have the same meaning as in the Poor Law Acts," and that this Act, therefore, incorporates the interpretation clause of 4 & 5 Will. 4, c. 76, s. 109, which enacts that "officer shall be construed to extend to any clergyman, schoolmaster, person duly licensed to practise as a medical man, vestry clerk, treasurer, collector, assistant governor, master, or mistress of a workhouse, or any other person who shall be employed in carrying this Act, or the laws for the relief of the poor into execution," and it was said that a solicitor is not there named. We do not agree that where, from the context, it appears that a word is used in a particular sense, we are to depart from that sense because, in the interpretation clause, it appears that the word is to be extended to include other things; but if we did, we should say that a solicitor employed to transact the legal poor law business of the parish is a person employed in carrying the Acts for the relief of the poor into operation. And it may not unreasonably be said, that a solicitor employed at a fixed salary to do this is very much *ejusdem generis* with a medical man who receives a fixed salary for attending the sick poor; and a medical man is mentioned as an officer. But our judgment does not depend on the interpretation clause contained in the Act of 1834, though brought into the Act of 1867. We proceed on what seems to us, from the

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object of the 67th section of the Act of 1867, and the language there used, to be the intention expressed in that enactment. We are, therefore, of opinion that the local board ought to inquire into the circumstances, and award such compensation as to them shall seem reasonable. We give no opinion as to what that should be.

Judgment for the prosecution.

Attorneys for prosecutor, *Satchell and Chapple.*

Attorneys for defendants, *Parkers, Pritchard, and Sharpe.*

Saturday, Jan. 17, 1874.

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Justices' clerks' fees—Verification of jury lists—Overseers' accounts—Disallowance by poor law auditor—6 Geo. 4, c. 50—7 & 8 Vict. c. 101—11 & 12 Vict. c. 43—25 & 26 Vict. c. 107.

A poor law auditor disallowed from overseers' accounts a sum of 4s. 6d. charged to the poor rates for fees paid to a justices' clerk for notices and oath upon verification of the jury lists. These fees were allowed in the table of justices' clerks' fees sanctioned for the county by the Home Secretary under 11 & 12 Vict. c. 43, s. 30.

Held that the overseers' duties in respect of the jury lists under 6 Geo. 4, c. 50, and 25 & 26 Vict. c. 107, were concluded upon the production at petty sessions; that these fees for the subsequent verification were not costs properly incurred by the officers of the parish in preparing and collecting the lists under 7 & 8 Vict. c. 101, s. 60; that the justices' clerk was not entitled to demand this amount; and that the disallowance was right.

THIS was a rule for a writ of *certiorari* directed to Edward Brent Prest, Poor Law Auditor of the Cambridgeshire and Huntingdonshire Poor Law Audit District, to show cause why a certain item of disallowance of 4s. 6d. made by him in the accounts of the overseers of the parish of Haslingfield, in the county of Cambridge, and within the said audit district, should not be quashed.

It appeared from the affidavit of the secretary to the Justices' Clerks' Society, on whose behalf the rule was granted, that in the receipt and payment book of the said overseers containing the receipts and payments for the half year ending Michaelmas 1872, was an entry as follows: "Aug. 31. Cost of jury list, 8s. 6d." Against this item the said auditor had written "4s. 6d. fees disallowed," and had made the following entry in the said book, "I hereby certify that in the accounts of R. Hall, and W. Coxall, overseers of Haslingfield, I have disallowed the sum of 4s. 6d., and that I find the said sum from them to be due. As witness my hand this 6th Dec. 1872. E. B. Prest, Auditor of the Cambs and Hunts Districts, which comprise the said parish. Mem.—Justices' clerks' fees for jury list, a payment for charging which on the poor rate the overseers have no statutory authority."

It appeared that the said overseers at the time of verifying their jury list and getting the same allowed, paid this sum as demanded by the clerk to the justices for the petty sessional division in which the said parish of Haslingfield is situate. Unless they are allowed such payment by the auditor in their accounts they will lose the amount; and on the next occasion of passing such lists will be compelled to sustain a similar loss or

else neglect to pass such list, and thereby render themselves liable to a penalty of 5l. each.

In the year 1854 the chairman of quarter sessions and the clerk of the peace of the county of Cambridge, published "A table of fees to be taken by the clerks to the justices of the peace within the county of Cambridge, made by the justices in general sessions assembled on Thursday, 29th June 1854, and certified by Her Majesty's Principal Secretary of State, pursuant to the statute 11 & 12 Vict. c. 43, s. 30." This table of fees is similar to those issued and published in other counties. The following, amongst other items, is contained therein:

	Fees. s. d.	By whom payable.
Jurors.—Notice to high constables and parish officers to return and verify jury lists, with notices to justices, each parish	2 6	By overseers.
For allowance of list, and return thereof, and oath, each parish	2 0	

The said auditor in an affidavit to show cause alleged the following grounds for his disallowance of this item; "First, that the overseers had no statutory authority for making the said payment to the said justices' clerk. Secondly, that the said 4s. 6d. did not consist of costs, charges, and expenses, properly incurred by the officers of the parish in making out, preparing, printing, and collecting the lists of persons qualified to serve on juries within the meaning of the statute 7 & 8 Vict. c. 101, s. 60. Thirdly, that the table of fees payable to the justices' clerks cannot impose any liability to pay them. Fourthly, that the justices' clerk was not set in motion by the overseers, and was bound to perform the duty gratuitously."

Lumley Smith, on behalf of the auditor, showed cause against the rule.—These items were properly disallowed; for although contained in the list of fees allowed to justices' clerks—or I should rather say, in the list which enables clerks (by 11 & 12 Vict. c. 43, s. 30), to demand the fees mentioned therein without exposing them to a penalty—yet unless there is some statutory authority for their payment by the overseers, they cannot be charged to the poor rates. The Juries Act 1825 (6 Geo. 4, c. 50), sect. 4 empowers the clerk of the peace of each county to issue warrants to the high constables of each hundred; sect. 6 directs high constables to issue precepts to churchwardens and overseers of every parish. The form of precept which states precisely the duties of the overseers is contained in the schedule to the Act, and concludes thus, "And when you have made out such list, you are authorised to order a sufficient number of copies thereof to be printed (the expense of which printing will be allowed you by the parish or township), and you are required, on the three first Sundays in September next, to fix a copy of such list, signed by you, on the principal door of every church, chapel, or other public place of religious worship within your parish or township, and also to subjoin to every such copy a notice to the following effect, inserting the time and place, of which you shall be previously informed: 'Take notice, that all objections to the foregoing list will be heard by the justices in petty sessions on the day of September next, at the hour of

at ; and you must allow any inhabitant of your parish or township to inspect the original list, or a true copy of it, during the three first

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weeks of September next, *gratis*; and you are also further required to produce the said list at such petty sessions, and there to answer on oath, such questions as shall be put to you by his Majesty's justices of the peace there present, touching the said list, and these several matters you are no wise to omit, upon the peril that may ensue." By sect. 8, it is enacted "That the churchwardens and overseers of every parish, and the overseers of every township within the meaning of this Act shall forthwith, after the receipt of such precept from the high constable, prepare and make out in alphabetical order a true list of every man residing within their respective parishes or townships, who shall be qualified and liable to serve on juries as aforesaid, with the christian and surname written at full length, and with the true place of abode, the title, quality, calling, or business, and the nature of the qualification of every such man in the proper columns of the form of returns set forth in the schedule herenunto annexed." The 10th section fixes the day for the special petty sessions for the purposes mentioned, and provides that the overseers "shall then and there produce the list of men qualified and liable to serve on juries as aforesaid, within their respective parishes or townships by them prepared and made out, as hereinbefore directed, and shall answer upon oath such questions touching the same as shall be put to them or any of them by the justices then present; and if any man not qualified and liable to serve on juries as aforesaid, is inserted in any such list, it shall be lawful for the said justices, upon satisfaction from the oath of the party complaining, or other proof, or upon their own knowledge, that he is not qualified and liable to serve on juries, to strike his name out of such list, and also to strike thereout the names of men disabled by lunacy, or imbecility of mind, or by deafness, blindness, or other permanent infirmity of body, from serving on juries." Justices may also insert names omitted, and reform errors and omissions. The section concludes, "and when every such list shall be duly corrected at such sessions, or at such adjournment thereof, it shall be allowed by the justices present, or two of them, at such sessions or such adjournment, who shall sign the same with their allowance thereof; and the high constable shall receive every list so allowed, and deliver the same to the court of quarter sessions next holden for the county, riding, or division on the first day of its sitting, at the same time attesting on oath his receipt of every such list from the petty sessions, and that no alteration hath been made therein since his receipt thereof." By sect. 12 the lists after being returned to the quarter sessions by the high constable are to be kept by the clerk of the peace. The Poor Law Amendment Act 1844 (7 & 8 Vict. c. 101), s. 60 enacts, "that the costs, charges, and expenses properly incurred by the officers of the parish in making out, preparing, printing, and collecting the lists of persons qualified to serve on juries, according to the provisions of the Act just referred to, "shall be paid and allowed to them out of the poor-rates of the parish." By 25 & 26 Vict. c. 107, s. 9, the justices' clerk is to send the jury lists, when allowed and signed, by post to the clerk of the peace, "and the clerk to the justices shall be entitled to the fee of 2s. 6d., to be paid out of the county rate for the discharge of the duties hereby imposed upon him." It may be seen that there is in these sections no authority

for any payment to clerks of justices out of the poor-rates, and if these fees are payable by overseers under 11 & 12 Vict. c. 43 (Jervis's Act), they must be paid out of the overseers' pockets. Sect. 30 of that Act provides "that the fees to which any clerk of the peace, clerk of the special sessions, or clerk of the petty sessions, or clerk to any justice or justices out of sessions shall be entitled, shall be ascertained, appointed, and regulated in manner following (that is to say): "The justices, of the peace at their quarter sessions for the several counties, ridings, divisions of counties and liberties throughout England and Wales, and the council or other governing body of every borough in England and Wales, shall, from time to time as they shall see fit respectively, make tables of the fees which in their opinion should be paid to the clerks of the peace, to the clerks of special and petty sessions, and to the clerks of the justices of the peace within their several jurisdictions, and which said tables respectively, being signed by the chairman of every such court of quarter session, or by the mayor or other head officer of any such borough respectively, shall be laid before her Majesty's principal Secretary of State; and it shall be lawful for such secretary of state if he thinks fit to alter such table or tables of fees, and to subscribe a certificate or declaration that such fees are proper to be demanded and received by the several clerks of the peace, clerks of special and petty sessions, and the clerks to the several justices of the peace throughout England and Wales; and such secretary of state shall cause copies of such table or set of tables of fees to be transmitted to the several clerks of the peace throughout England and Wales, to be by them distributed to the several clerks of special sessions and petty sessions, and to the clerks to the justices within their several districts respectively; and if after such copy shall be received by such clerks or clerk he or they shall demand or receive any other or greater fee or gratuity for any business or act transacted or done by him as such clerk, than such as is set down in such table or set of tables, he shall forfeit for every such demand or receipt the sum of 20*l.*, to be recovered by action of debt in any of the Superior Courts of Law at Westminster, by any person who will sue for the same." This section gives the justices at quarter sessions no power to make persons liable for fees who were not so before, nor does it enable them to invent any new fees. They can by this only fix the amount of fees already allowed. [BLACKBURN, J.—But if the Legislature imposes new work upon the justices' clerks, cannot the justices allow them fees for it, provided the sanction of the secretary of state be obtained?] They have no power to compel the overseers to pay them out of their pockets, and these fees cannot be in the words of 7 & 8 Vict. c. 101, sect. 60, costs, charges, or expenses properly incurred by the officers of the parish in making out, preparing, printing, and collecting the lists. The overseers do not incur them at all, and they are not payable until after the lists are completed, so far as the overseers are concerned. In the case of *Wray v. Chapman*, as reported in 14 L. T. Rep. 439, 440, Coleridge, J., with reference to a table of fees made under a similar provision in 26 Geo. 2, c. 14, which stated the fees to be respectively payable by the applicants, inquired "Is not that part of the table which specifies by whom payable *ultra*

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vires?" [BLACKBURN, J.—That is one of the questions we have now to answer.] Lord Denman thus enunciated the duties of overseers in *Reg. v. Stewart* (12 A. & E. 773, 777): "The overseer is a statutable officer, dealing with a statutable fund, and accountable for its application to statutable purposes. The language of that statute (43 Eliz. c. 2.) leaves no doubt. The relief and the employment of the chargeable poor are its objects; the fund is created for them, and cannot be diverted from them unless to objects specifically engrafted on them by subsequent statutes, of which this is not one. No usage, however proper in itself, or however uninterrupted, can prevail against that which the plain construction of a statute forbids."

Field, Q.C. and *Sills* supported the rule.—There are three propositions which should be treated separately: First, the justices' clerk is entitled to the fees; secondly, he should be paid by the overseers; and, thirdly, the fees should be charged to the poor rates. As to the first, the duty to do this work is imposed upon the clerk by sect. 10 of the Juries Act 1825, and a further duty, for which he is paid in another way, is imposed by the Juries Act 1862. The provision in the latter Act is an illustration of the general principle which should apply to the former, viz., that payment ought to be made for work done. [BLACKBURN J.—Your position is that a person who does fresh work imposed upon him by statute should have a reasonable fee.] Yes. As to the third point, in *Veley v. Pertwee* (L. Rep. 5 Q. B. 573; 22 L. T. Rep. N. S. 713) the principle upon which we rely is laid down by Cockburn, C. J.; he said, at p. 579 "According to common right, a man who is bound to perform the duties of an office, and is liable to the expenses incidental to that office, is not bound to pay out of his own pocket the fees of officers for the performance of duties not connected with that office." There the question was as to the churchwarden's personal liability for the fee due to an archdeacon's registrar when they had no funds arising from church rates. Cockburn, C. J., said, further on, "The true ground on which this fee is payable is that, though the registrar is the officer of the archdeacon, yet the system of visitations is essential to the interests of each parish included in the archidiaconal visitation; and as such fees have been paid from time immemorial to the registrars, the churchwardens as the custodians of the church fund ought to pay them. That is a very different liability from an absolute liability to pay out of the churchwardens' own pocket. I have, therefore, come to the conclusion that the liability affects the parish, and not the churchwardens personally." Concerning the second point, in *Wray v. Chapman* (14 A. & E. 742), the question considered was whether certain clerks of justices could deduct fees for summonses granted on application of the police, from the amount payable by them to the receiver of the police district. The court held that the clerks were entitled to the fees, but the reasons given for the non-liability of the receiver apply here in favour of the overseers' liability; "Now the table of fees," says Erle, J. at p. 758, "points out the applicant as the person who is to pay the fee; and in *Reg. v. Coles* (8 Q. B. 82) my brother Coleridge points out the principle: 'Whoever wants the thing in respect of which the fee is made payable must pay the fee.' The receiver is not connected with the application. There is no

enactment that I can find which makes it his duty to apply for these things." [BLACKBURN, J. How are the overseers benefited by the payment of these fees, and how is it their duty to apply for these acts of the clerk?] They cannot otherwise complete the lists. [BLACKBURN, J. They have by that time completed their duties in connection with them.] That depends upon the effect of the words in 7 & 8 Vict. c. 101, s. 60. Now the word "collecting" can have no meaning as it is there used, and the word is probably a mistake for "correcting." The verb "to correct" throughout the Juries Acts includes the whole process of verifying the lists, and if it were used in this section it would cover these expenses. So, if it should be intended to refer to the collection of the lists of the various parishes by the clerk of the peace, these expenses would be included. [QUAIN, J. In a sense there is a "collecting" of the lists at petty sessions.] (a) Without contending that the justices have power to fix the liability for their clerks' fees upon any particular person, it is sufficient that the overseers are bound to make out the lists and get them allowed; they cannot do so without paying these fees, and they must therefore pay them. [BLACKBURN, J.—If the justices' clerk is entitled to have these fees at all, I think they should be paid by the overseers, and out of the rates.]

BLACKBURN, J.—Three questions have been raised, and have very properly been separately argued. The two items in dispute which have been disallowed by the auditors are 2s. 6d. for notice to certain persons to verify the jury lists, and 2s. for the allowance and return of the list, and for the oath administered to the overseers in verification thereof. Both are allowed in the table of fees to be paid to the justices' clerks, which has been sanctioned by the Home Secretary; and the overseers of this parish, having paid these sums upon the demand of the clerk to justices of the district, charged the expense to the poor rates. The only effect of the 30th section of Jervis's Act is to prevent the clerk of justices from demanding more than the amounts sanctioned in his list of fees, and the question still remains whether he is entitled to these items, although they are payments for work actually done and are allowed in the list. It is clear that this was not work which the clerk did at the request of the overseers. The scheme of the Jury Act is that the overseers' duty with respect to the jury list is concluded upon the production of the list to the justices at petty sessions. What is then done is for the satisfaction of the justices, before their clerk sends the lists to the clerk of the peace. Supposing that it were established and clear that the clerk was entitled to these fees, and that the overseers were compelled to pay them, my impression is strong that they ought to charge them to the rates. But inasmuch as it is no part of the overseers' duty to pay any fees for this work of the clerk, which fees are not costs incurred under 7 & 8 Vict. c. 101, s. 60, it follows therefore that the clerk had no right to demand them from the overseers, and their payment therefore cannot be required from the poor rates. I am of opinion that the disallowance was correct.

QUAIN, J.—I am of the same opinion. I think

(a) At the desire of the court, the Master examined the Parliament Roll of this statute; the word "collecting" was there found to be the same as in the printed editions.

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the clerk of the justices was not entitled to obtain this fee from the overseers, and therefore the disallowance by the auditor was right. According to the provisions of the Jury Act the overseers have clearly done their duty when they produce the lists at petty sessions. The precept shows that is all they have to do; their functions and duties are then at an end, and they have nothing to do with correcting and allowing them. It cannot be said that these notices and oaths were administered at the request of the overseers, nor that they obtained any benefit thereby: upon the principle therefore that the law imposes fees upon persons for whose benefit work is to be done, there is no liability here. And further it cannot be said that these clerk's fees are expenses properly incurred in preparing the lists. What the word "collecting" may mean in the 60th section of 7 & 8 Vict. c. 101, I cannot say; but although I am inclined to think it was intended to have been "correcting," it is not for us to make such an amendment in the statute. The auditor was quite right, and the disallowance must be affirmed.

Rule discharged.

Attorney for overseers and justices' clerks,
Stanley Harris, Barnet.

Attorneys for the Poor Law Auditor, Sharpe,
Parker, and Clarke.

Saturday, Jan. 17, 1874.

HOARE v. METROPOLITAN BOARD OF WORKS.

Right to renew a tavern sign post—Metropolitan common—29 & 30 Vict. c. 122—34 & 35 Vict. c. lvii.

By the Metropolitan Commons Act 1866, the respondents are empowered to make a scheme for managing Blackheath, but no right of a profitable or beneficial nature in, over, or affecting the heath shall, except with the consent of the person entitled thereto, be taken away or injuriously affected by any scheme without compensation being made or provided for the same.

By a scheme thus made by the respondents, and confirmed by the Metropolitan Commons Supplemental Act 1871, no posts shall be maintained, fixed, or erected on the heath without the consent in writing of the respondents. One clause of the scheme saves to all persons all such rights of a profitable or beneficial nature in, over, or affecting the heath, or any part thereof as they before enjoyed.

By the bye laws, made in pursuance of this scheme and the said Acts of Parliament, a penalty is imposed for erecting on the heath, unless with the consent of the respondents in writing, any posts. The appellant, the owner of a tavern fronting the heath, was convicted and fined for erecting a new signpost on the heath opposite the tavern, in place of an old one which had been blown down. The occupiers of this tavern had, for more than forty years as of right, without interruption, and for the more profitable and beneficial occupation of the same, kept erected on and fixed into the soil of the heath at this spot a signpost of this kind, and had from time to time replaced it when desirable. The appellant had no knowledge of the above-mentioned scheme, and had received no compensation for the right to have this post.

Held, upon a case stated by the convicting magistrate, that the appellant's right to renew the sign-

post was a right in over or affecting the heath; that it was therefore saved by the scheme; and that the conviction must be quashed.

THIS was a case stated by R. Maude, Esq., one of the magistrates of the police courts of the Metropolitan, sitting at the Police Court, Greenwich, in the county of Kent, and within the Metropolitan Police District, under the statute 20 & 21 Vict. c. 43, for the purpose of obtaining the opinion of this court on the questions of law which arose before him as hereinafter stated.

Upon the hearing of a certain complaint preferred by the respondents against the appellant, for that she, the appellant, on the 7th Jan. 1873, in the parish of Greenwich, in the said county of Kent, and within the said district, did unlawfully erect or cause to be erected on Blackheath, without the consent of the respondents in writing, a certain new signpost contrary to the bye-laws made in pursuance of the Metropolitan Commons Supplemental Act 1871, the magistrate convicted the appellant in the penalty of 40s.; but she, being dissatisfied with his determination in point of law, duly applied to him to state and sign a case pursuant to the said first mentioned statute; which was done accordingly.

The common of Blackheath, in the county of Kent, is in whole or in part situate within the Metropolitan Police District as defined at the passing of the Metropolitan Commons Act, 1866 (29 & 30 Vict. c. 122), and is one of the commons in that Act referred to as a metropolitan common.

By sect. 6 of the said Act it is provided that a scheme for the establishment of local management with a view to the making of bye laws and regulations for the prevention of nuisances on a metropolitan common may be made under that Act, on a memorial in that behalf presented to the Inclosure Commissioners for England and Wales, in the said Act, and hereinafter called "the commissioners," by the local authority.

By sect. 14 of the said Act it is provided that "Every scheme shall state what rights (if any) claimed by any person or class of persons are affected by the scheme, and in what manner and to what extent they are affected thereby, and whether or not the scheme has been in relation thereto consented to by that person or class of persons or any of them." And by sect. 15 that "No estate interest or right of a profitable or beneficial nature in, over, or affecting a common shall, except with the consent of the person entitled thereto, be taken away or injuriously affected by any scheme, without compensation being made or provided for the same."

By sect. 18, "Every scheme when approved by the commissioners shall be certified by them, and sealed with their common seal."

By sect. 22 it is provided that "A scheme certified by the Commissioners shall not of itself have any operation, but the same shall have full operation when and as confirmed by Act of Parliament, with such modifications (if any) as to Parliament seem fit."

The local authority for the said common of Blackheath was and is, under and by virtue of the 2nd section of the said Act, and the first schedule thereto, the respondents.

On a memorial in that behalf presented to the said commissioners by the respondents, a scheme was made for the establishment of local manage-

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ment with a view to the making of bye-laws and regulations for the prevention of nuisances and the preservation of order on the said common of Blackheath; and the same was on the 3rd Nov. 1870, certified by the said commissioners and sealed with their common seal; and the same scheme was, with a certain modification, confirmed by the Metropolitan Commons Supplemental Act 1871; but although an abstract thereof was published and circulated in such manner as the said commissioners thought sufficient for giving information to all parties interested, that is to say, by advertisement in a London paper and in local papers, and by notice posted on the church and chapel doors of the several adjoining parishes, stating that a meeting would be held at the Alexandra Rooms, Blackheath, by one of the assistant commissioners, the said scheme and plan of Blackheath referred to therein having been before deposited for one month in the same rooms, such notices and advertisements and scheme did not nor did any of them come to the knowledge of the appellant, nor did she know of the said meeting; and no such right as that hereinafter mentioned was claimed by the appellant at the said meeting.

By the said scheme so modified it is by sect. 1 provided that the said common of Blackheath thereinafter and hereinafter called "the Heath" shall thenceforth for all the purposes of that scheme be regulated and managed by the respondents.

By sect. 4 of the said scheme so modified, it is provided that the respondents shall maintain the heath as delineated in the plan deposited with the said commissioners, free of all encroachment, and shall permit no trespass on or partial, or other enclosure of any part thereof; and no fences, posts, rails, or other matters or things shall be maintained, fixed, or erected thereon, without the consent in writing of the respondents.

By sect. 5 of the said scheme so modified it is provided that the respondents shall frame bye laws and regulations against encroachments, for the preservation of order on the heath for the prevention of nuisances, and to prevent any trespassers or persons who by any erections or otherwise shall occupy any portion of the Heath without the consent of the respondents, so that all such persons may be dealt with according to law. And it is provided that all such bye-laws made by the respondents shall be in writing under their seal, and that the respondents may by any such bye-laws impose upon offenders against the same certain penalties provided that no such bye-laws shall be repugnant to the laws of England or the provisions of that scheme, and that no such bye-laws shall be of any force or effect, unless sanctioned and confirmed by one of Her Majesty's Secretaries of State.

By sect. 3 of the said scheme so modified it is provided that any penalty, imposed by or under the authority of that scheme be recovered, together with the costs of the proceedings, in such manner and with such remedies by distress or otherwise as are given in the Metropolitan Local Management Act 1855, and the Acts amending the same.

Sect. 13 of the said scheme so modified saves to all persons and bodies, politic, and corporate, and their respective heirs, successors, executors, and administrators, all such estates, interests, or rights of a profitable or beneficial nature in, over, or affecting the Heath or any part thereof, as they or

any of them had before the confirmation of that scheme by Act of Parliament, or could or might have enjoyed, if that scheme had not been confirmed by Act of Parliament.

On the 17th Nov. 1871, and after the passing of the said Metropolitan Commons Supplemental Act 1871, the respondents made certain bye-laws in writing under their seal for the regulation and preservation of the said Heath; and the same was on the 21st Nov. 1871, sanctioned and confirmed by one of Her Majesty's Secretaries of State.

By the 1st of those bye-laws the matters in certain rules are prohibited, and are declared to be offences pursuant to the said last-mentioned statute including, "4. Erecting on the Heath, unless with the consent of the board in writing, any posts, rails, fences, poles, tents, booths, or any building of any kind whatsoever."

Adjacent to the said Heath as delineated in the said plan deposited with the said commissioners, and facing a certain road thereon is a house used as a tavern or public-house called, "The Princess of Wales," and on the same Heath, and close to the said tavern or public-house, and on the opposite side of the said road is a signpost fixed into the soil of the said Heath, with the sign or name of the said tavern or public-house, or other inscription relating to the said tavern or public-house thereon, for the purpose of the more profitable and beneficial occupation of the said tavern or public-house.

The said house has always during more than forty years before the confirmation of the said scheme by the said Metropolitan Commons Supplemental Act 1871, and until the erection of the said new signpost, complained of by the respondents, been occupied as a tavern or public-house; and during all that time the occupiers of the same have always, as of right without interruption and for the more profitable and beneficial occupation of the same, kept erected on and fixed into the soil of the said Heath on the opposite side of the road, and upon the spot where the said new signpost is erected, a signpost with the sign or name of the said tavern or public-house or other inscription relating to the said tavern or public-house thereon; and from time to time as any signpost became broken or decayed or fell down, or from any other cause it became desirable to replace the same, have removed such signpost and replaced the same by another.

At the time of the passing of the said Metropolitan Commons Supplemental Act 1871, and of the erection of the said new signpost complained of by the respondents, the said tavern or public-house was and still is in the occupation of Mr. Wm. Wise, under a certain lease of the 2nd Dec. 1858, from the owner thereof, whereby the same was demised to the lessee of the same, together with all rights, easements, profits, commodities, advantages, and appurtenances whatsoever to the same belonging, or appertaining, or therewith theretofore usually held, used, occupied, or enjoyed; and the appellant was and is mortgagee of the said lease. The appellant and her predecessors in business under the style or firm of "Hoare and Co.," have ever since the year 1846 held a mortgage from the lessee and occupier for the time being of the said tavern or public-house.

Shortly before the making of the same complaint, and after the passing of the said Metro-

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politan Commons Supplemental Act 1871, and the making and confirmation of the said bye-laws, the signpost which had been erected in the year 1857, in place of another then removed, was broken by the wind, and thereupon the appellant at the request of the said Mr. Wm. Wise caused the same to be removed and a new one to be erected in its place upon the spot previously occupied by it.

The respondents contended that, the old signpost having been removed, the said Wm. Wise had not nor had the appellant at his request any right to erect a new one in its place, and that by its erection she was guilty of an offence within the meaning of the bye-laws.

The appellant contended that at the time of the passing of the Metropolitan Commons Supplemental Act 1871, the occupier of the said tavern or public-house under the owner thereof, had in respect thereof a right to have and keep a signpost erected at the said spot, and from time to time to remove any one so erected as it became broken, or decayed, or fell down, and replace it by another, and that such right is a profitable and beneficial right, and is a right reserved by the said Metropolitan Commons Act 1866, and by the said scheme, and that consequently she was not by removing the said signpost and erecting a new one in its place under the circumstances hereinbefore stated guilty of any offence within the meaning of the said bye-laws; or that if she was guilty of any offence within their meaning, then, the said bye-laws are so far as they constitute such act an offence not authorised by the said scheme and Act confirming the same, and are to that extent invalid.

The question for the opinion of the court is whether the said Wm. Wise, or the appellant at his request or otherwise, had a right to erect or cause to be erected the said new signpost without the consent of the respondents in writing.

If the court should be of opinion that neither the said Wm. Wise nor the appellant at his request or otherwise, had such right, then the conviction is to stand; if otherwise to be quashed.

Dixon argued for the appellant.—As far as I can find there is no direct authority upon this matter, and the only case at all like it is that of stalls fixed at a fair which have been justified by an alleged custom. It was held by the Exchequer Chamber in *Tyson v. Smith* (9 A. & E. 406), that such a custom was reasonable, and a plea alleging the custom was a good justification in trespass brought by the owner of the soil. [QUAIN, J.—This is an easement, not a custom.]

Lord for the respondents.—The effect of sections 14 & 15 of the Metropolitan Commons Act 1866, is merely to give compensation for such a right as this; it does not continue the right. [BLACKBURN, J.—What is there to prevent the general reservation of rights in the 13th clause of the scheme from applying to this?] This is not a right in, over, or affecting the Heath; it is alleged to be a right in the owner of the house. [QUAIN, J.—The owner enjoys it, but it affects the Heath.] On this point *Lancaster v. Eve*, 5 C. B., N.S. 717, is certainly an authority against me; there the plaintiffs were possessed of a wharf on the Thames, in front of which was a pile which had more than twenty years before been driven into the bed of the river by the then occupiers of the wharf, and had remained there without interrup-

tion from the Crown, or the conservators of the river, and which was essential to the use and enjoyment of the wharf; it was held, the fact of the ownership not being disputed, that the court were justified in presuming that the pile had been placed there in virtue of an easement with the consent of the owners of the soil, and that a sufficient possession remained in the plaintiff to entitle them to maintain an action against the defendants for negligently running against and destroying the pile. [BLACKBURN, J.—Taking clauses 4 and 13 of the scheme together, how can it be said that the appellant's right is not reserved?]

BLACKBURN, J.—It is impossible but that we should say this conviction must be quashed. This was an easement which the appellants enjoyed. The scheme saves to all persons all such rights of a profitable or beneficial nature in, over, or affecting the Heath, or any part thereof, as they or any of them had before the confirmation of this scheme by Act of Parliament, or could or might have enjoyed if this scheme had not been confirmed. Then the question arises whether this right to have the post in the ground which the occupiers of the house are found by the case to have kept erected on and fixed into the soil of the Heath for forty years, as of right without interruption, and for the more profitable and beneficial occupation of the house, is in the words of the scheme "in, over, or affecting the Heath, or any part thereof." I am of opinion that it is such a right, and that the scheme does not take away such rights unless the person enjoying them consent to take compensation for them. The case of *Lancaster v. Eve* is closely in point, for it matters not whether a post is fixed in land or in the soil under water, as far as the right of the owner of the post is concerned.

QUAIN, J.—I am of the same opinion.

Judgment for appellant.

Attorneys for appellant, *Withall and Compton*.
Attorney for respondents, *W. W. Smith*.

COURT OF EXCHEQUER.

Reported by T. W. SAUNDERS and H. LEIGH, Esqrs.,
Barristers-at-Law.

Nov 19 and 21, 1873.

DAWSON AND OTHERS v. LORD OTHO FITZGERALD.

Landlord and tenant—Contract—Agreement to pay compensation for damage done by hares and rabbits—Arbitration clause—"Fair and reasonable compensation"—Reference to arbitration a condition precedent to action—Indivisible agreement.

Declaration, that the plaintiffs demised lands, &c., to the defendant upon the terms that he would keep upon the demised premises such a number only of hares and rabbits as would do no injury to the trees and plantations, &c., belonging to the plaintiffs, or to their growing crops, or the growing crops of any of their tenants, and that in case the defendant should keep such a number of hares and rabbits as should injure the trees, &c., or the growing crops, &c., the defendant should and would pay to the plaintiffs or their tenants, a fair and reasonable compensation for such injury. Breach assigned that the defendant kept such a number of hares and rabbits as did great injury to such

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trees, &c., respectively, and although frequently requested so to do, had not paid a fair and reasonable or any compensation.

Plea, that "one of the terms of the said tenancy was that, in case any such injury should be done by the defendant, he would pay a fair and reasonable compensation for the same, the amount of such compensation, in case of difference, to be referred to the arbitration of two arbitrators, or an umpire, to be chosen respectively as therein mentioned; that a difference arose, and that no arbitrators had been appointed, nor had an award ever been made deciding the amount of such compensation according to the terms of the said tenancy."

On demurrer it was

Held, by the Court of Exchequer (Kelly, C.B., and Pigott, B., dubitante Bramwell, B.), that the plea was a good plea, inasmuch as the covenant in question was one and indivisible to pay such amount of compensation as should be settled by arbitration and not otherwise, and was not two separate and independent covenants, the one to pay a compensation, and the other to refer the amount of it to arbitration.

THE declaration by the first count charged that the defendant became and was tenant to the plaintiffs, of a messuage or mansion house and pleasure grounds called West Park, and certain coach houses, stables, gardens, and hothouses, yards, and outbuildings thereunto belonging, and also of two pieces of pasture land, called Home Field and Ice House Field, with the liberty and right by himself, and his gamekeepers and servants, or other persons or person duly authorised by him or them, of searching for, pursuing, hunting, coursing, shooting, fowling and sporting in, upon and over certain manors and lands of the plaintiffs, upon the terms (among other things) that the defendant should and would, at all times during his said tenancy, keep and cause to be kept or encouraged such a number only of hares and rabbits upon the said manor or any part thereof, as would do no injury to the trees, woods, underwoods, and plantations belonging to the plaintiffs, or to their growing crops, or to the growing crops of any of their tenants or farmers; and that, in case the defendant should keep or encourage such a number of hares and rabbits upon the said manor or any part thereof, as should injure the trees, woods, underwoods, and plantations belonging to the plaintiffs, or their growing crops, or the growing crops of any of their tenants or farmers, the defendant should and would pay to the plaintiffs, or their tenants, or farmers, a fair and reasonable compensation for such injuries. The declaration then, after setting out other terms and condition of the tenancy, and amongst others, that he would not do or permit any wilful waste, damage or spoil, to the aforesaid hereditaments, or to the said furniture and fixtures, proceeded to assign breeches by the defendant of the said conditions, *inter alia*, as follows, "nor did the defendant, during his tenancy, keep or cause to be kept, or encouraged, such a number only of hares and rabbits, upon the said manors or any part thereof, as would do no injury to the trees, woods, underwoods, and plantations, belonging to the plaintiffs, or to their growing crops, or to the growing crops of any of their tenants or farmers, but, on the contrary, kept such a number as did great injury to such trees, woods, underwoods, plantations, and

growing crops respectively; and, although frequently requested so to do, the defendant would not pay, nor has he paid, to the plaintiffs or to their tenants or farmers, or any of them, a fair and reasonable or any compensation for such injury, or any part thereof, and the defendant has further permitted to be done wilful waste, damage, and spoil to the hereditaments of which he became and was tenant as aforesaid, and to the furniture and fixtures in the same.

By his third plea, to so much of the said first count as alleged that the defendant kept such a number of hares and rabbits on the said manor as did injury to trees, woods, underwoods, plantations, and growing crops, and would not pay and has not paid to the plaintiffs, or their tenants or farmers, or any of them, compensation for such injury, the defendant said that one of the terms of the said tenancy was that, in case any such injury should be done by the defendant he, the defendant, would pay a fair and reasonable compensation for the same, the amount of such compensation, in case of difference, to be referred to the arbitration of two arbitrators, one to be chosen by the plaintiffs and the other by the defendant, the said arbitrators, when chosen, to agree upon and nominate an umpire, and the decision of such arbitrators or umpire to be binding and conclusive on the plaintiffs and on the defendant. And the defendant, by his third plea, further said that a difference arose between the plaintiffs and the defendant as to the amount of the said compensation, as in the said count claimed, and that no arbitrators have ever been appointed by, nor has the defendant been requested by the plaintiffs to appoint an arbitrator, nor has an award ever been made deciding the amount of the said compensation, according to the terms of the said tenancy.

Demurrer, and joinder in demurrer, to the said plea on the ground that the agreement to refer is *collateral to, and not a condition precedent to, the right to sue on the agreement.*

The plaintiffs' points for argument.—First, that the defendant's third plea is bad in substance; secondly, that the arbitration clause therein set forth is a clause regulating the amount of compensation merely, and is collateral, and that the appointment of arbitrators and the making of an award are not conditions precedent to the plaintiffs' right to maintain this action; thirdly, that the defendant became liable, upon the happening of the said injury, to pay to the plaintiffs a fair and reasonable compensation.

The defendant's points for argument.—First, that the settling the alleged compensation by arbitration, as provided for by the terms of the tenancy, was a condition precedent to a right of action for the alleged injury; secondly, that the third plea is good, on general demurrer, as an argumentative traverse of the terms of the tenancy, as stated in the declaration.

Kingdon, Q.C. (with whom was *A. Charles*), for the plaintiffs, supported the demurrer.—The plea is bad, and no answer to the action of the plaintiffs, because the clause providing for reference to arbitration is a collateral and independent agreement, and is not pleadable in bar in the present action. The word "reasonable" would be without meaning if a reference to arbitration is to be a condition precedent to bringing an action, and the defendant would be bound to pay whatever an

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arbitrator might award, be it reasonable or unreasonable. One broad distinction has been recognised by the courts in several cases, similar to the present, the decisions in which would seem to be otherwise conflicting and irreconcilable. That distinction is that which was put by Bramwell, B., in the course of the argument of the case of *Tredwen v. Holman and another* (1 H. & C. 72, at p. 79), in the following words: "If a tenant covenants that he will cultivate the demised lands in a husbandlike manner, and also covenants that, if any dispute shall arise in respect thereof, it shall be referred to arbitration, an action may nevertheless be maintained; but where the covenant is to pay such damages as shall be ascertained by an arbitrator, no action will lie until he has ascertained them:" (s. c. 7 L. T. Rep. N. S. 627; 31 L. J. 398, Ex.; 8 Jur. N. S. 1080, Ex.) Now that is a perfectly intelligible distinction. But in the present case there is a distinct and absolute covenant not to do the particular injury. The defendant covenanted absolutely to keep only such a quantity of hares, &c., as would do no injury, and a cause of action arose as soon as there was a breach of that covenant. Had the clause with respect to arbitration been in a separate deed, or in a totally distinct part of the same deed, it could not have been said to be pleadable in bar in this action, and its following, in the same instrument, the defendant's covenant to do no injury or if he do to pay compensation, can make no difference. The principle which governs the case is fully recognised by this court in the case of *Elliott v. The Royal Exchange Assurance Company* (16 L. T. Rep. N. S. 399; L. Rep. 2 Ex. 237; 36 L. J. 129 Ex.) That was an action upon a fire insurance policy which contained an arbitration clause, which was pleaded to the action. In his judgment in that case Kelly, C.B. says: "The form of the policy is a covenant by the defendants that their capital, stock, &c., shall be subject to make good the plaintiff's loss, not exceeding the sum of 4200*l.*, according to the exact tenor of the articles hereunto subjoined. If the sentence had stopped at the figures 4200*l.*, and in a subsequent part of the instrument there had been an independent promise which might be supposed to have qualified those words, it might have been a question of greater doubt whether these provisions were to be held a condition precedent, or a collateral stipulation which could not avail to oust the jurisdiction of the court. But the covenant itself is, in its very terms, qualified and made conditional by the subsequent words referring to the articles, which, following without any interval, form an integral and substantial part of the covenant." The majority of the court (Kelly, C.B. and Martin and Pigott, BB.) there held that the covenant was a covenant only to pay the adjusted loss, and that the plaintiff had no cause of action; but Bramwell, B. was of a different opinion. Where, therefore, a deed contains in one part of it a covenant to pay a compensation, and in another part of it a covenant to refer, they are two distinct covenants, one to pay a reasonable compensation, and the other to refer the amount to arbitration. No doubt was ever entertained before the case of *Scott v. Avery* (8 H. of L. Cas. 811; 25 L. J. 308, Ex.), that an agreement to refer was a separate covenant. [BRAMWELL, B.—Nor was it disputed in that case. I there said so, and illustrated it by putting the case of a covenant in one instrument to

pay money, and in another to refer all differences. There, if a breach of the covenant in the first deed occurred before the second deed was executed, there could be no action; and if an action were brought for not naming an arbitrator, the damages would be nominal only, and not those arising from a breach of the covenant to pay.] If it be said that it was the intention of the parties to refer to arbitration in case of difference, a judge at chambers, if he sees fit to do so, may stay proceedings under sect. 11 of the Common Law Procedure Act 1854, and the defendant can obtain a compulsory reference; but the jurisdiction of the courts cannot be ousted by an arbitration clause: (Co. Litt. 536.) The intention of the parties is not to be taken into consideration unless it be most clearly stated, as it was in *Scott v. Avery*, that a reference to arbitration is to be a condition precedent to the defendant's liability to pay. In *Roper v. Lendon* (1 El. & El. 825; 28 L. J. 260, Q. B.), such a condition was held to be no bar, and the plaintiff was held entitled to sue. He cited also

Braunstein v. The Accidental Death Insurance Company, 5 L. T. Rep. N. S. 550; 31 L. J. 17, Q. B.; 1 B. & S. 782.

R. E. Turner (with him Sir J. B. Karlake, Q.C.) *contra*, for the defendant, in support of the plea, contended that the plea was a perfectly good one. It was a question of construction. Although the parties, whatever they may have intended, cannot oust the jurisdiction of the courts by an arbitration clause, it is nevertheless competent to them to enter into an agreement under which no liability shall accrue until there has been a reference to arbitration. The plea here is within the cases of *Scott v. Avery*, and *Tredwen v. Holman and another*, already cited. As was said by Coleridge, J., in his judgment in *Scott v. Avery*, "There is no dispute as to the principle. Both sides admit that it is not unlawful for parties to agree to impose a condition precedent with respect to the mode of settling the amount of damages, or the time for paying it, or any matters of that kind, which do not go to the root of the action. On the other hand, it is conceded that an agreement which is to prevent the suffering party from coming into a court of law, or in other words, which ousts the courts of their jurisdiction, cannot be supported." The covenant here is one only. It is like the agreement of a builder to abide by the surveyor's certificate. It means "I will pay for such damage done as, in case we differ about it, two arbitrators shall award." The object was to save the costs of a trial by jury. In principle the covenant here differs not from that in *Elliott v. The Royal Exchange Assurance Company* (*ubi sup.*). [BRAMWELL, B.—Would a plea that the defendant had paid a fair and reasonable compensation be good?] It would not be. To make it good it should be that he had tendered the sum awarded by the arbitrators. It is all one contract. The parties have agreed to arbitration and must stand or fall by that mode of arriving at the proper amount of compensation.

Kingdon, Q. C. replied.

Cur. adv. vult.

Nov. 21.—KELLY, C.B.—In this case the question before us arises on a plea, and it has led to some difference of opinion between the members of the court. The declaration charges that the defendant

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became and was tenant to the plaintiffs of a messuage and lands belonging to them, with a right of shooting over certain manors belonging to the plaintiffs, and that he had entered into a covenant that he would at all times during his said tenancy keep or cause to be kept, or encourage such a number only of hares and rabbits upon the said manors, or any part thereof, as would do no injury to the trees, woods, underwoods, and plantations belonging to the plaintiffs, or to their growing crops, or to the growing crops of any of their tenants or farmers; and that in case the defendant should keep or encourage such a number of hares and rabbits upon the said manors or any part thereof, as should injure the trees, &c., belonging to the plaintiffs, or their growing crops, or the growing crops of any of their tenants or farmers, the defendant should and would pay to the plaintiffs, or their tenants or farmers, a fair and reasonable compensation for such injury; and should not nor would do, or permit to be done, any wilful waste, damage, or spoil to the demised hereditaments, and so forth; and there, so far as it is stated in the declaration, the covenant stopped. The breach assigned is that the defendant did not keep or encourage such a number only of hares and rabbits as would do no injury to the trees and crops, &c., of the plaintiffs, but on the contrary kept and encouraged such a number upon the manors as did great injury to such trees and crops, &c. Now, no doubt, if the covenant had stopped there as stated in the declaration, and the breach had been committed as therein assigned, the action would have been maintainable. But the defendant, among other pleas, has pleaded a plea whereby, as to so much of the said first count as alleged that the defendant had kept such a number of hares and rabbits on the said manors as did injury to the trees, woods, underwoods, plantations, and growing crops, and would not pay, and has not paid to the plaintiffs, or their tenants or farmers, or any of them, compensation for such injury, he says that "one of the terms of the said tenancy was, that in case any such injury should be done by the defendant, he, the defendant, should pay a fair and reasonable compensation for the same, the amount of such compensation, in case of difference, to be referred to the arbitration of two arbitrators, one to be chosen by the plaintiffs and the other by the defendant, the said arbitrators, when chosen, to agree upon and nominate an umpire, and the decision of such arbitrators or umpire to be binding and conclusive on the plaintiffs and on the defendant. And the defendant says that a difference arose between the plaintiffs and the defendant as to the amount of the said compensation in the said count claimed, and that no arbitrators have ever been appointed, nor has the defendant been requested by the plaintiffs to appoint an arbitrator, nor has an award ever been made deciding the amount of the said compensation according to the terms of the said tenancy." The question then arises whether that plea is an answer to the present action, and I am of opinion that it is, and but for what has fallen from various learned judges, in some of the cases that have been decided upon the point, and for the inclination of opinion thrown out by my brother Bramwell during the present argument, I should have entertained no manner of doubt that, in order to give effect to the undoubted intention of the parties, this must

be taken to be one covenant. It is contained and expressed in one sentence, and its effect and meaning, as I understand the intention of the parties, is, that in case of any damage being done by the hares and rabbits, compensation should be made; but that the amount of such compensation should, in case of difference, be determined not by a jury, or by any tribunal or body of persons other than those prescribed by the parties themselves in the same consecutive sentence, without even the interposition of a comma, namely, two arbitrators or their selected umpire. Now, then, can it possibly be contended that the amount of compensation is to be assessed, not by such two arbitrators, or their umpire, but by a jury, or by any other tribunal or body of persons? The ground upon which the argument for the plaintiffs proceeded seems to rest upon a dictum, or something that is supposed to have fallen from Lord Coke, and which, therefore, is invested, and comes before us as supported by the highest authority, namely, that the effect of the proviso for submitting the amount of compensation to the decision of arbitrators, is to oust the jurisdiction of the courts of law, and, therefore, that such a proviso is inoperative. I can only say that I lament that such should ever have been thought to be the law of this country, because I think that it is obviously absurd and unjust. It is obviously absurd that, in a case where two persons have agreed for the payment of a sum of money by the one of them to the other, and that in case of difference, the amount should be determined by arbitration, in the manner agreed upon between them, a court of law is to be called upon to say that such an agreement shall not be held valid, but that an action must be brought, and a jury, and not the arbitrators, must determine and settle the amount. Now if, as has been held in some cases, we are to read an instrument of this kind as containing two separate and independent covenants, and are to give effect to them as such, the consequence and practical effect of such a construction would be this: The injured party brings an action for breach of the covenant to do no injury, which action proceeds to trial before a jury, who give a verdict for 500*l.* damages and costs, and there is judgment against the party who has committed the injury for that amount, which he must pay. Then there is the covenant to refer the matter to arbitration, and the defendant in the former action now has his turn, and brings his action against the former plaintiff for refusing to submit the question to arbitration, in order to settle the amount of compensation or damages, and in this second action the now plaintiff recovers damages. Now the jury in this second action may be of opinion that, if the matter had been referred to arbitration in the first instance, less than half the amount of damages found by the jury in that action might have been thought sufficient by the arbitrators, and that not so much as 250*l.* would have been awarded. Is it to be conceived that, in a country in which law prevails, and where there is such a rule as *lex semper intendit quod convenit rationi*, such should possibly be the law, and that, for one and the same cause of action, one tribunal shall have decided that 500*l.* is the amount of damages, and another tribunal, acting upon the same instrument, and between the same parties, and as to the same cause of action, shall have decided that the damages ought to be only half that amount. All

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I can say is, that a construction of an instrument which would lead to such a condition of things as that, is one which I think no court of law would sanction. But to return to the case at present before us. Shortly stated it is a covenant or agreement by the defendant to keep only such a quantity of ground game as shall do no injury to the property of the plaintiffs; but if the quantity kept is so great as to do such injury, then the defendant is to pay a fair and reasonable compensation for the same, and that the amount of such compensation, in case of difference, should be referred to the arbitration of two arbitrators, one to be chosen by each party. Here are these parties, the one claiming to be entitled to compensation, and the other having to make compensation according to the terms of the agreement, and how can effect be given to the agreement unless the amount of the compensation be ascertained? The court cannot give effect to this agreement, whatever it may be, apart from the tribunal or persons by whom the amount of compensation is to be assessed. Is it to be done by an action at law, and so by a jury? Why, in and as part of the same sentence, and, as I observed before, with scarcely the necessity of a comma between one part of the sentence and the other, it is said, "the amount of such compensation, in case of difference, shall be referred to the arbitration of two arbitrators." Taking, therefore, the whole of this record, the whole of the allegation in the declaration, and the plea together, I hold the covenant or agreement therein alleged to be one and indivisible. It is in effect an agreement that, in case the plaintiffs shall be entitled to compensation, by reason of a breach of the defendant's undertaking, the compensation is to be determined by the arbitration of two arbitrators, to be chosen by the parties themselves, and in no other way. It was suggested in the course of the argument that there are no negative words, and that the parties do not say that it shall not be determined by a jury. Is it necessary, or would it not be entirely superfluous, to incur the instrument with absurdly unnecessary matter by adding, "the amount shall not be determined by a jury?" Under these circumstances, it is quite unnecessary to refer to the case of *Scott v. Avery* and the other cases bearing upon the subject. Each case must depend upon the precise language and, perhaps, even the position in the deed of the covenant entered into between the parties. Here, upon the grounds which I have endeavoured to set forth, I think that the plea is a good answer to the action.

BRAMWELL, B.—There is, or ought to be no doubt or difficulty as to the principle upon which this case should be decided. The learned counsel on both sides are agreed upon the principle, and there was no difficulty with respect to it in the minds of the court. It may be correctly and concisely stated—as I have often before stated it—to be this, namely, that where there is a covenant to do a particular thing, or to pay a particular sum of money, and there is, in addition to that, what has been called a collateral covenant, a further additional and separate covenant that, in the event of there being a difference between the parties as to what shall be done under the first covenant the matter shall be referred to arbitration, this second or further covenant is a separate and distinct covenant. The first covenant may be broken, and a cause of action may arise,

and an action be brought upon it independently, whether the second covenant be broken or not. It does not matter whether the covenants are close together or in separate and different paragraphs or sections in the same deed, or whether they are in two separate and distinct deeds; the principle is the same. They are two separate covenants. If that be so, then the settlement of the amount by arbitration is not a condition precedent to the maintenance of the action. But if there is only a covenant to pay what shall be found due by arbitrators, then, obviously, no cause of action arises until the amount is settled. And that is so, whether there is a difference or not. I should have thought that this was plain, and that there was no doubt about it. But, as my Lord and my Brother Pigott are of a different opinion on that point, I will not formally disagree with them; but, at the same time, as it is impossible almost to have an opinion, although it may seem to some persons to be an idle one, without a disposition to say something in its behalf, I will proceed to say what occurs to me with respect to this matter. I should say that it may be, in certain cases, very wrong for a man not to refer a matter to arbitration, but to hold that it is monstrous and absurd to suppose that there can be two such separate covenants as these contained in this agreement, appears to me to be without any foundation at all; and until the distinction was laid down in *Scott v. Avery*, numberless cases had been decided, indeed not only before but since that case, upon the footing that there may be two covenants in the same instrument, by one of which one man may make himself liable to an action for not paying a sum of money, and by the other of which another man may make himself liable for not referring the dispute to arbitration; and, preposterous as it may seem to be, it is the law of the land, and is, in my opinion, very reasonable law too. I have had cases before me at chambers, where I have refused to act upon the provisions of the Common Law Procedure Act, by referring the matter—as for instance a case where a man has been compelled to admit that he owes, let us say 100*l.*, but where there has been some dispute on a technical point as to his liability to a sum of 5*l.* or so, which he wished to refer to arbitration. In such a case I have always said, "Pay the 100*l.* first." It is I think most reasonable that the party to whom the 100*l.* is owing should say, "I am not going to be hampered by a long arbitration, which may last a year before being settled, upon the question whether you owe me 5*l.* or not, where it is certain that if I bring an action you must pay me 100*l.* I abandon the 5*l.*" Not only is that a rational construction for the courts of law to put upon these instruments, but it is not an unreasonable bargain for people to enter into; and when we bear in mind the provisions of the Common Law Procedure Act, which enable a defendant to stay the proceedings, and to appoint a single arbitrator, if the other party declines to appoint one, and thereupon to have an award made, not only is there nothing unreasonable in making two covenants such as I have supposed, but, when we come to look at the deed we are called upon to construe, there is no presumption against such a thing being done. I think it is right law, and we ought to follow the footsteps of the law. I incline to think, and for two reasons, that this plea is a bad one. In the first place, the covenant

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by the defendant is this, "that he should and would at all times during his said tenancy, keep or cause to be kept or encouraged such a number only of hares and rabbits upon the said manors or any part thereof, as would do no injury to the trees, woods, underwoods, and plantations belonging to the plaintiffs, or to their growing crops, or to the growing crops of any of their tenants or farmers." I have a very considerable doubt whether that is not a separate and independent covenant, and whether there might not be a breach of it if the covenantor committed the act which he had covenanted against, without going on to aver that "he did not pay compensation." For, suppose that he had done the act wilfully, I am not at all sure that vindictive damages might not be recovered against him, though there may be a question about that. But the covenant goes on, "and that in case the defendant should keep or encourage such a number of hares or rabbits upon the said manors or any part thereof, as should injure the trees belonging to the plaintiffs, or their growing crops, or the growing crops of any of their tenants or farmers, the defendant should and would pay to the plaintiffs, and their tenants or farmers, a fair and reasonable compensation for such injury." Now it may be said that the meaning of the covenant is not absolutely that he would not do it, but that if he does do it he will pay a sum of money. I doubt very much, but the inclination of my opinion is, that that is not the meaning of the covenant, partly for the reasons I have already given, and partly, also, because I am by no means sure that the tenants would not have an action, against him, independently of any such covenant. That is one difficulty in the plea about which I will say no more, and I am not sure that Mr. Kingdon has put such a point during the argument. Then we come to the other part of the covenant—namely, "that the defendant should and would pay to the plaintiffs, or their tenants or farmers, a fair and reasonable compensation, for such injury, the amount of such compensation, in case of difference, to be referred to the arbitration of two arbitrators," &c. Now, it is said on the part of the defendant, by Mr. Turner, who argued this case as he argues every case—that is to say, by saying all that can be said in the fewest possible words—that the effect and meaning of this covenant is this, "I will pay you in the event of my doing this which I have covenanted not to do, such a sum of money as shall be fixed by two arbitrators." If that were so then the plea would be good and on this declaration the plaintiff would be entitled on the plea of *non assumptit*, the agreement not being such as is stated in the declaration. If there were no other description of the sum to be paid then that it should be referred to arbitration; then it might be that it must be referred. But there is another description of it, namely, that he is to pay a *reasonable* compensation." Suppose the defendant had said, "I am afraid I have kept too many hares and rabbits, here are 50*l.*; what do you think is the damage which they have done?" And the plaintiff had said, "Well, I will take the 50*l.* for what they are worth, I have not looked accurately into the matter." According to the argument for the defendant, although that might be a most reasonable amount and full compensation for the injury done, it would not be a defence to the action, because the plaintiff might say, "I never agreed

to take a reasonable amount, or any amount at all except that sum which two arbitrators might award." To which the defendant's reply would be, "You agreed to take a reasonable sum, and if we differed as to what that might be, it should be settled by arbitration; but in the meantime I say that I have paid you a *reasonable amount*, and it is open to you to bring an action against me for not referring the matter to arbitration." That is the alternative way of putting the matter. And then we come to consider what the defendant is to pay to the plaintiffs or their tenants. It may be, that he has paid half a dozen of the tenants the amounts which they are satisfied with, and that the only difference is as to what he shall pay to one single tenant, and that upon that the plaintiffs seek to drive him to an arbitration. If I had had to decide the case for myself, and but for the different opinion entertained by my Lord and my brother Pigott, I would have held—first, that there was an absolute agreement not to do the mischief; or, secondly, if that were not so, that it was an agreement "not to do the injury, or if it were done, to pay a reasonable amount." I should have thought that the covenant, that, in the event of difference it should be referred to arbitration, was a separate and independent covenant; that it was a collateral covenant which might be the subject of an action between the parties, but which did not furnish an answer to the action in this case. Though I entertain these opinions on the subject, my views are not sufficiently strong for me to say that I formally differ from the judgment that is to be pronounced in this case.

Pigott, B.—I concur in the opinion expressed by the Lord Chief Baron that the judgment of the court in this case ought to be for the defendant. We are no longer trammelled with the difficulty of the doctrine that parties may not oust the jurisdiction of the courts—a doctrine which, wherever it came from, I must say, a very artificial one, and one that was sufficiently discredited by the House of Lords in *Scott v. Avery*. In that case Lord Campbell (at p. 853 of 5 H. of L. Cas.) said the foundation of that singular doctrine was the jealousy of courts as to the amount of their business. That doctrine, therefore, is no longer a stumbling block in the way of our decision. In this case, then, we have only to see, as Lord Cranworth, L.C., said, in that case (at p. 849, *Id.*), what is the real meaning and intention of the parties as expressed by them in the agreement into which they have entered. That being so, and reading this record, I come to the conclusion that there is one and only one agreement between the parties with reference to the damage to be done by the hares and rabbits. There are not two, but only one agreement. We must read the whole sentence, and, if necessary, the whole of the context, to see what the parties mean by the language which they have used. Reading it in that way, I understand from this plea that the defendant contracted that, if he should keep such a number of hares and rabbits as should do injury to the woods and trees and crops of the plaintiff, he would pay a fair and reasonable compensation for the same, the amount of such compensation, in case of difference, to be referred to the arbitration of two arbitrators, one to be named on either side. I will not stop to consider whether this is expressed in one sentence, or in two or more sentences. It seems to me that what

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the defendant contracted to do was, that, in case of injury being done by the hares and rabbits, he would pay a fair and reasonable compensation, to be assessed by arbitration in case of difference; and that must mean, not that there is something fixed which is fair and reasonable, and which he, the defendant, stopping there, says in the first instance, "I am liable to pay," so that an action may be maintained for what is fair and reasonable, which may be matter for a jury, but it means "I will pay what is fair and reasonable, if agreed to between us to be so." I can understand it in no other way. But inasmuch as the term "fair and reasonable" may mean very different things in different minds, and as I may think that 50*l.* is a fair and reasonable amount, and you may think that 500*l.* alone answers that description, we will, say the parties, agree that in that event an arbitrator shall determine the question of what is fair and reasonable before I am liable, or you can have your action. If that be the meaning, the result is that there is a condition precedent to any right of action to recover what is fair and reasonable, the condition precedent being that the amount is to be assessed by the arbitrators. I think the whole thing depends upon what was the intention of the parties. Now, with reference to the reasonableness of the matter, no one, I think, can doubt that, when we are discussing the question of hares and rabbits, and the damage done by them upon farms, it would not be safe to go upon the open question to a jury, whether constituted either of common or special jurymen. There is sure to be a preponderance of prejudice on the one side or the other, according as the jury is composed; therefore, it is highly reasonable that the parties, in such a state of things, should contract for the determination of the question by a direct and independent tribunal. The notion about ousting the courts of their jurisdiction would create almost an unjust restriction on the liberty of men making contracts; at all events, no sensible man, when such a question of damage as this arises, would submit it to a jury, but would refer it out of court. On the whole, I come to the conclusion which my lord has come to, that this is one indivisible covenant, and not two covenants, and that it is not to be the subject-matter of suit, until the assessment has been made by the tribunal appointed by the parties. The stipulation would otherwise be nonsense, and the parties would be constantly coming to the courts with their disputes as to damages, and pressure would be put upon them to refer.

Judgment for the defendants.

Attorney for the plaintiffs, *P. A. Hanrott*, 9, Bedford-row, W.C.

Attorneys for the defendant, *Markby, Wilde, and Barra*, 9, New-square, Lincoln's Inn, W.C.

CROWN CASES RESERVED.

Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

Saturday, Nov. 15, 1873.

(Before KELLY, C.B., BLACKBURN, J., LUSH, J., POLLOCK, B., and HONYMAN, J.)

REG. v. KITCHENER.

County bridge—Damage thereto by locomotive—Repair—24 & 25 Vict. c. 70.

The Locomotive Act (24 & 25 Vict. c. 70, s. 7), enacts

that where any bridge on a turnpike or other road, carried across any stream, watercourse, or navigable river, canal, or railway, shall be damaged by reason of any locomotive passing over the same, or coming into contact therewith, none of the proprietors, undertakers, directors, conservators, trustees, commissioners, or other persons interested in, or having charge of, such navigable river, canal, or railway, or of such bridge shall be liable to repair the damage, &c., but the same shall be repaired to the satisfaction of such proprietors, &c., by the owners or persons having charge of the locomotive at the time of the happening of the damage:

Held, that this provision does not apply to bridges repairable by the inhabitants of a county.

CASE reserved for the opinion of this court by Cleasby, B.

This case was tried before me at the Bedford Summer Assizes.

The defendant was indicted for the non-repair of a highway which had become impassable by reason of the breaking in of a bridge over which it passed, and which it was alleged the defendant was bound to make good by virtue of the 7th section of the 24 & 25 Vict. c. 70.

The indictment alleged that the highway was a highway for passengers, carriages, and locomotives, and was carried over a watercourse by means of a bridge, and that the bridge and the walls and supports thereof, were broken in by reason of a locomotive of the defendant passing over, and coming in contact with the same, and that the defendant, though requested to do so, and though a reasonable time had elapsed, had not repaired the damage done to the bridge, and so the highway could not be used by the public with safety.

It was proved or admitted at the trial, that there was a highway for passengers, carts, and carriages, leading from Biggleswade to Broom, in the county of Bedford, and that it passed over a stream or water-course called Rook's-hole, by means of a bridge which was sufficiently strong for ordinary traffic.

That the defendant was the owner of the locomotive traction engine, weighing about 10 tons, and that on the 11th Feb., the engine in passing over the bridge, broke in the part over which it passed, and fell through into the water, and that in consequence the highway became unsafe for ordinary traffic.

That the bridge was formed of iron girders fastened in brickwork on each side, and was repairable by the county.

That one of the outside girders was cracked and defective, and that the attention of the county surveyor had been called to this two years ago, but nothing was done to repair it, because the bridge was safe for ordinary traffic, and the defective girder was an outside one, and that traffic was not immediately over it, and the surveyor did not know that the road was used by traction engines.

That the bridge was broken in at the middle, and it did not appear that the breaking in was attributable to the defective girder.

That no notice had been put up to prevent the road being used by locomotives, and that the locomotive of the defendant complied with the requirements of the stat. 28 & 29 Vict. c. 83.

That the defendant had been requested to

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repair the bridge and road, and that a sufficient time for doing so had elapsed.

It was contended, on behalf of the defendant, that he could not be convicted—First, because the facts do not show an indictable offence; secondly, because no notice had been given under the statute to prevent the road being used by locomotives; thirdly, because no injury was done to the bridge by the locomotive striking against the piers, or any other part of it, or any damage by mode of propelling it; fourthly, because as the locomotive was lawfully using the road, and the bridge had broken in from its weakness to support it, the bridge could not properly be said to be damaged by the use of the locomotive, but by reason of its own unfitness.

I overruled all the objections, and directed the jury that if the road and bridge were in a fit state for ordinary traffic a person using a locomotive upon it did so at his peril, and if the bridge was broken in from being unable to bear the weight of the locomotive passing over it, the defendant was responsible.

The jury found the prisoner guilty, and he was let out on bail, and the judgment respited.

If my direction was wrong, the conviction is to be quashed, if otherwise to stand.

(Signed)

A. CLEASBY.

Merewether for the defendant.—The question turns on the construction of the 24 & 25 Vict. c. 70, s. 7, which enacts that, "Where any turnpike or other road upon which locomotives may be used shall be carried over or across any stream or watercourse, navigable river, canal, or railway, by means of any bridge or arch, and such bridge or arch, or any of the walls, buttresses, or supports thereof shall be damaged by any locomotive, &c., passing over the same, or coming into contact therewith, none of the proprietors, undertakers directors, conservators, trustees, commissioners, or other persons interested in or having the charge of such navigable river, canal, or railway, or the tolls thereof, or of such bridge or arch, shall be liable to repair or make good any damage so occasioned. . . . but every such damage shall be forthwith repaired to the satisfaction of the proprietors, undertakers, directors, conservators, trustees, commissioners, or other persons aforesaid interested in or having the charge of such river, canal, or railway, or the tolls thereof, or of such bridge or arch, by and at the expense of the owner or owners, or the person or persons having the charge of such locomotive at the time of the happening of such damage," &c. Now, it is contended that this bridge being repairable by the county, does not fall within the above enactment. There are no words in sect. 7 applicable to a county bridge, nor is the county surveyor mentioned in it; while in the previous section 6 the surveyor may prohibit the use of a bridge by locomotives. In sect. 7, the repairs of the damage done by locomotives are to be done to the satisfaction of the proprietors, undertakers, directors, &c., not mentioning the surveyor. Sect. 7 applies to bridges which a body of persons interested in some undertaking have to make and keep in repair, and not to ordinary county bridges. Then, again, the 43 & 44 Geo. 3, c. 59, s. 4, enables the inhabitants of counties to sue for damages done to bridges made and repaired at the county's expense in the name of the surveyor.

Graham for the prosecution.—At the time the

24 & 25 Vict. c. 70 passed, the law upon this subject stood thus: It was a nuisance to the highway by the common law if a carrier carried an unreasonable weight, with an unusual number of horses (Com. Dig. Chimin, A. 3.) Also in 3 Salk. 183 it appears that upon an information against a common carrier, setting forth that no waggon ought to carry more than 2000lb. weight, and that the defendant used a waggon with four wheels *et cum inusitato numero equorum*, in which he carried 3000lb. or 4000lb. weight at one time, by which he spoiled the highway, it was held to be a nuisance because of the excessive weights carried. It was unlawful, therefore, to carry an excessive and unusual load upon a highway, when the Act passed. The preamble of the 24 & 25 Vict. c. 70, and also sect. 7, refers to turnpike and other roads carried over any stream, by any bridge or arch, and draws no distinction between county and other bridges. [POLLOCK, B.—The proprietors and other persons mentioned in sect. 7 have no means of preventing locomotives passing over the turnpike and other roads as the surveyor has under sect. 6 in the case of suspension and other bridges.] The words of sect. 7 are sufficiently general to apply to county bridges. If they do not so apply, will sect. 7 apply to bridges repaired by persons liable *ratione tenuræ*? The prosecutors are within the words, "as other persons having charge of such bridge," in sect. 7.

1 Burns Inst. 515: title "Bridges."

KELLY, C.B.—I am of opinion that this conviction cannot be sustained. This was not a bridge within the meaning of sect. 7, and the inhabitants of a county do not come within the description therein of "persons interested in or having the charge of such bridge." With respect to county bridges, the provisions in ss. 6 and 13 of the 24 & 25 Vict. c. 70, and 43 & 44 Geo. 3, c. 59, s. 4, are sufficient to protect the inhabitants of a county from the evil sought to be remedied by sect. 7 of 24 & 25 Vict. c. 70. By sect. 6, locomotives are forbidden to be driven over any suspension or other bridge at all on which a notice has been placed by the surveyor or persons liable to the repair of the bridge, that the bridge is insufficient to carry weights beyond the ordinary traffic of the district, without the consent of the surveyor or persons liable to the repair of the bridge. Then comes sect. 7, and that applies to bridges across any stream or watercourse, navigable river, canal, or railway which are what may be termed private property, and belong to some company or body that would be prejudiced by injury done to their bridges by the use of locomotives upon them. If it had been intended to apply to county bridges the inhabitants of the county would have been mentioned in the section, whereas the section refers to a more limited description of persons, "proprietors, undertakers, directors, conservators, &c." The provision which renders the owners of locomotives liable for damage is limited to trading partnerships or bodies or persons such as described. The interests of the inhabitants of a county and the public are sufficiently protected by sects. 6 and 13.

BLACKBURN, J.—I am of the same opinion. At common law the highways within a parish or township were repairable by the inhabitants of the parish or township, and where they were carried across small streams, the inhabitants of the parish or township were probably by immemorial

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custom also, liable to repair the bridges; but bridges over large streams were repairable by the inhabitants of the county. In the case of *Reg. v. Ely* (19 L. J. 223, M. O.), it was held that he who, under lawful power, makes an artificial cut through a highway, and in whom the cut is vested for his own advantage, incurs the obligation to repair the bridge over the highway, yet not so as to relieve the parish or township from liability, for the Queen's subjects are not to be deprived of their right of coming upon the parish or township to repair. Now, remembering that many railway and canal companies cut through public highways, and necessarily erect bridges to continue the highways, the Legislature passed the enactment in sect. 7. It seems to me that the class of persons meant therein are such as the Bedford Level Commissioner, Railway and Canal Companies, and such like, who are bound to repair the bridges over their works in ease of the inhabitants of the parish or township, but it was never intended that the inhabitants should be freed, in cases like the present, in consideration of the great injury to the public from the bridge remaining in ruins, in case of the insolvency, death, or inability to find the owner of the locomotive that might have caused the damage. The section does not say that those persons who are liable to repair the bridge shall be discharged from their liability, but that such companies or proprietors as I have mentioned, interested in or having charge of the bridge, shall not be liable to repair or make good the damage so occasioned, and that such damage shall be repaired to their satisfaction by the owner or person having charge of the locomotive at the happening of such damage. And the section gives them power to enforce such obligation by civil proceedings or *mandamus*, but not by indictment. The county ought, therefore, to have repaired this bridge and taken other proceedings. The conviction must therefore be quashed.

LUSH, J., and POLLOCK, B., concurred.

HONTMAN, J.—I am of the same opinion. Sect. 7 does not say that the damage is to be repaired to the satisfaction of the inhabitants of the county, which it should have done if the contention of the prosecution was right, but to the satisfaction of the persons named in the section.

Conviction quashed.

COURT OF APPEAL IN CHANCERY.

Reported by E. STEWART BOONE and H. PEAT, Esqrs.,
Barriers-at-Law.

Friday, Dec. 5, 1873.

(Before the LORD CHANCELLOR (Selborne) and Lord Justice MELLISH.)

Ex parte THE REV. JOHN EDWARDS.

Church Discipline Act (3 & 4 Vict. c. 86), s. 3—
Issue of commission—Discretion of bishop—Fitness of promotor—Prohibition.

Where a commission has been issued by a bishop under the 3rd section of the *Church Discipline Act* (3 & 4 Vict. c. 86), to inquire into charges brought against a clerk in holy orders, the court will not grant a prohibition staying proceedings until the clerk has been heard by counsel before the bishop as to certain preliminary objections, and especially as to the fitness of the promotor.

Decision of Bacon, V.C., affirmed.

THIS was an appeal from a decision of Bacon, V.C.

The hearing in the court below is reported in 29 L. T. Rep. N. S. 529, where the facts of the case are fully stated.

The Vice-Chancellor having refused to grant a writ of prohibition, the applicant appealed.

The application below, and the present application, were made *ex parte*.

Dr. Stephens, Q.C. and Phillimore, in support of the appeal.—This application is made *ex parte*, but in a case like this it is not necessary to give notice. *Re Bateman* (22 L. T. Rep. N. S. 60; L. Rep. 9 Eq. 660) shows that such a prohibition as we seek can be issued by the Court of Chancery out of term. This is the proper time to take objections to the character of the promotor, for when once the bishop has issued the commission the promotor alone has the control of the proceedings, and it is then too late to raise objections against the promotor: *Reg. v. Archbishop of Canterbury* (6 E. & B. 546). The Act requires the bishop to give fourteen days' notice before issuing the commission, and to state the name and residence of the promotor. The object of that provision is clearly to give the accused an opportunity of raising the objection that the promotor is not a fit and proper person. It is true that the Act gives the bishop a discretionary power to issue the commission or not, but he is bound to exercise the discretion in a judicial manner, and *Elphinstone v. Purchas* (23 L. T. Rep. N. S. 285; L. Rep. 3 P. C. 245) shows that the bishop is bound to decide judicially as to the position of the promotor. If a clerk in holy orders, against whom charges are brought under the Church Discipline Act, cannot obtain a prohibition to restrain the issuing of the commission till he has been heard before the bishop, as to objections which he wishes to raise as to the fitness of the promotor, charges may be made by a man of straw who will be unable to pay the costs when, after all the expense of the commission has been incurred, the charges are proved to be groundless. They also referred to

Martin v. Mackonochie, L. Rep. 2 A. & E. 116, 123;

Poole v. The Bishop of London, 5 Jur. N. S. 522;

Reg. v. The Bishop of Chichester, 2 E. & E. 209.

The LORD CHANCELLOR (Selborne).—This application appears to me to be quite unfounded, and absolutely frivolous. The statute imposes upon the bishop the duty, in what he may consider a proper case, of issuing a commission of inquiry; and that he may do in the language of the statute (a) either "upon the application of any party com-

(a) The 3rd section of the Church Discipline Act (3 & 4 Vict. c. 86) is as follows: "That in every case of any clerk in holy orders who may be charged with any offence against the laws ecclesiastical, it shall be lawful for the bishop of the diocese within which the offence is alleged or reported to have been committed, on the application of any party complaining thereof, or, if he shall think fit, of his own mere motion, to issue a commission under his hand and seal to five persons, of whom one shall be his vicar-general, or an archdeacon or rural dean within the diocese, for the purpose of making inquiry as to the grounds of such charge or report. Provided always, that notice of the intention to issue such commission, under the hand of the bishop, containing an intimation of the nature of the offence, together with the name, addition, and residence of the party on whose application or motion such commission shall be about to issue, shall be sent by the bishop to the party accused fourteen days at least before such commission shall issue."

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plaining of an offence alleged to have been committed, or, if he shall think fit, on his own mere motion." I have a very serious doubt whether it would be competent for the bishop to refuse to entertain an application from any party, because the statute says, any party who thinks fit to complain may make the application. Doubtless it is for the bishop to exercise a discretion whether he will issue the commission or not when he has received the application from a party, or when he is minded to do it upon his own motion. The present application asks the court to restrain the bishop from doing the very thing which the statute gives him jurisdiction to do, on the ground that he has not done something else which the statute does not directly or indirectly make it his duty to do, because the statute nowhere either requires certain conditions to enable the party to make any application—and it says "any party"—nor does it impose upon the bishop, at the instance of the person accused, the duty of entering into a preliminary inquiry of any sort or kind in which that party shall be heard against the issuing of a commission. I have always understood that, as things are under the Church Discipline Act, it is sufficiently onerous, both to the parties accused and to those who promote proceedings, to have to go to the expense of a double inquiry, first before the commissioners, and afterwards in court. But this proposal is to compel a treble inquiry, and at the instance of the person accused, to enable him to turn the tables upon the accuser, and to require the bishop to hear, and if to hear I should think to receive, evidence upon any possible imputation which may be made upon the promoter's character. As I said at the beginning, I look upon this application as not only groundless but frivolous, and of course it must be refused.

Lord Justice MELLISH.—I am entirely of the same opinion. The question turns expressly upon the construction of the statute. There is nothing extraordinary in the first proceeding in a suit being made *ex parte*. Almost all proceedings are *ex parte* in the first instance. Take for example an application for a warrant, or the issuing of a writ, or the preliminary process before a grand jury; it is quite in accordance with our law that the first issue of a proceeding should be *ex parte*. Well then, I will assume what is not quite certain on the construction of the section, that the bishop has a discretion on account of the character of the promoter to refuse to issue a commission. I say it is not quite certain, because the words are: "It shall be lawful" for the bishop to do it, and those words are very often considered to be compulsory. But I will assume that, for this purpose, he has a discretion, yet when we see that he may do it either on the application of any person, or on his own mere motion, what is there in those words that can for a moment suggest that the party accused is to be entitled to be heard as to whether the promoter is a fit and proper person upon whose motion to issue the commission or not, the statute not in the least degree showing what are the objections (if any objections are to be made) which may be made? What was principally relied upon by the applicant was the proviso at the end of the section, namely, that fourteen days' notice of the issuing of the commission should be given to the parties accused, together with the name and description of the person who has made the application. It appears to me quite clear that that

notice is given to the party, simply that he may be able, when he comes before the commissioners, properly to make his defence. Of course he ought to have that sufficient notice before the commissioners meet; it is quite right that he should have such a notice of who the person is who brings the accusation against him, because that may be very material matter for him in framing his defence. I entirely agree with the Lord Chancellor, that there really is not the least ground for this application.

Solicitors: Brooks, Tanner, and Jenkins.

COURT OF QUEEN'S BENCH.

Reported by J. SHORRITT and M. W. McKELLAR, Esqrs.,
Barristers-at-Law.

Thursday, Jan. 15, 1874.

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Removal of indictment into Queen's Bench by certiorari—Costs of prosecution—Whether necessary that prosecutor should be a "party grieved"—5 & 6 Will. & M., c. 11, s. 3—16 & 17 Vict. c. 30, s. 5.

Sect. 5 of 16 & 17 Vict. c. 30, after reciting that "it is expedient to make further provision for preventing the vexatious removal of indictments into the court of Queen's Bench," enacts "that whenever any writ of certiorari to remove an indictment into the said court, shall be awarded at the instance of a defendant or defendants, the recognisance now by law required to be entered into before the allowance of such writ shall contain the further provision following, that is to say, that the defendant or defendants, in case he or they shall be convicted, shall pay to the prosecutor his costs incurred subsequent to the removal of such indictment," &c.

This enactment is general in its application, and renders it unnecessary that the prosecutor, in order to be entitled to the payment of his costs, should be "the party grieved or injured," as required by 5 & 6 Will. & M. c. 11, s. 3.

In this case the defendant had been indicted for obstructing certain highways, and had been found guilty on certain counts of the indictment.

E. Clarke now moved to set aside a side bar rule which had been obtained on the part of the prosecution to tax the costs, on the ground that the prosecutor was not a "party grieved" within the meaning of sect. 3 of 5 & 6 W. & M. c. 11, which provided that "if the defendant prosecuting such writs of certiorari be convicted of the offence for which he was indicted, then the said Court of King's Bench shall give reasonable costs to the prosecutor, if he be the party grieved or injured, or be a justice of the peace, mayor, bailiff, constable, headborough, tytheman, churchwarden, or overseer of the poor, or any other civil officer, who shall prosecute upon the account of any fact committed or done, that concerned him or them as officer or officers, to prosecute or present, which costs shall be taxed according to the course of the said court, and that the prosecutor, for the recovery of such costs, shall within ten days after demand made of the defendant, and refusal of payment on oath, have an attachment granted against the defendant by the said court for such his contempt; and that the said recognisance shall not be discharged till the costs so taxed shall be paid." [BLACKBURN, J.—Is there not a later statute dealing with the recog-

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nissances to be entered into where indictments are removed into this court by *certiorari*?] 16 & 17 Vict. c. 30 s. 5, enacts that "whenever any writ of *certiorari* to remove an indictment into the said court shall be awarded at the instance of a defendant or defendants, the recognisance now by law required to be entered into before the allowance of such writ shall contain the further provision following, that is to say, that the defendant or defendants, in case he or they shall be convicted, shall pay to the prosecutor his costs, incurred subsequent to the removal of such indictment; and whenever any such writ of *certiorari* shall be awarded at the instance of the prosecutor, the said prosecutor shall enter into a recognisance (to be acknowledged in like manner as is now required in cases of writs of *certiorari*, awarded at the instance of a defendant) with the condition following, that is to say, that the said prosecutor shall pay to the defendant or defendants in case he or they shall be acquitted, his or their costs incurred subsequent to such removal." This statute must be read in connection with the former one, and does not do away with the condition that the prosecutor, in order to be entitled to his costs, should be the "party grieved." [BLACKBURN.—But you seek to make out that the latter enactment, which is perfectly general in its terms, is to be limited by the former.] The object of the latter statute was to give increased security for the payment of the costs of the prosecution, but not to entitle to payment a party who was not entitled previously. [BLACKBURN.—Sect. 5 of the latter Act begins with a recital that "It is expedient to make further provision for preventing the vexatious removal of indictments into the Court of Queen's Bench," and the terms of the enactment apply to all such removals.] If the condition annexed by the old Act had been intended to be abolished, it would have been expressly repealed.

BLACKBURN, J.—I am clearly of opinion that the 5th sect. of 16 & 17 Vict. c. 30, applies to all removals of indictments into this court by *certiorari*. There will, therefore, be no rule.

QUAIN and ARCHIBALD, JJ., concurred.

Rule refused.

Attorneys for defendant, Ford and Lloyd.

Wednesday, Jan. 21, 1874.

HARDING (app.) v. HEADINGTON (resp.)

Toll gate—Person driving over his own land round the gate—Evasion of liability—Highways Turnpike Act 1822 (3 Geo. 4, c. 126), s. 41.

By sect. 41 of the Highways Turnpike Act 1822, a penalty is imposed upon any person who shall, with a horse or carriage, go off or pass from any turnpike road, through or over any land or ground near or adjoining thereto (not being a public highway, and such person not being the owner or occupier, or servant, or one of the family of the owner or occupier of such land or ground), with intent to evade the payment of tolls; or if any person shall do any other act whatever in order or with intent to evade the payment of tolls, and whereby the same shall be evaded.

The respondent cut a semi-circular road over land occupied by him, round a toll gate; he fenced each side, and put a gate across the middle of the road, but left no communication from this semicircular road to his land adjoining. He made this road,

and drove along through the gate mentioned, with intent to evade payment of the toll which he would have incurred by passing through the toll gate.

Held, that this was a successful evasion of liability for the toll, and that the respondent could not be convicted under this section.

This was a case stated under 20 & 21 Vict. c. 43, by three justices of the peace in and for the county of Berks, for the purpose of obtaining the opinion of the court on the question of law which arose as hereinafter stated.

Upon the hearing of the information, it was admitted by the respondent that the Maidenhead turnpike trustees, who are appointed by virtue of the Maidenhead Turnpike Road Act 1826 (7 Geo. 4, c. lxx.), (a plain copy of the said Act, which has been continued by the Act passed annually for that purpose, was also admitted by the respondent), are duly authorised to erect the Maidenhead Thicket Toll Gate, on the said Maidenhead turnpike road, in the parish of Cookham, in the county of Berks, and may demand toll for the passage of vehicles along the said road, but not for the passage of vehicles not passing above 100 yards upon the said road.

It was also admitted by the respondent that the provisions of the statute 3 Geo. 4, c. 126, are applicable to the Maidenhead turnpike road.

It was proved in evidence, and found by the justices as facts, that the appellant, Charles Harding, is the surveyor to the Maidenhead Turnpike Road Trustees, and had the management of the said turnpike road.

That upon the said turnpike road, which is the high road between Reading and Maidenhead, there has been erected, for thirty years, a toll house known as the Maidenhead Thicket Toll House.

That the respondent is the resident occupier of a farm in the parish of Wargrave, and about five years ago became the occupier of the Highway Farm, which adjoins the said Maidenhead turnpike road on the north side of it, and extends on the east side of the Maidenhead Thicket Gate for a distance of upwards of half a mile, and on the west side of the said gate for a distance of about 160 yards. That there are no gates from the turnpike road on to the Highway Farm, on the Reading side of the Thicket Toll Gate, between the Thicket and the toll gate, a distance of about 160 yards, nor on the Maidenhead side of the toll gate for 150 yards and upwards from the Thicket Toll Gate.

Until about three years ago the hedge of Highway Farm, near the toll gate, continued in an unbroken line parallel with the turnpike road, on the north side of it.

The respondent, about three years ago, cut the hedge of the Highway Farm, adjoining the turnpike road, in two places, one on the east and one on the west side of the toll gate, at a distance of 20 feet from the toll gate; he at the same time made a road 26 feet wide over the land which formerly was used as a part of Highway Farm, to connect these openings, and made a post and rail fence filled with bushes, on the respondent's road; the road thus made was a semicircle, the middle of which was the gate herein mentioned.

There are no gates at the openings of the respondent's road on to the Maidenhead turnpike road. The said road was metalled and gravelled when it was first made.

The only means of preventing the free passage of passengers over the said road is a gate

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placed across the middle of the road. The public have, since the making of the said road, had free use of the said road, with the exception only of the right of passing through the gate placed thereupon, at pleasure. The said gate, at the time it was so placed as aforesaid, was fitted with a lock, and the respondent at the same time gave to the collector of tolls appointed by the said trustees, and who lived at the said toll gate, a key of the said lock, which was received by him in order that he, the said collector, or the collector for the time being, might keep the said gate locked at his will, so as to prevent any persons other than respondent passing over and along the said road.

The respondent's road is not capable of being used as an entrance to Highway Farm in any way whatever, and it was made and has been since occasionally used by him and his servants only, for the purpose of enabling him to avoid passing through the toll gate, and of evading the payment of toll. Until the said road was made, the respondent duly paid toll when he passed through the toll gate, but since the said road has been made he has passed over the road made by him, instead of passing through the toll gate, and has wholly refused to pay toll.

That on the 3rd April 1872, the respondent drove a chaise, drawn by one horse, along the Maidenhead turnpike road in the direction from Reading, and on his way from his said farm at Wargrave, and had travelled more than 100 yards on the said road before he reached the turning from the said turnpike road to the respondent's road on the Reading side of the Thicket Toll Gate.

That when he approached within 7 yards of the toll gate he rapidly drove off, and passed from the turnpike road on to the road made by him as aforesaid, and returned on to the turnpike road about 7 yards on the Maidenhead side of the toll gate, having passed over the road made as aforesaid with the intent to evade the payment of the toll, if toll could be legally demanded of him. He then continued along the turnpike road towards Maidenhead for several hundred yards, and did not pass through any gate belonging to Highway Farm.

On the part of the appellant, it was contended that the respondent should be convicted under the 41st section of 3 Geo. 4, c. 126. It was also contended, that, as the respondent had travelled 100 yards along the turnpike road before he turned from it, he had incurred toll, and having passed from the road only to evade the payment of toll, he should be convicted; and that if the respondent could legally pass from the Maidenhead turnpike road on the said road made by respondent as aforesaid, without paying the toll, he could not return again on to the turnpike road, and travel 100 yards upon the road, without being liable to pay toll.

On the part of the respondent no witnesses were called, but it was contended that, as occupier of the Highway Farm, he could legally make the said road, and afterwards use the same, for the purpose of evading the toll gate; and that he was not liable, under the circumstances, to pay toll.

The justices were of opinion that the respondent had not been shown to have incurred the liability to pay toll, and was entitled to make and use the said road for the purpose of evading the toll gate; and that he, being the occupier of the land or ground of which the road so fenced off formed part, had not by using such road com-

mitted any offence under the statute 3 Geo. 4, c. 126, s. 41, and gave their determination against the appellant in the manner before stated.

In delivering the judgment of the court, reference was made to a previous case in which the said respondent was defendant, the facts of which were, in the justices' opinion, identical with the present case, and which was decided at the petty sessions for the Maidenhead division of the county of Berks on the 14th March 1871. After a conference with the magistrates on the law, as applicable to the case on that occasion, a case was applied for, for the opinion of a Superior Court, and refused by the bench. In delivering the judgment of the court, in the case now stated, the magistrates were of opinion that, although the present case came before the bench as an original one, it was in fact a virtual appeal against the former decision.

Whereupon the opinion of the Court of Queen's Bench is asked whether, upon the facts hereinafter stated, and the law applicable thereto, the said justices were correct in their determination as aforesaid.

If the Court of Queen's Bench is of opinion that they were correct, the complaint is to stand dismissed.

If the said court is of opinion that they were not correct, the case is to be sent back to be dealt with accordingly.

H. D. Greene, for the appellant.—The local Act, 7 Geo. 4, c. lxx, enacts, by sect. 12, that the respondents, or a person appointed by them, may demand, receive, and take "at the turnpike or toll gate and side gate now erected, and to be continued or hereafter to be erected by virtue of this Act," certain tolls therein mentioned. Sect. 13 provides, "That if any person shall have paid the toll hereby authorised to be taken for the passing of any horse or horses, cattle, beast, carriage or carriages, through any of such turnpike toll gate, side gate, or bar continued or erected by virtue of this Act, the same horse or horses, cattle, beast, carriage and carriages shall, upon a ticket denoting the payment thereof on that day being produced, be permitted to pass and re-pass toll free" through the same. It appears from these two sections that the tolls are payable at the gate, and for passing through the gate; but the words of sect. 41 of the Highways (Turnpike) Act 1822 (3 Geo. 4, c. 126) are "That if any person shall with any horse, cattle, beast, or carriage, go off or pass from any turnpike road, through or over any land or ground near or adjoining thereto (not being a public highway, and such person not being the owner or occupier, or servant or one of the family of the owner or occupier of such land or ground), with intent to evade the payment of the tolls granted by any Act of Parliament," . . . "or if any person shall do any other act whatever in order or with intent to evade the payment of all or any of the tolls, and whereby the same shall be evaded, every such person shall, for every such offence, forfeit and pay any sum not exceeding five pounds." It was held under this section, in *Veitch v. Trustees of Exeter Roads* (8 E. & B. 986), that a person was not liable for an evasion of payment of toll if he merely made some arrangement by which he avoided liability for payment. Here, however, the respondent did an act with intent to evade the payment of the tolls, he having incurred the liability by passing along the road upwards of 100 yards. It was held by Wightman, J., in *Howard*

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v. *Powell* (30 L. J. 203, M. C.); that a person is liable to pay toll at a toll gate on a turnpike road, though he has not travelled 100 yards on the road before coming to the gate, if, after passing through the gate, he uses the road for a space which together with that he has passed over previously exceeds in all the distance of 100 yards. From these two cases, it appears that passing over any 100 yards of a road is sufficient to incur liability for toll, but payment is to be made only at the gates. [QUAIN, J.—Your difficulty is, that respondent is the owner or occupier of this side road.] That exemption only applies to a person going off or passing from a turnpike road; here the respondent comes within the last clause of sect. 41, to which there is no exemption; he went off or passed from the turnpike and then returned to it again, which is included in the description of "any other act whatever," in order or with intent to evade the payment of toll, whereby the same was evaded. [BLACKBURN, J.—Here respondent went off or passed from the road through or over land or ground adjoining, he being the owner of such land or ground, with intent to evade payment.] He does more than that; he turns back on to the road with that intent. [BLACKBURN, J.—The evasion is complete by that time.] Then arises the question, whether he is *bonâ fide* the owner or occupier of the ground. It is open to the public, except for the gates. [BLACKBURN, J.—Whatever motive he has in thus using this piece of ground, the case raises no question as to his *bonâ fide* occupation.]

Sawyer, contra, not heard.

BLACKBURN, J.—According to the local Act, the tolls of this road are leviable only at this gate. We need not say whether they become due and payable for any 100 yards which do not include the gate. Here the respondent is the occupier of land along a piece of the road, which includes the toll gate; by the 41st section of the Turnpike Act, he ought morally, when he passes 100 yards along the road, to come to the gate and pay the toll. The section imposes penalties for any acts done with intent to evade payment, but at the same time the Legislature seems to have thought that a person might fairly, even for the purpose of this evasion, go off or pass from the road over his own land, and exempt such a person from the penalty. Here the gentleman who occupies the land adjoining the turnpike has made a little road for himself round the gate, over his own land. This he has admittedly done, in order to avoid liability for the toll. He is the respondent upon this information, and he is clearly not within the early part of the 41st section, where the occupier of adjoining land is expressly exempted. Then as to the latter part of the section, Mr. Greene has argued that the act committed is not exactly that provided for by the former part, and is therefore within the clause to which there is an express exemption. There is, however, in my opinion, no ground for limiting the exemption to the first part of the section, and although I am sorry for it, I cannot but hold that the respondent's evasion of toll has been successful, and is not forbidden by the Act.

QUAIN and ARCHIBALD, JJ., concurred.

Judgment for respondent.

Attorney for appellant, *H. F. Turner*, Maidenhead.

Attorney for respondent, *J. Crowdy*, for *B. A. Ward*, Maidenhead.

Saturday, Jan. 24, 1874.

MAUND (app.) v. MASON (resp.).

Poor—Persons liable to support relations—Children—Grandfather and grandchild—43 Eliz. c. 2, s. 6. The word "children" in 43 Eliz. c. 2, s. 6, does not include grandchildren.

A grandchild is therefore not bound to maintain his grandfather.

CASE stated by justices under 20 & 21 Vict. c. 43. At a petty session of the peace, holden at the police court in and for the city of Worcester, on Friday, 13th June 1873, before us, the undersigned John Longmore and James Dyson Perrins, being two justices acting in and for the city of Worcester aforesaid, Robert William Henry Gell Mason (hereafter called the respondent) was summoned by Reuben John Maund (hereafter called the appellant), under sect. 6 of the statute 43 Eliz. c. 2, and charged for that the said Robert William Henry Gell Mason (in the information laid by the appellant, called Robert Henry Mason) on the 22nd May last, at the parish of St. Martin in the city of Worcester, being then and there a person of sufficient ability to support or relieve his grandfather, Robert Gell, a poor person unable to work, and chargeable to the common fund of the Worcester Poor Law Union, did neglect and refuse so to do. And the said parties respectively being then present by their respective attorneys, the said charge was duly heard by us, and we ordered that the said summons should be dismissed. Whereupon the appellant being dissatisfied with our decision, as being, in his opinion, erroneous in point of law, did, pursuant to the provisions of the before-mentioned statute, gave us notice, and require us to state and sign a case setting forth the facts and grounds of our determination upon the hearing of the said complaint, in order that he might take the opinion thereon of this honourable court.

Now we, the said justices, pursuant to such notice and the provisions of the statute aforesaid, do hereby state and sign such case accordingly.

By the 43 Eliz. c. 2, s. 6, it is enacted that "the father and grandfather, and the mother and grandmother, and the children of every poor, old, blind, lame and impotent person, or other poor person not able to work, being of a sufficient ability, shall at their own charges relieve and maintain every such poor person."

At the hearing of the said complaint the chargeability of the grandfather and the sufficiency of the ability of his grandson (the respondent) to relieve and maintain, was not disputed on the part of the respondent, but his liability as a grandchild was denied on the ground that the word "children" only was mentioned in the statute. It was contended on the part of the appellant that the word "children" should be construed to mean and include a grandchild, and that the respondent should be accordingly held liable to relieve and maintain his grandfather.

Having heard the attorneys for the appellant and respondent, and considered the words of the statute, we were of opinion that they did not create a liability upon grandchildren, and we gave our determination in the respondent's favour.

Our opinion was based upon the following reasons:

1. That the statute specially enumerates the degrees of relationship which shall create a liability

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to relieve and maintain amongst which grandchildren are not included.

2. That if the Legislature had intended to extend the liability to grandchildren, the words "and grandchildren" would have been added after the word "children."

3. That as the statute imposes a substantial liability not imposed at common law, and in default of obeying an order creates a criminal liability also, we did not feel at liberty to construe its words as extending to a class of relations not made liable expressly or by necessary implication.

4. That there is no latitude in the wording of the statute admitting the importation of a liability upon persons in any other degree of relationship than those enumerated.

And we submit for the opinion of this honourable court whether our determination was correct in point of law as aforesaid, or as to what should be done in the premises.

Given under our hands the 23rd June 1873.

JOHN LONGMORE.

J. DYSON PERRINS.

43 Eliz. c. 2, s. 6, enacts :

That the father and grandfather, and the mother and grandmother, and the children of every poor, old, blind, lame, and impotent person, or other poor person not able to work, being of sufficient ability, shall at their own charges relieve and maintain every such poor person, in that manner and according to that rate, as by the justices of the peace of that county where such sufficient persons dwell, or the greater number of them, at their general quarter sessions shall be assessed; upon pain that every one of them shall forfeit twenty shillings for every month which they shall fail therein.

Anstie, for the appellant, contended that the word "children" included grandchildren. This interpretation has often been given in cases relating to wills. [BLACKBURN, J.—But has any statute been so interpreted?] No; but the courts would not have so construed the word in wills unless that was a common and ordinary meaning of it. [QUAIN, J.—I see that in sect. 78 of 4 & 5 Will. 4, c. 76, which is an Act in *pari materia*, the words are, "father, grandfather, mother, grandmother, child or children," omitting the word grandchildren.] In *Walton v. Sparkes*, reported in Comberbach's Rep. 321, Bulstrode, J., cited *Gerard's case*, and said, "the word children in the statute is extended to grandchildren, because there is the same natural affection." [BLACKBURN, J.—That dictum was quite irrelevant to the decision.] It must be confessed that this dictum is not found in the report of the same case in Skinner's Rep. p. 556; and, moreover, Holt, C.J., in the last-mentioned report, says: "This ought not to be understood, *ultra* John, his wife and children, and ought not to be extended to grandchildren."

Bosanquet, for the respondent, pointed out that the Act of 43 Eliz. c. 2, was only an extension of a previous statute of 39 Eliz., in which the words were "parents and children." The Act of 43 Eliz. instead of the word parents, uses the more extensive words "father and grandfather, mother and grandmother," but leaves the word "children" unaltered.

BLACKBURN, J.—The fact last mentioned furnishes an additional reason for holding that the word "children" must be limited to "children" strictly so called, and we cannot extend it so as to include grandchildren. It is for the Legislature to do so

if it thinks it ought to be done. Our judgment must be for the respondent.

QUAIN and ARCHIBALD, JJ., concurred.

Judgment for respondent.

Attorney for appellant, Knott, Worcester.

Saturday, Jan. 24, 1874.

MULLINS (app.) v. COLLINS (resp.).

Licensing Act (35 & 36 Vict. c. 74) s. 16.—Supplying liquor to constable on duty—Liability of master for act of his servant.

Sect. 16 of the Licensing Act 1872 (35 & 36 Vict. c. 74) enacts that "if any licensed person . . . supplies any liquor or refreshment, whether by way of gift or sale, to any constable on duty, unless by authority of some superior officer of such constable," he shall be liable to a penalty.

The servant of a licensed person having supplied to a constable in uniform and on duty a certain quantity of brandy, in the ordinary course of business :

Held, that the master was liable to the penalty imposed by the statute, personal knowledge on the part of the master not being necessary to constitute the offence.

CASE stated by justices under 20 & 21 Vict. c. 43.

At a petty sessions holden at the sessions house in Cullompton, in and for the division of Cullompton, in the county of Devon, on the 26th May 1873, an information preferred by Richard George Collins, superintendent of police for the division of Cullompton aforesaid (hereinafter called the respondent), against William Mullins (hereinafter called the appellant), under sect. 16 of the Licensing Act 1872, charging for that the said William Mullins, on the 7th May 1873, at the parish of Cullompton, in the said county, then being a person duly licensed to sell by retail excisable liquors in his house and premises there situate, unlawfully did supply certain liquor called brandy, by way of sale, to a certain constable on duty called Robert George Joint, without the authority of some superintendent officer of such constable, was heard and determined by us, the said parties respectively, being then present; and upon such hearing we were unanimously of opinion that the offence was proved; but in consideration of the respectability of the appellant, and of the liquor not having been supplied personally by him, were unwilling to convict and fine, and therefore recommended that appellant pay the costs, and that the case be then withdrawn. The appellant having immediately refused to pay any costs whatever, and his advocate having stated his desire and intention to apply for a case upon the points raised by him hereinafter mentioned, we thereupon convicted the appellant of the said offence, but directed that the conviction should not be indorsed upon his license; and in order that he might have the opportunity of having a case stated, and at the request of the appellant's advocate (who suggested a nominal fine of 6d. and costs being imposed in order to entitle him to a case) we directed a nominal sum of 6d. or 1s. or the lowest competent sum to be added to the costs, and the amount thereof to be entered as the fine imposed, and consented to grant a case accordingly. Our clerk, finding that under sect. 67 of the Licensing Act 1872, the penalty could not be mitigated or reduced to a less sum than 20s.,

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added the sum of 9s. to the costs of 11s., in order to make up the penalty to the said sum of 20s. for which sum the conviction has been drawn up and signed by us. And whereas the appellant being dissatisfied with our determination upon the hearing of the said information, as being erroneous in point of law, hath, pursuant to sect. 2 of the said statute 20 & 21 Vict. c. 43, duly applied to us in writing to state and sign a case setting forth the facts and the ground of such our determination as aforesaid, for the opinion of this court, and hath duly entered into a recognizance as required by the said statute in that behalf; now, therefore, we the said justices, in compliance with the said application and the provisions of the said statute, do hereby state and sign the following case.

Upon the hearing of the information it was proved on the part of the respondent, and found as a fact, that the constable Robt. Geo. Joint, was on duty in Cullompton on the 7th May 1873, on the occasion of the fair there, having been specially ordered there (from his regular station at Kentisbeare, about four miles distant), for special duty on the said day, commencing at nine o'clock in the morning of the said day; that the appellant's house was in his district of duty for such day; that whilst on duty and in uniform on the said day, and about three o'clock in the afternoon he visited the appellant's house called the Railway Hotel in Cullompton, and was there supplied by a female, whether the wife or servant of the appellant he did not know, with some brandy, for which he paid 3d.; that he had no authority from any superior officer to be supplied with any liquor or refreshment, and that he did not state to the person who supplied him with the brandy that he had any authority from any superior officer, and that he was not asked the question whether he had any such authority or not; that he had read and signed written instructions as to his district of duty (which included the appellant's house), on the day in question, and that such instructions (which were produced and put in evidence), contained the following words: "Any constable found drinking at any public-house during the hours appointed for his being on duty will be reported;" that he was not called into the appellant's house in the execution of his duty by any person whilst on duty, and that he had voluntarily gone into the house; that he had not nor had his superior officer given any notice to the appellant that he was on duty at Cullompton on the day in question, and that he was not asked by anyone in the house whether he was on duty or not.

The appellant called no witness, but it was admitted by him that the brandy was sold and supplied to the constable at his house by his servant; but it was contended by him (1) that before he could be convicted of any offence under sect. 16 of the Licensing Act 1872, it must be proved that such offence was committed either by himself personally or with his knowledge, and that he must be actually present at the time the liquor was supplied to the constable, or that the same must be supplied under his express authority; (2), that even assuming it was not necessary to prove that the offence was committed by the appellant personally, or with his knowledge or express authority, before he could be convicted of the said offence, it must be proved that he or his servants knew the constable to be on duty at the time, when the liquor was

supplied; (3) that notwithstanding sect. 35 of the said Licensing Act, and notwithstanding the appellant's house being in the district allotted to the said constable as aforesaid, the constable was not on duty at all when he entered the appellant's house, and that in fact he had deserted his duty at the time he entered the said house. We, however, being of opinion that the evidence given before us brought the case within the operation of the said 16th section of the Licensing Act 1872, gave our determination against the appellant in the manner before stated. If, therefore, this honourable court should be of opinion that our said judgment was correct in point of law, then the conviction is to stand; but if the court should be of a contrary opinion, then the said information is to be dismissed. Witness our hands, &c.,

G. M. MARKER,
J. C. NEW.

Poland, for the appellant, contended that the conviction was wrong, because the liquor was not supplied to the constable with the defendant's knowledge, and the knowledge of his servant, if she did know, was not sufficient to render the defendant liable. Sect. 16 of the Licensing Act 1872 (35 & 36 Vict. c. 94), under which the conviction took place, enacts that "if any licensed person (1) knowingly harbours, or knowingly suffers to remain on his premises, any constable during any part of the time appointed for such constable being on duty, unless for the purpose of keeping or restoring order, or in execution of his duty; or (2) supplies any liquor or refreshment, whether by way of gift or sale, to any constable on duty unless by authority of some superior officer of such constable; or (3) bribes or attempts to bribe any constable, he shall be liable to a penalty not exceeding for the first offence 10l., and not exceeding for the second, or any subsequent offence, 20l. Any conviction for an offence under this section shall, unless the convicting magistrate or justices shall otherwise direct, be recorded on the licence of the person convicted." It was clearly the intention of the Legislature in this enactment that in order to render a licensee liable to the penalty, the offence should have been knowingly committed by him—i.e., committed with his own personal knowledge. [BLACKBURN, J.—Knowledge that the person supplied was a constable may be necessary; but here he was in uniform, and the justices have in effect found that the female who supplied the liquor knew he was on duty. Is not the appellant liable for the acts of his servant?] The mere fact that the constable was in uniform does not of itself prove that the servant must have known he was on duty. [QUAIN, J.—*Prima facie*, the uniform was sufficient notice that the constable was on duty; had he been in plain clothes it might have been different.] Even supposing the servant knew that he was on duty, it is submitted that the servant's knowledge does not render the master liable; personal knowledge—a guilty mind—being always necessary to constitute a criminal offence. In *Chaney v. Payne* (1 Q. B. 712) it was held a conviction under the Pilot Act (6 Geo. 4, c. 125), for continuing in charge of a ship after a licensed pilot has offered to take charge, must show on the face of it that the defendant knew of the offer; for it is not enough to describe the offence in the words of the statute creating the offence without adding facts to show that defendant was a party to it. "It is plain,"

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said the court in this judgment (p. 721), "that the continuing in charge of a ship in ignorance of a licensed pilot having offered to take it, is not the offence; but the offence must depend on the knowledge of the party charged, although the word "after" is the only word used in the section in question. [BLACKBURN, J.—Knowledge must, no doubt, be proved wherever the nature of the offence requires knowledge. In the 1st sub-section of sect. 16 of the Licensing Act 1872, the word "knowingly" occurs twice; but it is omitted from sub-section 2, under which the appellant is convicted.] In *Reg. v. Stephens* (L. Rep. 1 Q. B. 702; 14 L. T. Rep. N. S. 593) where the owner of works carried on for his profit by agents, was held liable to be indicted for a public nuisance caused by acts of his workmen in carrying on the works, though done by them without his knowledge and contrary to his general orders, Blackburn, J. said: "I wish to guard myself against it being supposed that either at the trial or now the general rule that a principal is not criminally answerable for the act of his agent is infringed." In *Hearne v. Gaston* (28 L. J. 216, M. C.), where a penalty of 10*l.* was imposed by statute on any person who "should send or cause to be sent by the Great Western Railway, any aqua fortis, oil of vitriol, gunpowder, or other goods of a dangerous quality," unless he should "distinctly mark or state the nature of such goods on the outside of the package," it was held that guilty knowledge was necessary to the commission of the offence; "for *actus non facit reum nisi mens sit rea*." And in *Nichols v. Hall* (L. Rep. 8 C. P. 322; 28 L. T. Rep. N. S. 473), it was held that knowledge that the animal was diseased was necessary to constitute an offence under sect. 75 of the Contagious Diseases (Animals Act 1869), which provides that every person having in his possession or under his charge an animal affected with a contagious or infectious disease, shall, with all practicable speed, give notice to a police constable of the fact of the animal being so affected.

No one appeared on behalf of the respondents.

BLACKBURN, J.—I think it quite clear that on the case as stated to us the justices were perfectly right in convicting the appellant. The Licensing Act 1869, s. 16, says, amongst other things, that "if any licensed person . . . supplies any liquor or refreshment, whether by way of gift or sale to any constable on duty, unless by authority of some superior officer of such constable . . . he shall be liable to a penalty not exceeding for the first offence ten pounds, and not exceeding for the second or any subsequent offence twenty pounds." Taking the very words of the statute, "supplies any liquor or refreshment, whether by way of gift or sale to any constable on duty;" that was exactly what was done here. The constable being on duty and in uniform, which would tell every one that he was on duty, was supplied in the bar by a barmaid with brandy for which he paid. It has been contended that from the nature of the offence there must be knowledge that the person supplied is a constable. I do not say anything as to that, and wish carefully to avoid expressing any opinion. But here there is ample evidence to show that the barmaid knew what he was; and no such point as this was attempted to be made before the justices. What was contended for before the justices was that the owner of the house could not be guilty of the

offence created by the statute unless he personally knew that the person supplied was a constable, and on duty at the time he was supplied with the liquor. Such a construction as that would make the Act a dead letter. Whether the liquor be supplied by himself or by his servant, if supplied to a constable on duty, the licensee is guilty. Our judgment must, therefore, be for the respondents.

QUAIN, J.—I am of the same opinion. The statute says that if a licensed person "supplies any liquor or refreshment, whether by way of gift or sale to any constable on duty, unless by authority of some superior officer of such constable," he shall be liable to a penalty. We must look at the nature of the Act which the Legislature is dealing with. How does a licensed victualler usually carry on his business? Does he carry it on in person or by means of servants? We know that for the most part, such a business is carried on by means of servants. Some licensed victuallers have several public houses in different places at the same time. Bearing in mind, then, the nature of the business of a licensed victualler, does the supply of brandy to a constable on duty by a servant, come within the mischief intended to be remedied by the statute? I think it clearly does. A barmaid supplied it to him at the counter in the ordinary way of her business, and knowing that he was a constable. If this is not an offence within the Act, the Act would be wholly inoperative. We carefully abstain from deciding what would be the case if she had been tricked into believing that he was not a constable, or that he was not on duty, or if a servant had given him drink secretly at the back door. I am clearly of opinion that the master would not be liable in such a case. If the master could show that express orders had been given not to supply any constable on duty, that might have been gone into in a rebutting case. But nothing of that kind appears here. The conviction therefore was right.

ARCHIBALD, J.—I am of the same opinion. In putting the only safe construction on the Act of Parliament, we are, I think, doing nothing contrary to the general principle contended for by Mr. Poland, that in order to constitute a criminal offence there must be a *mens rea*. It is not immaterial to see what was the object which the Legislature had in mind in making these provisions. That is shown by the general name given to the offences of which this is one—"offences against public order." As to harbouring constables, or suffering them to remain on the premises, the Legislature has expressly said that this must be done "knowingly;" but in the 2nd sub-section of sect. 16 the word is simply "supplies," the word "knowingly," which was twice used before, being omitted. The intention must have been that the owner of the house should be answerable for the ordinary acts of his servants. If the servant had been tricked into the belief that the person supplied was not a constable, it lay on the appellant to show that. There is nothing whatever in the case to show that this was done. The servant had full notice that the person whom she was supplying was a constable on duty.

Judgment for the respondents.

Attorney for appellant, *Stretton*, for *Loosemore*, *Tiverton*.

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REG. v. SUTTON COLDFIELD; REG. v. ASTON.

[Q. B.]

Jan. 17 and 28, 1874.

REG. v. SUTTON COLDFIELD; REG. v. ASTON.

*Quarter sessions—Entry and respite of appeal subject to a case—Refusal to express opinion.**Quarter sessions granted an application to enter and respite these appeals against poor rates, subject to a case for the opinion of this court:**The court heard the arguments, but, after consideration, and although no objection was raised by either side, declined to express an opinion in a case reserved on such an order.*

REG. v. SUTTON COLDFIELD.

On an application by the appellants, the North-Western Railway Company, at the Warwickshire Epiphany Quarter Sessions, holden at Warwick on the 31st Dec. 1872, to enter and respite an appeal against a poor's rate made by the respondents, the churchwardens and overseers of the parish of Sutton Coldfield, on the 18th Oct. 1872, the application was granted, subject to a case for the opinion of the Court of Queen's Bench.

The Assessment Committee of the Aston Union, who were the other respondents, on the 2nd April 1872, duly approved a valuation list for the parish of Sutton Coldfield, in which list the appellants were assessed in respect of their railway and premises in the rateable value of 1330l.

On the 17th May 1872, the overseers of the said parish duly made a rate, in conformity with the said valuation list.

On the 3rd Aug. 1872, the appellants gave notice of objection to the said assessment committee and to the overseers against the said valuation list; but there was no meeting of the assessment committee between the said 3rd Aug. and the time of holding the said Epiphany Quarter Sessions.

On or about the 30th Sept. 1872, the appellants paid the rate made on the 17th May.

On the 18th Oct. 1872, the said overseers duly made another poor rate, in conformity with the said valuation list, and no further notice of objection to the said valuation list was given by the appellants after the making of the last-mentioned rate; but on the 6th Dec. 1872, they gave notice of appeal to the said quarter sessions against the said rate.

At the said quarter sessions the appellants made application to enter and respite the said appeal. It was objected by the respondents that the appellants, after the making of the rate appealed against, had not, so far as it was concerned, gone before or failed to obtain relief from the assessment committee; and it was contended that a notice of objection ought, after the making of the said rate, to have been given to the assessment committee against the valuation list, as a condition precedent to an appeal against the rate; and the case of *Reg. v. Great Western Railway Company* (L. Rep. 4 Q. B. 323; 20 L. T. Rep. N. S. 481) was cited, but the sessions were of opinion that it did not apply in this instance, and that the notice of the 3rd Aug. was a still existing notice of objection.

The appellants contended that the rate having been made on a valuation list, in which the figures were the same, so far as they were concerned, as when they gave notice of objection on the 3rd Aug., and the said notice of objection not having been heard by the assessment committee, it was unnecessary that they should again give notice of objection to the valuation list, and the Court of Quarter Sessions entered and respited the appeal.

If the court should be of opinion that the Court of quarter sessions ought not to have granted the application, the entry of the said appeal against the said rate is to be struck out.

REG. v. ASTON.

In this case the London and North-Western Railway Company were again appellants; and the respondents were the churchwardens and overseers of the poor of the parish of Aston, in the county of Warwickshire, and the Assessment Committee of the Aston Union.

On an application by the appellants to the Warwickshire Epiphany Quarter Sessions, holden at Warwick on the 31st Dec. 1872, to enter and respite an appeal against a poor's rate made by the respondents, the churchwardens and overseers of the parish of Aston, on the 27th Sept. 1872, the application was granted, subject to a case for the opinion of this court.

The facts upon which this appeal was based differed from those in the previous case in that one rate only was made by the respondents during the year, viz., on the 27th Sept. 1872. The valuation list was approved on the same day, the amount at which the appellants were assessed in this parish being 5769l. Notice of objection to the valuation list and notice of appeal to quarter sessions was given on the same days, the 3rd Aug. and the 6th Dec. respectively; and there was no meeting of the assessment committee between the notice of objection and the quarter sessions; the same decision was given and the same point reserved.

Staveley Hill, Q.C. and *Soden*, on behalf of the North-Western Railway Company, the appellants, showed cause in both cases against the rules to set aside the decisions of the quarter sessions, and argued at considerable length the two points raised, viz., whether, after notice of objection against an assessment list, and a subsequent payment of a rate framed in conformity therewith, fresh notice of objection against the list is necessary before the entry of an appeal against another rate framed in conformity with the same list; and also whether, under the circumstances, the appellants had failed to obtain such relief in the matter as they deemed just, according to the words of 27 & 28 Vict. c. 39, s. 1.

Wills, Q.C., *Dugdale*, and *Russell Griffiths*, on behalf of the respondents, the churchwardens and overseers of the parish in each case, contended that the effect of an interposition of an appeal to the assessment committee was to postpone the next practicable sessions required by 17 Geo. 2, c. 28, s. 4, to the sessions after the next meeting of the assessment committee:

Reg. v. Guardians of the Biggleswade Union, 21 L. T. Rep. N. S. 494.

During the argument on behalf of the respondents, Blackburn, J. inquired, upon the authority of the case of *R. v. Martin-cum-Grafton* (10 Q. B. 975), handed to him by the Master of the Crown Office, how the cases came to be stated as they were. The proper course, he said, would have been either that the sessions should have refused to enter the appeal, in which case the appellants' remedy would have been by *mandamus*, or that the sessions should have finally heard and decided the appeal before they reserved this question for the court.

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Wills, Q.C. stated that the case was reserved by consent of the parties; but this was not admitted by counsel for the railway company.

The COURT heard the whole of the arguments on both sides, and then took time to consider all the points raised.

Our. adv. vult.

Jan. 28.—BLACKBURN, J. delivered this judgment of the court (Blackburn and Quain, JJ.)—In these two cases on appeal against a poor rate, the sessions granted an application to enter and respite an appeal against a poor rate, subject to a case for the opinion of this court. The two cases came on for argument before my brother Quain and myself, but we are of opinion that we ought not to take notice of the facts stated in a case reserved on such an order. This court has not in general any jurisdiction to review the decision of the court of quarter sessions on any matter in which that court had jurisdiction, nor will it take any notice of a case reserved by the sessions on the trial of an indictment: (*R. v. Salop*, 13 East, 95.) But there is an exception from that general rule in cases where the court of quarter sessions on appeal makes an order, either confirming or reversing the decision appealed against, subject to the opinion of this court on some point of law reserved on a case stated by the sessions. This court will then, on a *certiorari*, bringing up the order of sessions, take cognisance of the facts stated in the case, and quash or confirm the order of sessions, according to their view on the points of law submitted to them by the sessions. But such cases have never been heard except on a *certiorari* to bring up an order of sessions, which, if unreversed, would finally decide the appeal. There have been instances in which an attempt has been made indirectly to obtain the opinion of this court on a preliminary point by making an order in form disposing of the appeal finally, but subject to a case in which it was directed that in the event of the court deciding in a particular way, the case should be remitted to be reheard by the sessions. In *Beg. v. Kesteven* (3 Q.B. 819), decided in 1844, Lord Denman said: "It is satisfactory that we may now take it as universally known that on cases sent from the sessions the Court of Queen's Bench will not decide merely for the purpose of putting the inferior court in motion." Notwithstanding this, there was a renewed attempt to do this. In *R. v. Martin-cum-Grafton* (10 Q. B. 975), in 1847, the sessions on appeal confirmed an order, subject to a case in which it was stated that if the court was of opinion that the sessions were wrong on one of the points reserved, the case should go back to be heard on its merits. The Court of Queen's Bench, noticing this, took time to consider as to their judgment on this point; and in the considered judgment said: "We have repeatedly declared that we shall not act on such a direction, but that the court below ought to hear and decide the appeal, subject to the opinion of this court on the point reserved. We have had occasion to advert to such matters before, and this case affords a fit opportunity for declaring that we may find it necessary for the discharge of our other duties, to decline answering cases thus improperly stated." In that case, however, the court did express an opinion that the sessions had taken a right view on the point reserved. This is a strong authority for saying that a point not finally disposing of the appeal ought not in any

form to be brought before the court on a case. But this is the first instance, as far as we can find, in which it has ever been attempted to obtain the opinion of this court in this form. We have in form the order of the sessions to enter and respite the appeal brought before us by *certiorari*, and a rule has been obtained to quash it. We think we can no more look at the special case reserved on such an order than the King's Bench could look at that reserved by the sessions on the trial of an indictment, in *R. v. Salop* (13 East, 95). The order being clearly good on the face of it, and we not taking notice of the facts stated in the case, the rule to quash the order must be discharged. It is not to be understood that we give any judgment on the points sought to be reserved on this occasion.

Judgment for appellants.

Attorneys: *B. F. Roberts; Beale, Marigold, and Beale.*

Saturday, Jan. 31, 1874.

REG. v. WARD OF CHEAP.

Right to vote at ward elections—Change of premises—Twelve months' occupation—30 Vict. c. i.

By the City of London Municipal Elections Amendment Act 1867, the right of voting for ward officers is given by sect. 2 to persons who shall, for a period of not less than twelve months previous to the 1st Dec. in any year, have been in the occupation of premises within the City. By sect. 3, every person on the register of voters for the city of London in use at elections for members to serve in Parliament, and then in force, in respect of the occupation of premises therein, shall be entitled to vote. By sect. 6, before voting every person shall declare that he is an occupier of premises in the ward, and is on the list of voters entitled to vote.

A man whose name was on the parliamentary list changed his occupation of premises for that of others in the same ward. The alderman and council of the ward, without notice to him, struck his name off the ward register, and refused to re-enter it upon his application at a subsequent election:

Held, upon mandamus to compel the insertion of his name in the list of voters, that the third section gave a qualification quite distinct from that of the second; and that the mandamus must go.

Glenn had, on the 19th Jan., obtained a rule nisi on behalf of James Waddell, calling upon the Alderman and Common Councilmen of the Ward of Cheap, in the City of London, to show cause why a writ of *mandamus* should not issue, directed to them, commanding them to insert the name of the said James Waddell in the list of voters for the said ward.

It appeared from the affidavit of the said James Waddell, upon which the rule was granted, that he was on the 3rd Dec. 1873, of full age, and not subject to any legal incapacity, and that for a period exceeding twelve months previous to the 1st Dec. in the said year, he was and still is in the occupation within the said city of London, jointly with one other person, of offices situate in the said ward of Cheap.

That on the 3rd Dec. in the said year he was and still is on the register of voters for the City of London in use at elections for members to serve in Parliament, then and still in force, in respect of

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the occupation of offices situate in the said ward of Cheap, in the said city of London.

That his name was in the list of persons entitled to vote at any election for alderman, common councilman, or ward officer for the said ward of Cheap, in the City of London, from the 3rd Dec. 1872 until the 3rd Dec. 1873.

That neither prior to the said 3rd Dec. 1873, nor at any other time did he receive, or has he received, any notice of objection to the retention of his name on the said list.

That not having received any notice of objection to the retention of his name in the said list, or of the omission of his name from the said list, he on the Feast of St. Thomas the Apostle, now last passed, to wit, the 21st Dec. 1873, attended at a wardmote of the said ward, when he learnt for the first time that his name was not then in the said list.

That he then and there applied to the alderman of the said ward, presiding over the said wardmote, and to the members of the common council of the said ward, all of whom were then present, to cause his name to be inserted in the list of persons entitled to vote at any election of alderman or common councilmen, or ward officers for the Ward of Cheap, in the City of London; but his demand was refused by the said alderman and common council.

That he was informed, and verily believed, that the date of making out and settling the list of persons entitled to vote at any election of alderman or common councilman or ward officer for the Ward of Cheap, in the City of London, was the 3rd Dec. in every year, and that the said alderman and common councilmen did actually make out, and the said alderman did sign the said list on the 3rd Dec. in the year aforesaid, without inserting his name therein; and that the said alderman and common councilmen, although they frequently meet together on business connected with the said ward, refused to revise or alter the said list after the said list had been so signed.

That it was a fact that on the said Feast of St. Thomas the Apostle, there was no poll for the election of common councilmen for the said ward; but vacancies may arise in the representation of the said ward, and certain prejudices arise to a citizen excluded from municipal representation in his ward.

The affidavit to show cause, of the clerk of the Ward of Cheap, in which ward the offices lately occupied by the said James Waddell, at No. 7, Poultry, are situated, stated as follows:—

The name of the said J. Waddell was upon the municipal voters' list for the year ending the 3rd Dec. 1873, in respect of the said offices, and also upon the parliamentary register of voters for the City of London, for the year 1873, in respect of the same qualification.

The usual course of procedure for the settlement of the list of voters, under the City of London Municipal Elections Amendment Act 1867, is as follows:—

The alderman and common council of the ward are summoned by notice from the ward beadle to attend at the offices of the ward clerk on the 3rd Dec. to settle the said list, previous to which printed notices are sent round and delivered by the ward beadle to each of the occupied houses, warehouses, and offices within the ward, giving notice that the parliamentary list of voters is prepared and ready for inspection at his offices, and also of the said meeting, and of the object and purpose thereof, in order that every person duly qualified to have his name placed on the register may attend and satisfy himself of his name being duly registered accordingly, or have the

opportunity of making his claim before the alderman and common council at such meeting.

Upon the 3rd Dec. 1873, it was represented to the aldermen and common councilmen of the ward assembled, in pursuance of such notice as aforesaid by the ward beadle, that Mr. James Waddell had removed some time previously from the offices of No. 7, Poultry, in respect of which qualification his name had been placed upon the list of municipal voters for the previous year, and as there was no evidence to show that the said J. Waddell was then duly qualified to have his name retained upon the register for the ensuing year, his name was not included in such register.

It was not until the wardmote, which was held at the Guildhall Coffee House, on the 22nd Dec. 1873, that the said James Waddell, to the clerk's knowledge, made any claim to have his name placed upon the register for the year ending the 3rd Dec. 1874, and then only in respect of the offices or premises now occupied by him, Mansion House Chambers, No. 12, Queen Victoria-street, which said offices are situate in the said Ward of Cheap, but were not rated to any of the rates of the said ward until the 8th Jan. inst., and the clerk was informed and verily believed that on the 3rd Dec. last no rates had been assessed or made on the said premises, 12, Queen Victoria-street, by the parish in which such premises are situate, for the poor or any other purpose.

Brown, Q.C. and F. M. White, showed cause on behalf of the Alderman and Council of the Ward of Cheap.—The Act of Parliament which regulates the register of the City Wards is 30 Vict. c. i. By sect. 2: "At any election for alderman or common councilman, or ward officer for any ward in the said city, every male person of full age, not subject to any legal incapacity, who shall, for a period of not less than twelve months previous to the 1st Dec. in any year, have been in the occupation within the said city, or the liberties thereof, either solely or jointly with any other person or persons, of any house, warehouse, counting-house, office, chambers, or shop, or other building, and shall, in the case of a sole occupation, be rated in respect of such premises in his own name to an amount not less than 10*l.* per annum, or in the case of a joint occupation, be rated in the joint names of the occupiers, to an amount which, when divided by the number of occupiers, will give a sum of not less than 10*l.* per annum for each of such occupiers, to the police or any other rate, subject to the provisions of this Act, shall be entitled to vote in any such election for alderman, or common councilman, or ward officer in the ward in which such premises shall be situate." The following section (3) enacts that, "At every such election every person on the Register of Voters in the City of London in use at elections for members to serve in Parliament, and then in force, in respect of the occupation of any house, warehouse, counting-house, shop, office, chambers, or other building, subject to the provisions hereinafter contained, shall be entitled to vote in any such election for alderman or common councilman or ward officer in the ward in which such premises shall be situate." Sect. 4 extends the right to vote to persons excluded by non-residence from the parliamentary register. By sect. 5: "On the 3rd Dec. in every year . . . the alderman and common councilmen of each ward shall cause to be made out an alphabetical list of all persons who shall be entitled to vote under this Act, such list to be duly signed by the alderman of the ward; and the ward clerks shall keep a true copy of such list, to be perused by any person, without payment of any fee, at all reasonable hours between the 5th and 15th Dec. in every year, and shall at all times deliver a printed copy of such list to any person requiring the same, on payment of a sum not ex-

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ceeding 1s. for each copy, and the said list shall be the list of persons entitled to vote, after the passing of this Act, at any election for alderman or common councilman, or ward officer for any ward, until the 3rd Dec. in the then next year, and shall be conclusive as to the person so entitled." By sect. 6, every person before he is "permitted to poll at any such election, shall make the following declaration:— 'I do declare that I am an occupier of premises in the ward of , and that I have not polled before at this election, and that I am on the list of voters entitled to vote for the ward of . And if any person shall refuse or neglect to make the declaration hereby appointed to be made, then and in every such case the poll or vote of such person so neglecting or refusing shall be null and void, and shall be rejected and disallowed.'" Ever since the passing of this Act, it has been the practice in all the wards of the City of London to read the second and third sections together, and limit the extension given by sect. 3 to those persons on the parliamentary register who have continued their occupation until the December of the election. If they are not to be so read, there is nothing in the Act, except the declaration required by sect. 6, to prevent a person whose name is on the parliamentary list from being out of occupation for nearly a year and a half before a ward election. And this sect. 6 is a further reason for requiring a voter to be qualified under both sects. 2 and 3; because the required declaration would exclude a person from voting who was not at the time of the election occupying premises in the ward, and therefore would unequally apply to persons who perhaps had changed their occupation merely to the opposite side of the street. Further, this is a discretionary writ, and Mr. Waddell might, by applying on the 3rd Dec., have obtained what he now asks. [BLACKBURN, J.—He received no notice.]

Glenn appeared to support the rule, but was not heard.

BLACKBURN, J.—There seems to be no reason why this *mandamus* should not go. The corporation has clearly made a mistake in reading these two sections together. The third is intended to extend the franchise for the ward elections beyond that provided by the second; and if it be found that in consequence the qualification has become too extensive, the corporation must go to Parliament to amend the law.

QUAIN and ARCHIBALD, JJ. concurred.

Rule absolute.

Attorney for prosecutor, B. Chandler.

Attorneys for defendants, Lozley and Morley.

Wednesday, Jan. 21, 1874.

REG. v. LONDON AND NORTH WESTERN RAILWAY COMPANY.

Rateable value—Branch railway—Connection with competing main lines—25 & 26 Vict. c. 103, s. 15. The appellants, a railway company, were owners of a branch line connecting their main line with three other main lines. If the branch were in the market, either of the three companies which owned these three other main lines would, in consequence of the traffic which it would bring to their line, be willing to acquire it upon the same terms in every respect as those upon which the appellants held it; if so acquired by either of such other companies, they would work it in a similar manner to

that in which it was worked by the appellants, and under such circumstances the traffic upon it would not produce a higher rateable value, calculated upon the mileage principle in respect to the traffic of the branch only, than what it produced to the appellants:

Held that, in assessing the part of the branch line within the respondents' parish, this circumstance must be taken into consideration in estimating the rateable value.

In an appeal against an assessment for the relief of the poor of the parish of Kempston, in the county of Bedford, made the 5th Jan. 1871, in which appeal the London and North Western Railway Company were appellants, and the Assessment Committee of the Bedford Union and the overseers of the parish of Kempston were respondents:

It was ordered that the appeal be dismissed, subject to the opinion of the Court of Queen's Bench on the understated case; and the court awarded and ordered the appellants to pay to the respondents the sum of 32l. 17s. 10d., their costs in that behalf.

The appellants are the owners of the line of railway from Bletchley to Bedford, and of the line of railway from Bedford to Cambridge, which two lines form one continuous railway from Bletchley to Cambridge, and are worked as part of the London and North Western railway system. Each of these lines passes through parishes in the respondents' union.

The line from Bedford to Bletchley is a double line, and joins the appellants' main line at Bletchley.

The line from Bedford to Cambridge is a single line; it joins the main line of the Great Northern Railway at Sandy, and then runs on to Cambridge, where it joins the Hitchin Branch of the Great Northern at the main line of the Great Eastern Railway. At Bedford, the Bedford and Bletchley line crosses the main line of the Midland Railway upon the level, and for the purposes of goods traffic is connected with it, but the stations are some distance apart.

The said lines from Bletchley to Bedford, and from Bedford to Cambridge, were originally made by independent companies or individuals, but both these lines have now become vested in the London and North Western Railway Company, the former by virtue of an Act of Parliament (8 & 9 Vict. c. xliii), the shareholders becoming stockholders of the said company, and having 4 per cent. guaranteed to them upon a sum of 365,000l. agreed upon as representing the sum expended upon the line; and the latter by virtue of an Act of Parliament passed in the 27 & 28 Vict. c. lxxii, whereby the line became the property of the London and North Western Railway, subject to a like guarantee of 4 per cent. per annum upon a sum of 290,000l.

Either of these interests thus guaranteed would, if regarded as rent and taken as the basis of rateable value, give a much larger rateable value per mile than that contended for by the appellants.

In order to compete on equal terms, as far as fares are concerned, with the Midland, the Great Northern Railway, and the Great Eastern Railway, the appellants charge the same fares for goods and other passengers carried to London or the North from any station on the Cambridge and Bletchley line, *via* Bletchley, and the appellants' main line,

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that the Midland, Great Northern, and Great Eastern Railway Companies respectively charge for carrying the same from the same station *via* Bedford, Sandy, or Cambridge respectively upon their main line.

The distance from Cambridge to Sandy is	21 miles.
" from Sandy to Bedford	8½ "
" from Bedford to Bletchley	16 "
" from Cambridge to London by G.N.E. 58½ "	
" ditto ditto by G.E.R. 57½ "	
" from Sandy to London by G.N.E.	44 "
" from Bedford to London by Midland. 49 "	
And from Bletchley to London y L. & N.W.R. 46½ "	

The fare for a first-class passenger

From Cambridge to London by G.E.R. is	s. d.
" " " by G.N.E.	11 0
" Sandy to London by G.N.E.	8 0
" Bedford to London by Midland.	8 6
" Cambridge to London, <i>via</i> Bletchley	11 0
" Sandy to London, <i>via</i> Bletchley.	8 0
" Bedford to London, <i>via</i> Bletchley.	8 6
" Bletchley to London	8 6

And for passengers who do not continue their journey upon the appellants' main line:

From Cambridge to Bletchley	7 6
" Sandy to Bletchley	4 0
" Bedford to Bletchley	2 6

And in similar proportions for second and third class passengers, goods, &c.

The appellants ascertain what they contend to be the rateable value of the line in the respondents' parishes in the usual manner, treating the Cambridge and Bletchley line as a portion of the London and North Western system; that is to say, if a passenger is carried from Bedford *via* Bletchley to London, a distance of 62½ miles, they apportion the fare as above described equally amongst the 62½ miles, and then deduct from the earnings of each mile so ascertained the expense of working it, and other usual deductions, the same being ascertained where practicable for each particular mile, and not being a general average of the whole system, but still treating the branch from Bletchley to Cambridge as a part of the North Western system for the purpose of calculating the general and miscellaneous expenses.

The respondents contend; First, that in ascertaining the rateable value of the portion of the line in their parishes, if it is to be ascertained by deducting the working expenses from the actual receipts, they are entitled to allocate to the Bedford and Bletchley Line so much of the fares charged, in such a case as that above described, as is equivalent to what is usually charged by the appellants to a traveller who travels only from Bedford to Bletchley; and that this should be apportioned equally amongst the 16 miles from Bedford to Bletchley; secondly, if the Bletchley, &c., line were now in the market, either of the three companies above mentioned would, in consequence of the traffic which it would bring to their line, be willing to acquire it upon the same terms in every respect as those upon which the appellants now hold it. If so acquired by either of such other companies, they would work it in a similar manner to that in which it is now worked by the appellants; and under such circumstances the traffic upon it would not produce a higher rateable value calculated upon the principle now contended for by the appellants than what it now produces. The respondents contend that the above circumstances must be taken into consideration in estimating the rateable value of the appellants' line.

If the respondents are right in either of the above contentions, the rate is to be confirmed.

If the appellants are right in their contention, their line in the said parish of Kempston is to be assessed at 80l. per mile net rateable value.

Graham argued for the respondents.—The question is, whether the circumstances of this branch line do not take it out of the ordinary rule of rating branches only for the actual profits made upon them. Without pressing the whole of the first contention stated in the case on behalf of the respondents, it will be sufficient for them, on this appeal, if something ought to be added to what would be assessed upon a similar branch line as the actual earnings in respect of the value enhanced by its position in connection with all these main lines. The two cases, *Newmarket Railway Company v. St. Andrew the Less, Cambridge* (2 E. & B. 94), and *Reg. v. Llantrissant* (L. Rep. 4 Q. B. 354), seem at first sight authorities against this; they are, however, both distinguishable from the circumstances here. In the former case, the Newmarket Railway Company, the appellants, had agreed with the Eastern Counties Railway Company to complete a branch communicating between the two lines. Agreements were made for the interchange of traffic, and the Eastern Counties Railway Company bound themselves, whenever the dividend of the appellants, from their earnings on their whole line, fell below 3 per cent., to make good the deficiency to an extent not exceeding 5000l. The appellants completed and worked the branch, and the expenses of working exceeded the gross receipts on the branch. The appellants' dividend from their whole line falling short of 3 per cent., the Eastern Counties Railway Company made good to them the deficiency, amounting to 3705l. The majority of the court held that this payment ought not to be taken into account in estimating the rateable value of the branch, but on the ground that it was due upon a contract of guaranty, and was not actual profit. At p. 103, Erle, J., recognises the principle that "the respective values of two rateable subjects may be increased by combining their operation; and in that event the rate will be increased accordingly." In the *Llantrissant* case, the Ely Valley Railway ran through the parish, and formed a junction with the Great Western Railway, whose company occupied the other railway at a fixed rent. It was held that the Great Western Railway Company were to be rated only in respect of the profits which were earned within the parish, and that the value of the traffic contributed by the Ely Valley Railway to the Great Western main line ought not to be taken into consideration in estimating the amount of the rate in that parish. Mellor, J., said, at p. 358, "It is not because a particular tenant will give a large sum as rent that that is any criterion of the rateable value." Here it is expressly found in the case that either of the three other companies would, in consequence of the traffic which it would bring to their line, be willing to acquire it upon the same terms in every respect as those upon which the appellants now hold it. Neither of those two cases was decided upon the peculiar circumstances here stated. In *R. v. The Proprietors of the Liverpool Exchange* (1 A. & E. 465), Littledale, J., at p. 474, states the principle established by the cases to be, "That the advantages attendant upon a building, either in respect of its situation or the mode of its occupation, are to be taken into the

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account in estimating its rateable annual value, wherever those advantages would enable the owner of the building to let it at a higher rent than it would otherwise fetch." The case of the *South Eastern Railway Company v. Overseers of Dorking* (3 E. & B. 491), affords strong support to the respondents' contention; there the South Eastern Railway Company, the appellants, occupied the Reading line, a branch which passed through the respondents' parish, and joined other railways which brought profit to the extension line. It was also proved as a fact, that if the branch were in the market, it would be an object of competition between the South Eastern and rival companies, and the rent would, in fact, be enhanced by such competition. The majority of the court held that both these matters were to be taken into account, inasmuch as, though lying out of the parish, they enhanced the value of the occupation of the portion of the line within it, and though there might be much difficulty in calculating the result, the sessions were to find it as nearly as they could. And in *London and North Western Railway Company v. Churchwardens of Cannock* (9 L. T. Rep. N. S. 325), the special case was sent back to the sessions to have it ascertained what, taking all its advantages into consideration, was the rateable value of a branch line in the respondents' parish. Amongst the advantages to be considered was the fact that it produced a profit to the occupier by virtue of traffic which it carried over the occupiers' main line. The case of *Great Eastern Railway Company v. Haughley* (14 L. T. Rep. N. S. 548; L. Rep. 1 Q. B. 666) is distinguishable. There the rate was sought to be made on the mileage principle in disguise; it was an attempt to bring in traffic, not originating in the parish, as contributing to the profit earned by diminishing the expense of working the whole traffic on the line; while here it is the traffic over the branch that earns the profit on the main line.

Field, Q.C. and Byles, for the appellants, the North Western Railway Company.—The case finds that, if this branch were acquired by either of the other companies, the traffic upon it would not produce a higher rateable value; we must take it, therefore, that no tenant would rent it for a larger sum. [BLACKBURN, J.—There is no practicable actual letting at all; therefore we must judge by analogy.] At all events, the rateable value, according to the respondents' contention, would be enhanced beyond the actual worth of the branch traffic by reason of the appellants' occupation of the main line in other parishes; so that the appellant, being fully rated by those other parishes, would be rated twice over for the same profits. This would be directly opposed to the decisions in the *Haughley* and *Llantrissant* cases. [BLACKBURN, J.—Another authority like the *Dorking* case is *Allison v. Overseers of Monkwearmouth Shore* (4 E. & B. 13), where appellant was the occupier of a brewery, the value of which was enhanced by the compelled custom of public-houses in the ownership of the appellants' landlord. It was held by Lord Campbell, and Crompton, J., that appellant was properly rated on the enhanced value, it being an advantage connected with this occupation, which would be taken into calculation by a tenant in estimating the annual rent; and that it was not material that the origin of this advantage was in a personal contract.] Erle, J., however dissented from that decision, and the same point was decided

the other way by Erle, C.J. and Montague Smith, J. (Byles, J., however dissenting), in *Sunderland v. Sunderland* (18 C. B. N. S. 531). Moreover, there is nothing in the respondents' contention, as stated in the case, to show that any other tenant would obtain an advantage by renting this branch; the words are, "under such circumstances (i.e., the acquisition upon the same terms by one of the other three companies), the traffic upon it would not produce a higher rateable value" than now.

BLACKBURN, J.—I think the respondents are entitled to our judgment on one of the two contentions submitted to us. Mr. Graham admits he cannot support the first, and we need not, therefore, further consider it. The other point is thus raised; if the Bletchley line were now in the market, four companies, the appellants and three others mentioned, would be willing to acquire it upon the terms upon which it is now held; not for the value of the traffic upon it, but for the traffic it would bring to the line of the company occupying it. That being so, the respondents say something ought to be added to the rateable value of a similar ordinary branch on account of that circumstance; and, if we think so, the case provides that the rate is to be confirmed. We must take the general principle of the Parochial and Assessment Acts (6 & 7 Will. 4, c. 96, s. 1, and 25 & 26 Vict. c. 103, s. 15), and adopt it as nearly as we can. We have to find the rent at which the hereditament might reasonably be expected to let from year to year, free of certain taxes and expenses. It happens, unfortunately, that a great difficulty exists in applying this principle to the present case, because the appellants' property, in this particular case, could not be let by itself. No practicable tenant could reasonably be expected at all for a small piece of a line which, of itself, could not possibly be worked. We must, therefore, enter into a calculation, as nearly as possible, of all the circumstances which might, if such a letting were possible, regulate what Sir Robert Peel called the "higgling" of the market. One principle to be borne in mind is quite clear, that in letting from year to year no tenant can be obtained at a rent larger than the amount he would expect in some way to make by it. Another matter to be considered, in order to arrive at that amount, is the number of persons who would be willing to compete for the occupation. As an illustration of the importance of this latter consideration, I would refer to what I said in a recent case (*Mersey Docks and Harbour Board v. Overseers of Liverpool*, 29 L. T. Rep. 454), about chambers in the Temple. The same set of rooms might produce larger profits if occupied by the Attorney-General than by a young barrister without practice; the rateable value, however, would be the same. But if there should be a large competition for the occupation of the chambers of the Attorney-General, in consequence of their affording greater facilities for practice than others, and he should have in consequence to pay higher rent, then the rateable value would increase, although the Attorney-General might make no greater profits than he would in other chambers. So here, the value of the occupation must be taken to be enhanced by the benefits and advantages which it may give to the occupier. This may be found to be the adopted rule in all the cases down to the present time. As far back as *R. v. Bradford* (4 M. & S. 317), a canteen was held to be rateable not only upon its rental of 15*l.*, but also

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upon the annual aggregate sum which was paid for the privilege of using the premises for a canteen; so with respect to the brewery in the case of *Allison v. Overseers of Montvener-mouth Shore*, cited during the arguments. The question always is, what is the value obtained by occupation? The facilities thus acquired would enhance the rateable value, whether realised in or out of the parish. Here there is but one railway along this particular piece of land, and the number of possible tenants are the four companies who could use the railway in connection with their own. In consequence of this facility, by which the occupation of this particular line would increase the traffic along the main line of the occupiers, either of these four companies, as the case states, would be willing to acquire it upon the same terms, in every respect, as those upon which the appellants now hold it. If that means, as argued for the appellants, that either of these companies would be willing to acquire possession only upon a long lease or in perpetuity, as the appellants hold it, then I should consider it no enhancement of the value; but I think the case means that either of the companies would accept these terms upon a new bargain at the end of each year, and would rent the line upon the same terms as the appellants would from year to year. I do not think that what these companies would pay in rent is the whole matter, but the actual rent at which the property might reasonably be expected to let from year to year would be enhanced by the fact that there are four competitors for the occupation. It is an element in the consideration of the rateable value, and if so the respondents' contention is right. The rate must, therefore, be affirmed.

QUAIN, J.—I am of the same opinion. All that we have to decide is, whether the second contention on behalf of the respondents is to be considered in fixing the rateable value. Several companies are, it is said, ready to compete for this railway, and willing to acquire it upon the same terms. This is because the occupation would be worth something to them, either directly or indirectly. I think, therefore, the fact is to be taken as part of the test of what a tenant would give. The *Dorking* case, as I understand it, decided by a majority of the court that the value of a branch railway for rating purposes may consist of something besides the actual earnings on the branch. Here the competition is a fact to be considered as enhancing that value beyond the mere profits of the branch line alone. That is the only point about which our opinion is asked, and that we give in favour of the parish.

ARCHIBALD, J.—I am of the same opinion. The first contention of the respondents contained in the case is to be left out of the question, but the second they still rely upon. All we can do is to apply as nearly as possible the general principle for rating all hereditaments. It is clear that we must take the value of the occupation from year to year to be enhanced by any advantages which may go along with the occupation. I think we must infer from the words of the case that either of these companies would be willing to take the branch from year to year, and that fact must therefore be taken into consideration in fixing the rateable value.

Judgment for respondents.

Attorneys: *B. F. Roberts; Shum, Crossman, and Crossman, for Turnley, Sharman, and Smail, Bedford.*

Wednesday, Jan. 21, 1874.

WILSON v. CUNLIFFE.

Line of shop—Goods projecting—Vested right—
35 & 36 Vict. c. lxxviii, s. 95.

By a local Act of 1872, if any person places, hangs up, or otherwise exposes any furniture, goods, produce, wares, merchandises, matter or thing, so that the same projects or project into or over any footway, or beyond the line of any house, shop or building, at which the same is or are exposed, he shall be liable to a penalty.

Justices refused to convict defendant, who was charged under this section; but they stated, in the case reserved at the complainant's request, that defendant exposed greengrocery, in which he dealt, on a cooler or tray of wood, projecting 2 ft. 9 in. beyond the line of the brickwork of his building. This tray fell forward from the shop window, and when used was supported by iron stanchions and hinges. The steps of the adjoining house projected three inches further than this tray during the day. At night, and on Sundays, the tray was not beyond the line of defendant's and the adjoining house; the street was exceptionally wide at this particular part. The defendant's premises had been erected between thirty and forty years, and during that period the tenants had always used the same cooler or tray, or something of the same description:

Held, that the Act must be taken to refer to the line of shop existing at the time of its passing, which in this case was the line of the tray; and that the justices were right.

This was a case, stated by two justices of the peace acting in and for the borough of Bolton, under the statute 20 & 21 Vict. c. 43, for the purpose of obtaining the opinion of the court on questions of law, which arose before them as hereinafter stated.

At a petty sessions, holden at the borough of Bolton aforesaid, on 16th Nov. 1872, an information laid by John Wilson a police constable of the borough (hereinafter called the appellant), against Wm. Cunliffe (hereinafter called the respondent), was heard before them. For that the said respondent, on the 12th Oct. 1872, at Great Bolton, in the borough of Bolton, did expose certain produce and wares, so that the same projected beyond the line of a certain building, to wit, a shop in Derby-street, in the said borough, in his occupation; at which the same were exposed.

The information was laid under the 95th section of the Act 35 & 36 Vict. c. lxxviii, intituled, "The Bolton Corporation Act 1872," which enacts, that

If any person places, hangs up or otherwise exposes any furniture, goods, produce, wares, merchandises, matter or thing, so that the same projects or project into or over any footway, or beyond the line of any house, shop or building, at which the same is or are exposed, he shall for every such offence be liable to a penalty not exceeding 40s.

The respondent is a shopkeeper, and deals in greengrocery, at the corner of Derby-street and Pilkington-street, in the said borough.

The appellant proved that on the day in question the respondent exposed his goods and wares on a cooler or tray of wood. This cooler or tray falls forward from the defendant's shop window, and rests on two iron stanchions and on hinges, and projects 2 ft. 9 in. beyond the line of the brickwork of the respondent's building in Derby-street. The tray is a temporary one, and removable at pleasure.

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In cross-examination of the appellant, it appeared that the respondent's shop stands back 3ft. 3in. from the front of certain steps which project beyond the line of the brickwork of the adjoining buildings, and the width of the space between the curbstone of the footpath and the brickwork of respondent's building is 17ft. 4in. from the wall line; and of the space between the said curbstone and the front of the last-named steps is 14ft. 1in. The appellant had known the structure to be thus used about three years and six months. Under the above-mentioned tray is an iron cellar-grid, let fast into the stonework.

It was also further proved by the evidence of the surveyor for the corporation of Bolton, that the line of building of the house of respondent is the line of brickwork of the wall; and that at night, when the business premises of the respondent are closed, and on Sundays, the tray is removed, and the public have free access to walk over the place covered by the tray at other times; and it was also proved that the line of the wall of respondent's shop in Derby-street is in the same line as the line of the wall of the premises next adjoining.

It was also proved that the respondent's premises had been erected between thirty and forty years, and had been held by several successive tenants in occupation: and that the same cooler or tray, or something of the same description, had been used for thirty to forty years by the tenants.

For the respondent it was contended, that the line of the outer extremity of the cooler or tray was the line of building referred to in the 95th section of the Act of Parliament; and that, although the respondent had permitted the public to walk over the space when the tray was not used, yet that he had never parted with his right to place the same in the position it usually occupied.

He also produced plans to show the exceptional width of the street at that particular part, and to show that the respondent's landlord had not built up to the general average line of the street.

The justices found, as a fact, that the respondent or his landlord had not dedicated the particular space underneath the tray to the public, except so far as when the cooler or tray was not in use; and that therefore the line of building referred to in the Act of Parliament must be taken to be the extent to which the cooler or tray extended. On these grounds they did not convict.

The attorney for the appellant expressed himself dissatisfied with this determination as being erroneous in point of law, and pursuant to the 2nd section of the statute 20 & 21 Vict. c. 43, duly applied in writing to the justices to state and sign a case setting forth the facts and the grounds of this determination as aforesaid, for the opinion of this honourable Court; and the appellant duly entered into a recognizance as required by the said statute in that behalf.

Therefore the said justices, in compliance with the said application and the provisions of the said statute, stated and signed this case.

The question for the opinion of the court is, whether the line of building, referred to in the information and the said section of the statute, means the line of brick or stonework of the house, or the line of the outer extremity of the tray.

If it should be the opinion of the court that the justices were wrong in their decision, then

the case was to be remitted for their judgment thereon.

J. Edwards (with him Black) argued for the appellant, the officer of the corporation of Bolton.—This local Act contains no interpretation clause nor definitions, and it incorporates no public Act which in any way explains what is meant by the words "line of any house, shop or building." As, however, the case finds that this cooler or tray "projects 2ft. 9in. beyond the line of the brickwork of the respondent's building:" this is in almost the very words a breach of the Act for which a penalty is imposed, and the respondent ought therefore to have been convicted.

Baylis for respondent, the defendant.—*Prima facie* vested rights cannot be affected by general provisions: (*Moody v. Corbett*, L. Rep. 1 Q. B. 510; 14 L. T. Rep. N. S. 568.) Here it appears that at all events for thirty years before the Act was passed, the occupiers of this house enjoyed and exercised the right to deposit goods as far forward into the street as they do now. It was held in *Morant v. Chamberlin* (6 H. & N. 541), that a highway may be dedicated to the public, subject to a pre-existing right of user by the occupiers of adjoining land, for the purpose of depositing goods thereon. [BLACKBURN, J.—Can there be a line of shop further out into the street by day than by night?] That is a matter of fact, about which the justices have decided in respondent's favour. *Lord Auckland v. Westminster Local Board of Works* (L. Rep. 7 Ch. App. 597; 26 L. T. Rep. N. S. 961) is a case concerning a general line of buildings of a street, in which the Lords Justices held that in determining this general line, the architect of the Metropolitan Board of Works ought to have regard to the frontage of houses previously existing, and which may be rebuilt, as well as to those still standing. And in *Ashworth v. Heyworth* (20 L. T. Rep. N. S. 439; L. Rep. 4 Q. B. 316), the majority of this court held that a shed projecting 3ft., and the land which it covered formed part of the dwelling-place or shop into which the shed was built. That case arose under the Markets and Fairs Clauses Act 1847, which imposes a penalty on every person who shall sell or expose for sale in any place within the prescribed limits, except in his own dwelling-place or shop, any articles in respect of which tolls are authorised to be taken in the market. The appellant was the tenant of a dwelling-house and shop, and a piece of ground in front of the shop; there was a wooden shed affixed to the house and supported on posts, which had been erected for eighteen years on flags which projected 3ft. from the house. The justices convicted the appellant for exposing articles for sale beneath this wooden shed. The court quashed the conviction.

Edwards in reply.—The words "project" and "line" are used inconsistently in the statute and in the case. The projecting tray or steps cannot be the line of the building beyond which they project. The question of dedication is immaterial, for the line of a building must be the permanent structure.

BLACKBURN, J.—I think we must hold that the justices were right. The question turns entirely upon the construction of this one section of the local Act. The words are, if any person places or exposes any goods or merchandise so that the same project into or over any footway, or beyond the line of any house, shop or building at which

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the same are exposed, he shall be liable to a penalty. The magistrates have found that this tray was not over a footway; but it is certain that these goods were placed so as to project beyond the wall of the house, although not beyond the space which had been used and enjoyed by the occupiers of the house for forty years for this purpose. The question is, which of these is the line of the house, shop or building? The magistrates have determined it to mean the extent to which the cooler or tray extended; although the words of the Act are not clear, I think this interpretation is plausible; and we ought, rather than take away this vested interest, to hold that the justices have adopted the right view. They say in effect that this was the line of shop *de facto* enjoyed by the respondent at the time the Act was passed, and that must be the line to which the Act was meant to refer. It would be another matter if the shop were new, but as there is no power in this Act, as in the Metropolis Act 1862, considered in *Lord Auckland v. Westminster Local Board of Works (sup.)*, to give compensation, it could not be intended to affect vested interests.

QUAIN, J.—I have great doubt and hesitation in holding that the justices were right, because it involves the decision that a line of building may be variable at different times. Still it is a strong power to give the justices by a general provision that they should thus deprive an owner of a right vested in him for forty years. I see that in the case of *Ashworth v. Heyworth (sup.)* the only difference in the circumstances from those of this case is that the shed there was a structure of a more permanent nature than this tray. It is clearly an authority for affirming this decision, and I think therefore the refusal to convict was right.

ARCHIBALD, J.—I also think the justices were right. The section says, goods shall not project beyond the line of any shop; but this must be taken to be the line of shop at the time of the Act. This was a right exercised more than thirty years; so that if there were any doubt, at all events our conclusion is the most consistent with justice.

Judgment for defendant.

Attorneys for complainant, *Chester, Urquhart, Busby, and Mayhew*, for J. Hinnell, Boston.

Attorneys for defendants, *Phelps and Sidgwick*, for Sale, Shipman, Seddon, and Sale, Manchester.

Tuesday, Jan. 27, 1874.

POPULAR BOARD OF WORKS v. LOVE.

Paving and sewerage—Incidental costs and charges—Costs of collection, survey plan, and notices—Building owner—18 & 19 Vict. c. 120; 25 & 26 Vict. c. 102.

Defendant was owner of some houses, and occupied land bounding or abutting on a new street, which the plaintiffs had paved under sect. 105 of the Metropolis Management Act 1855, and sewered under sect. 52 of the amending Act of 1862.

Amongst other items which the plaintiffs had apportioned to defendant's contribution were costs of collecting apportioned amounts, of survey plan and obtaining names of owners, and of filling-up, printing, advertising, and serving notices. These sums were all paid to persons employed for the purpose, and not plaintiffs' servants, although plaintiffs had in their employ a surveyor and a clerk, and payments were requested at their office.

Defendant occupied the said land under a building agreement, by which the owner of the land agreed to demise to defendant or his nominees the several pieces of land upon which defendant was to build, as the houses and buildings respectively became erected and covered, for 80 years, at the rent of a peppercorn for two years, and of sums increasing every year up to 364l. in the sixth and following years. The defendant was to be considered as holding the undemised portion on the terms of the leases. There was a power of re-entry upon non-completion of the building covenants. The houses at this time were in every stage of building progress, and some had been demised to other persons at defendant's nomination:

Held, upon an action to recover defendant's apportionment, that, with the exception of the houses demised to other persons, the defendant was liable as owner of all the premises, and that the above items were incidental costs and charges within the 77th section of the said Act of 1862.

THIS was an action commenced on the 30th Jan. 1869, brought to recover 183l. 0s. 4d., consisting of 77l. 8s. 11d., the amount apportioned to be paid by the defendant, as the owner of certain houses in Eglinton-road, Bow, of the costs of paving the said Eglinton-road; 53l. 0s. 3d., the amount apportioned to be paid by the defendant as the owner of certain houses in Stafford-road, Bow, of the costs of paving the said Stafford-road; 39l. 16s. 6d., apportioned to be paid by the defendant as the owner of certain building land bounding and abutting on Mary-street, Bromley St. Leonards; and 12l. 14s. 8d., apportioned to be paid by the defendant as the owner of certain other building land, bounding and abutting on Mary-street, for the costs of constructing a sewer in the said Mary-street, Bromley St. Leonards.

The cause came on to be tried before Cockburn, C.J., at a sitting at Nisi Prius held at Westminster, on Wednesday, the 14th June, 1871, when the verdict was entered for the plaintiffs for the damages in the declaration, with costs 40s., subject to the opinion of the court upon the following case:

1. The pleadings in this action, a copy of which accompanied this case, were to be considered part thereof, but it is not material to the judgments that they should be set out or more fully referred to.

2. The plaintiffs are the Board of Works for the Poplar District, within the true intent and meaning of the Metropolis Management Act 1855, and the Metropolis Management Amendment Act 1862, and are the Board of Works of the Poplar District, mentioned and referred to in part 1 of schedule B of the first-mentioned Act.

3. The plaintiffs, as such board, in the first count of the declaration, seek to recover from the defendant, as owner of certain houses in Eglinton-road, 77l. 8s. 11d., being the amount apportioned by the plaintiffs as the proportion to be paid by the defendant as owner of the said houses, of the costs of paving the said Eglinton-road.

4. The plaintiffs, as such board, in the second count of the declaration, seek to recover from the defendant, as owner of certain houses in Stafford-road, 53l. 0s. 3d., being the amount apportioned by the plaintiffs as the proportion to be paid by the defendant as owner of the said houses, of the costs of paving the said Stafford-road.

5. The estimated expenses of paving Eglinton-road, for the apportionment of which the plaintiffs

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in the first count of the declaration sue, amounted, as determined by the surveyor to the plaintiffs, to 768*l*. 8*s*. 8*d*., but in the said amount of 768*l*. 8*s*. 8*d*. were included, beside the mere costs of paving and of paving at the point of intersection of streets, the following charges :

	£	s.	d.
For collection of apportioned amounts	13	7	2
Survey plan and obtaining names of owners ...	8	2	0
For filling-up and serving notices	1	13	0
	£18	12	2

The persons to whom the above-mentioned sums were paid respectively were not officers or clerks of the plaintiffs, but persons carrying on business independently of the plaintiffs, and employed by the plaintiffs to do the said work.

6. The estimated cost of paving Stafford-road, for the apportionment of which the plaintiffs in the second count of the declaration sue, amounted, as determined by the surveyor to the plaintiffs, to 669*l*. 15*s*. 8*d*., but in the said amount of 669*l*. 15*s*. 8*d*. were included, besides the mere costs of paving, and of paving at the points of intersection of streets, the following charges :

	£	s.	d.
For collection of apportioned amounts	13	2	7
Survey plan and obtaining names of owners	8	4	6
For filling-up and serving notices	2	11	3
Advertisements and printing notices	2	17	4
	£21	15	8

The persons to whom the above-mentioned sums were respectively paid were not officers or clerks of the plaintiffs, but persons carrying on business independently of the plaintiffs.

7. Except in so far as the fact of including the charges, 18*l*. 12*s*. 2*d*. and 21*l*. 15*s*. 8*d*. just mentioned in the respective amounts of 706*l*. 8*s*. 8*d*. and 669*l*. 15*s*. 8*d*., apportioned as before respectively stated, may disentitle the plaintiffs to recover from the defendant either of the amounts in the first and second counts respectively sought to be recovered, all things were done and happened, and all conditions existed and exist, necessary to entitle the plaintiffs to recover those amounts, except as aforesaid. The arbitrator found all the issues on the pleas to the said first and second counts for the plaintiffs.

8. The plaintiffs, as such board, in the third and fourth counts of the declaration, seek to recover from the defendant, as owner of certain lands abutting on a certain street called Mary-street, 52*l*. 11*s*. 2*d*., being the amount apportioned by the plaintiffs as the proportion to be paid by the defendant, as such owner of the said land, of constructing a sewer in the said Mary-street.

9. The plaintiffs, as such board, having duly resolved to construct the said sewer in Mary-street, further duly resolved, on the 21st May 1867, that with reference to the cost of construction of the sewer in Mary-street, the owners of the unbuilt land should pay half the cost, and that the owners of the property on the built side should pay two-thirds of the remaining half, and that the plaintiffs, as such board, should pay the remainder of the cost of the construction of the said sewer. It is as owner of part of the unbuilt land that the plaintiffs, in the third and fourth counts, seek to charge the defendant.

10. The plaintiffs commenced and executed and completed the said sewer in Mary-street, between the 2nd June and the 4th Oct, 1867.

11. The expenses apportioned by the plaintiffs

in respect of the construction of the said Mary-street sewer, amounted to 126*l*. 17*s*. 8*d*.; but in this amount of 126*l*. 17*s*. 8*d*. are included besides the expense of constructing such sewer, and the works appertaining thereto, including the cost (if any) of gullies, side entrances, lengths of sewer at the intersection of streets, the following charges :

	£	s.	d.
For plan and survey	2	8	2
Filling-up and serving notices	0	13	0
	£2	21	2

The persons to whom these charges were respectively paid were not officers or clerks of the plaintiffs, but persons carrying on business independently of the plaintiffs.

12. The following account shows the manner in which the plaintiffs apportioned the 126*l*. 17*s*. 8*d*. between the unbuilt land on the north side and the houses on the south side of Mary-street :

Frontage, north side, 638ft. 10in.	£	s.	d.
Half the contract sum for construction.....	61	18	3
Proportion of costs of plan, &c.	1	0	0
Filling-up and serving notices.....	0	2	0
	63	0	3
Frontage, south side, 720ft. 9in.			
Half the contract sum for construction.....	61	18	3
Proportion of costs of plan, &c.	1	8	2
Filling-up and serving notices	0	11	0
	63	17	5
			2
	3)	127	14 10

13. The plaintiffs, in apportioning the 63*l*. 0*s*. 3*d*., being the half of the total expenses incurred in respect of the construction of the said Mary-street north side sewer, plus a due proportion of the charges added to the expense of construction, as above-mentioned in paragraph 11, payable by the owners of the unbuilt land, charged upon a plot of land described in plan as plot A, and having a frontage in Mary-street of 141ft. 6in., the sum of 12*l*. 14*s*. 8*d*.; and charged upon a plot of land described in plan as plot C, and having a frontage in Mary-street of 442ft. 6in., the sum of 39*l*. 16*s*. 6*d*.: which two sums together make up the 52*l*. 11*s*. 2*d*. claimed in the third and fourth counts of the declaration.

14. The defendant was not, at the time of the construction of the Mary-street sewer, or at the time of the passing by the plaintiffs of any of the resolutions relating thereto, nor has been since, the owner of plot A; the said plot, together with a plot described on plan 1 as plot B, having been sold in the year 1865 by Mr. Boyd, the freehold owner thereof, to certain persons other than the defendant, which sale is the sale mentioned in the memorandum written at the foot of the agreement between Mr. Boyd and the defendant hereinafter in paragraph 15 mentioned.

15. Plot C is part of the land comprised in the agreement between Mr. Boyd and the defendant, dated the 23rd June 1863, which is to be taken as part of this case. No lease has been granted to the defendant under the said agreement in respect of houses erected on plot C, nor have any houses or buildings been erected thereon.

16. The following is a list of the houses and buildings erected in May 1867, on land other than plot C, comprised in the said agreement :

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Park-street.—Finished houses 30, rental 24,
at 18l. 18s. per annum.
5, at 18l. 4s. "
1, at 20l. 0s. "

Unfinished houses; 11 carcasses, valued at 60l. each.

Charles-street.—Finished houses 5, rental 3,
at 18l. 4s. per annum.
2, at 10l. 8s. "

Unfinished houses; 20 carcasses, valued at 20l.

Cross-street.—Finished houses, none.

Unfinished houses; 5 carcasses, valued at 30l. each.

Brickfield-lane.—Finished houses, none.

Unfinished houses; 5 carcasses, valued at 50l. each.

Public-houses.—Rental, 50l. per annum.

17. The plaintiffs gave the defendant separate notices to pay the said sums of 12l. 14s. 8d. and 39l. 16s. 6d., and did not include the said sums in one notice.

18. Mr. Boyd had, in May 1867, advanced to the defendant the sum of 2000l.; this advance was not secured by any mortgage, nor was there any formal certificate of the surveyor, pursuant to clause 8 of the agreement between Mr. Boyd and the defendant.

19. Except in so far as the fact of including in 126l. 17s. 8d. (the apportioned cost of constructing Mary-street sewer), the 3l. 1s. 2d. in paragraph 11 mentioned, and the facts stated with reference to the ownership, within the meaning of the Metropolis Management Act 1855, and the Metropolis Management Act 1862, of plots A and C., may disentitle the plaintiffs to recover the sum of 52l. 11s. 2d. in the third and fourth counts of the declaration sought to be recovered, all things were done and happened, and all conditions existed and exist necessary (subject to questions as to the form of the declaration) to entitle the plaintiffs to recover the said sum of 52l. 11s. 2d., and, except as aforesaid, the arbitrator found all the issues on the pleas to the third and fourth counts for the plaintiff.

It is agreed between the parties that the court may draw inferences of fact.

The question for the opinion of the court is: If the defendant is liable to pay all or any, and which or what part of the said sums claimed.

In both the said notices referred to in paragraphs 12 and 17 of the case, it was recited that the several sums claimed had "been apportioned and determined by Robert Parker, the surveyor to the said board of works, and by the said board of works, as being the fair proportion of the said costs and expenses as becoming due in respect of the houses" belonging to defendant.

The notices were signed, "S. Jeffries Barth, clerk of the said board," and were dated at the offices of plaintiffs. They concluded with a memorandum as follows:—"N.B. You are requested to bring this notice with you."

The said agreement, dated the 23rd June 1863, which was directed in paragraph 15 of the case to be taken as part thereof, was made between one James Boyd and the defendant, described as a builder. It was agreed, amongst other things, as follows:—(1) "The said James Boyd will, upon the written request, and at the expense of the said Henry Love (when and so soon as the houses and buildings hereinafter agreed to be built, shall from time to time be erected and covered in to the satisfaction of the said James Boyd or his surveyor, Mr. Robert Heley, or other his surveyor for the time being, as hereinafter mentioned), demise unto the said Henry Love, or his nominee or nominees, by one lease or several leases at his option," the

pieces of ground there described, for the term of eighty years, from the 25th Dec. 1862, at the rent of a peppercorn, till the 25th Dec. 1864; and for the year ending at Christmas Day 1865, the rent of 91l.; for the year ending at Christmas Day 1866, the rent of 182l.; for the year ending at Christmas Day 1867, the rent of 273l.; and from Christmas Day 1867, and for each and every then succeeding year of the said term, the yearly rent of 364l."

By paragraph (6) of the agreement: "Until the whole of the premises hereby agreed to be demised shall be demised accordingly, the said Henry Love, his executors, administrators, or assigns, shall be considered as holding the same, or the undemised portion thereof, upon the terms of the said lease or leases."

By paragraph (7) of the agreement: "If the said Henry Love, his executors, administrators, or assigns, shall make default in building or covering in the said houses, or any of them, within the periods hereinbefore respectively appointed in that behalf, or in the payment of the rent hereby agreed to be paid, or in performance of the agreements herein contained, the said James Boyd, his heirs or assigns, may re-enter and take possession of such part of the said land and premises as may not have been specifically demised, and this agreement, so far as regards the land and premises undemised, shall thenceforth become void."

At the foot of this agreement a memorandum was added on the 29th April 1865, by which it was further agreed between the parties, that Love should be at liberty to sell and convey part of the said land in the agreement mentioned to Messrs. Currie, and others, and that Love should be liberated from the terms of the said agreement, so far as it related to that part of the land. This part is referred to in paragraph 14 of the case, as plots A and B in the plan.

Shaw (with him *Arbutnot*), argued for the plaintiffs.—It is impossible, upon the finding in the 14th paragraph of the case, to support the Mary-street sewers' rate. The first question is concerning the paving rates, which were originally subject to 18 & 19 Vict. c. 120, s. 105. That section, however, enabled a vestry or district board to obtain payment for the estimated expenses only from owners of houses, and the only remedy was before justices. In consequence of the case of *Vestry of St. Pancras v. Batterbury* (26 L. J. 243, C. P.), this section was amended by 25 & 26 Vict. c. 102, s. 77, whereby owners of the land bounding or abutting on a street are liable to contribute to the expenses of paving as well as the owners of houses, the vestry or district board having power to apportion the expenses in manner therein stated, and to recover from the owner, either by action at law or in a summary manner. The costs recoverable are thus described:—"Any such costs or expenses" (i. e., of paving a new street, as in sect. 105 of the earlier Act), "including the cost of paving at the points of intersection of streets, and all other incidental costs and charges, shall be apportioned by the vestry or board, and shall be recoverable either before the work shall be commenced, or during its progress, or after its completion." The defendant contends that the costs mentioned in the case are not incidental to the paving, but so far as that is a question of fact, the case finds in the plaintiff's favour. There is no authority upon the matter; but the intention of the Legislature clearly was, that these owners should bear the whole of

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the first expense of paving. A similar provision is contained in the Highway Act 1835 (5 & 6 Will. 4, c. 50), s. 23. Payment is to be made, under sect. 105 of the Act of 1855, by the owners *on demand*; some kind of notice or demand must therefore be made upon them, and it is not found in the case that these charges are excessive. The sewers' rate is subject to the 52nd and following sections of the Act of 1862, and can be apportioned and recovered by the vestry or board just as a paving rate, except that by sect. 57 an appeal to the Metropolitan Board of Works concerning sewers' rate is given to any person who may deem himself aggrieved. The same point as to incidental expenses arises under these rates; and there is a further important question as to the defendant's ownership. By sect. 250 of the Act of 1855, "owner" is to mean "the person for the time being receiving the rack rent of the lands or premises in connection with which the said word is used, whether on his own account or as agent or trustee for any other person, or who would so receive the same if such lands or premises were let at a rack rent." The agreement here differs from that in the case of *Lady Holland v. The Kensington Vestry* (17 L. T. Rep. N. S. 73; L. Rep. 2 C. P. 565), in that there is no clause that the builder shall have no interest in any house or land until a lease of it is granted. The defendant, therefore, is owner within the meaning of the interpretation clause.

Kingdon, Q.C. (with him *Tapping*), for defendant.—The board has regular officers, who should do all this work for which they charge as incidental expenses. It appears from the notices referred to, that they have a surveyor and clerk, and from the demand at the bottom, no collector apparently is necessary. Yet, as the case finds, they employ for this purpose persons who are not in their service, these charges are unnecessary. Further, these are not costs or charges incidental to paving, but only to the collection of the paving rates, for which sect. 77 of the Act of 1862 makes no provision. As to the question raised concerning the sewers rate, can defendant be owner when a substantial rent is reserved to the vendor of the land? [QUAIN, J.—Is it not a ground rent only?] Certainly there is a decision somewhat against me in *Caudwell v. Hanson* (25 L. T. Rep. N. S. 595; L. Rep. 7 Q. B. 55).

Shaw was not heard in reply.

BLACKBURN, J.—There seems to be not the smallest doubt, except as to the claim in the third count, which is most properly given up. The plaintiffs are entitled to everything else. No question is raised as to whether the sums charged for collection and notices are excessive, and it seems that the things for which they were paid were required to be done. Although Mr. Kingdon says the board's servants ought to have done them without extra charge, on that point our opinion is not asked. It is clear that if they cannot be recovered from the owners of lands and houses in their neighbourhood, the board must be out of pocket for them. They seem to me to be costs and charges incidental to the costs of paving, and are therefore included in the defendant's liability. That defendant is owner for the purposes of these Acts, I also have no doubt. He was in actual occupation; his peppercorn rent to be raised to a ground rent. This could not be a reason for saying that Mr. Boyd was receiving the rack rent. It may be a

substantial rent, but not such as to prevent the defendant from being the owner. The plaintiffs are, therefore, entitled to judgment.

QUAIN, J.—I am of the same opinion. It seems to me that the words, "all other incidental costs and charges" are added in the Act of 1862 to the costs made recoverable by the Act of 1855 for the very purpose of meeting such expenses as these. On the other point, I concur in the case mentioned by Mr. Kingdon.

ARCHIBALD, J.—I am of the same opinion. The first point is plain. The expenses of collection and notices are incidental to paving, within the Act of 1862. And on the other point, I agree that the defendant is the person entitled to receive the rack rent, and therefore liable for this contribution.

Judgment for plaintiff for the whole sum claimed, except 39l. 16s. 6d.

Attorney for plaintiffs, S. J. Barth.

Attorney for defendant, M. K. Braund.

Saturday, Jan. 31, 1874.

REG. v. JUSTICES OF LANCASHIRE; *Re* MANN v. JOHNSON.

Order of bastardy—Application—Hearing of summons—35 & 36 Vict. c. 65—36 Vict. c. 9.

The mother of a bastard child signed a form of application for a summons against the putative father containing the words Who saith that she hath been delivered of a bastard child since the passing of the 'Bastardy Laws Amendment Act 1872. When the summons came on to be heard, objection was taken by the defendant that the child was born before the passing of the Act; the mother was sworn and admitted this was so, and the justices dismissed the summons. Upon another summons, reciting the same application but without the mistake therein, justices made an order of 2s. 6d. a week against the defendant.

Held, upon certiorari, that the dismissal of the first summons was not such a hearing as to exhaust the application; and that the order upon the second summons was within the justices' jurisdiction.

On the 22nd Jan. a rule nisi had been obtained by French on behalf of John Johnson, calling upon the Rev. J. J. Dixon Clerk, and T. Whaley, Esq., two of her Majesty's justices of the peace in and for the county of Lancaster, to show cause why a writ of certiorari should not issue to remove into this court a certain order under the hands and seals of the said two justices, bearing date on or about the 19th Dec. 1873, whereby the said John Johnson was adjudged to be the putative father of a certain bastard child, born of the body of Esther Mann.

The said Esther Mann was delivered of a bastard child on the 14th Jan. 1872.

The Bastardy Laws Amendment Act 1872 (35 & 36 Vict. c. 65) was passed on the 10th Aug. 1872.

By sect. 2:

The enactments specified in the first schedule to this Act are hereby repeated, except as to anything heretofore duly done thereunder, and except so far as may be necessary for the purpose of supporting and continuing any proceeding taken before the passing of this Act.

All previously existing jurisdiction in bastardy was thereby repealed, and no exception was made with respect to children born before the passing of

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the Act, concerning whom no proceeding had been taken at that time.

By sect. 3:

Any single woman who may be with child, or who may be delivered of a bastard child after the passing of this Act, may either before the birth or at any time within twelve months from the birth of such child . . . make application to any one justice of the peace acting for the petty sessional division of the county or for the city, borough, or place in which she may reside, for a summons to be served on the man alleged by her to be the father of the child . . . and such justice of the peace shall thereupon issue his summons to the person alleged to be the father of such child to appear at a petty session to be holden after the expiration of six days at least for the petty sessional division, city, borough, or other place in which such justice usually acts.

The Bastardy Laws Amendment Act 1873 (36 Vict. c. 9), was passed on the 24th April 1873.

By sect. 3,

Any woman delivered of a bastard child on or before the 10th August, 1872, who, but for the repeal of the said recited Act (viz., the aforesaid Act of the previous year) of the enactments specified in the first schedule hereto would have been entitled to apply for a summons against the putative father of such child, shall be entitled to apply for such summons as follows: In any case in which she would have been entitled to apply at any time within twelve months from the birth of the child, she shall be entitled to apply at any time within six months next after the passing of this Act. . . . And upon any such application the same proceedings shall or may be taken, and the same consequences, including all rights of appeal, shall or may ensue as should or might have been taken or have ensued if the said enactments had not been repealed by the said recited Act.

The said Esther Mann made application to a justice under the preceding enactments on the 17th Oct. 1873. She signed a partly printed paper, which, when filled up by the justices' clerk, was in the following words:

County of Lancaster to wit.—The information and application of Esther Mann, singlewoman, residing at the township of Ashton in Mackerfield, in the county of Lancaster, before me, the undersigned, one of Her Majesty's justices of the peace acting for the petty sessional division of Wigan, in the said County of Lancaster, in which she resides, this 17th day of October, A.D. 1873, who saith that she hath been delivered of a bastard child since the passing of the Act of the 35th and 36th year of the reign of Her present Majesty, intituled "The Bastardy Laws Amendment Act, 1872," and more than [or] within twelve calendar months before this day, to wit on the 14th day of January, in the year of our Lord 1872; and alleges that one John Johnson, of Newton-le-Willows, in the county of Lancaster, is the father of such child, and maketh application to me for a summons to be served upon the said John Johnson, to appear at a petty sessions to be holden for the petty sessional division in which I usually act, to answer such complaint as she shall then and there make touching the premises.

ESTHER MANN.

Exhibited before me the day and year first above written.
HENRY WOODCOCK.

On the same day, the 17th Oct. 1873, in pursuance of the aforesaid application the said justice Henry Woodcock issued a summons to the said John Johnson to appear at a petty session to be holden on the 7th Nov. The summons recited the application in its exact words, and with the mistake contained therein, viz., "since the passing of the Act" of 1872.

In one of the affidavits upon which this rule was granted, the attorney of the said John Johnson stated that he attended the petty sessions at Wigan, and acted as advocate for him at the hearing of this summons on the 7th Nov. The case, he said, was called on, and the complainant was called as a witness on her own behalf by her

own advocate, and examined by him; and after hearing her evidence the justices dismissed the said summons.

Afterwards, on the 5th Dec. last, the said justice issued another summons to the said John Johnson to appear at a petty session to be holden on the 19th Dec. The recital in this summons was as follows: "Whereas, on the 17th Oct. last, application was made to me the undersigned one of her Majesty's justices of the peace, for the county of Lancaster, by Esther Mann, single woman, residing at Ashton in Mackerfield, in the petty sessional division of the said county, for which I act, who stated that she had been delivered of a bastard child on the 14th Jan. 1872, for a summons to be served upon you to appear at a petty sessions of the peace according to the form of the statute in such case made and provided."

It was stated in the said affidavit of the said John Johnson's attorney that he attended with counsel the hearing of this second summons; that when the case was called on, counsel objected that the justices had no jurisdiction to hear the summons or make an order, on the ground that the summons was issued on the same application on which the said first summons before mentioned had been issued, and that the said first summons had been heard and dismissed; and also on the ground that the said summons to which the defendant then appeared had not been issued in accordance with the said Esther Mann's application for the same. The justices, however, decided to hear the case, and they made an order against the said John Johnson for the payment of 2s. 6d. a week. This was the order concerning which this rule was granted.

By an affidavit filed in answer to the rule, the justices who were sitting in petty sessions on the 7th Nov. 1873, to hear the first summons of the 17th Oct., stated that upon the case of *Esther Mann v. John Johnson* being called on, the said 7th Nov., objection was taken by the attorney acting for and on behalf of the said John Johnson to the form of the summons of the 17th Oct., the objection being that it alleged the child was born since the passing of the Bastardy Laws Amendment Act 1872; whereas the said child was in fact born before the passing of the said Act. The affidavit proceeded: "The only evidence taken before us was given by the said Esther Mann, from which it appeared that the said child was in fact born before the passing of the said Act, and we allowed the objection; and thereupon the said summons was accordingly dismissed. We say that we did not on the said 7th Nov. hear and determine the said summons upon its merits, nor did we go into it or discuss the merits, but dismissed it solely upon the objection taken by the defendant's attorney as aforesaid."

A. L. Smith for the justices showed cause.—The short question is whether what took place before the justices on the 7th Nov., constituted a hearing of the summons. This certainly was not such a hearing as that in *Reg. v. Thomas* (8 L. T. Rep. N. S. 460), which is the authority relied upon by the defendant. There the first summons in pursuance of the application was heard, and in consequence of there being no sufficient corroborative evidence it was dismissed. Cockburn, C. J., said, "The justices can only proceed upon the application of the mother; she did make her application, and it was heard and dismissed. That application

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therefore was spent. If she had been within the statutable time she might have made another application, but here she was out of time." The only other case on the subject is *Potts v. Cumberbridge* (8 E. & B. 847), where it was held that, although a summons professed to be on a renewed application, it was good, having been founded upon an original application made in time; and that it was not necessary that the summons should issue at the time when the application is made. All that happened in this case may be said to have been the grant of an inaccurate summons upon the woman's application; she then asked for an accurate summons in accordance with her first application. [BLACKBURN, J.—Clearly it would have been all right if the summons had been changed before the hearing came on; why should it not be so after the decision of the justices?] The justices might have amended the summons; and if that be so, their dismissing it improperly could not have exhausted the application.

Torr, Q.C. and *French* supported the rule.—Even if this were a dismissal of the summons upon a preliminary objection, it was after a hearing sufficient to exhaust the application. It was held in *Reg. v. Stamper* (1 Q. B. 119), that the mere attendance upon the entry of an application to quarter sessions was a hearing of such application, although the applicants did not appear, and no order was made. The order for costs of the party appearing was supported accordingly. [BLACKBURN, J.—That was a mere hearing for the purpose of costs, the same effect as a nonsuit.] In *Rea v. Justices of Carnarvon* (4 B. & Ald. 86), the court refused to grant a mandamus to rehear an appeal when quarter sessions had declined to hear the witnesses of one side. [QUAIN, J.—Those cases have nothing to do with the second hearing of a summons upon a single bastardy application.] *Reg. v. Recorder of Exeter* (5 B. & Ald. 342), is an authority that a dismissal of an application on the ground of want of jurisdiction is a sufficient hearing to warrant an order of costs under 4 & 5 Will. 4, c. 76, s. 73. Further, the case of *Reg. v. Thomas* was the dismissal of the summons by way of nonsuit for want of corroborative evidence; yet it was held to be a hearing sufficient to spend the application. So here the first summons was not irregular; it was in accordance exactly with the words of the woman's application; upon the hearing, the evidence failed to support the application, and the summons was dismissed.

BLACKBURN, J.—I am of opinion that there was no determination of this first summons. I think the justices might have amended it upon the objection taken, and their unnecessarily dismissing it does not amount to a hearing and determination. It does not matter that the justices did not amend the summons; for on the single application, another summons if in time, may be taken out. The defendant has come here upon a point raised on the motion, which the evidence does not support. The material part of what took place upon the first summons was omitted from the defendant's affidavits; if it had been stated, no rule would have been granted. It must be discharged with costs.

QUAIN and ARCHIBALD, JJ., concurred.

Rule discharged.

Attorneys: for defendant, *Combe and Wainwright*, for *J. F. Bretherton*; for justices, *Gregory, Rowcliffe*, and *Bawle*, for *Leigh and Ellis*.

COURT OF COMMON PLEAS.

Reported by H. F. POOLLEY and JOHN ROSE, Esqrs.,
Barristers-at-Law.

Friday, Jan. 30, 1874.

MAUDE AND OTHERS (pet.) v. LOWLEY (resp.)

Corrupt Practices (Municipal Elections) Act 1872 (35 & 36 Vict. c. 60)—*Jurisdiction of judge at chambers to amend petition—What is a fresh petition—Power of superior court under sect. 21.*

Section 13 of the *Corrupt Practices (Municipal Elections) Act 1872* (35 & 36 Vict.) c. 60, directing that a petition shall be presented within twenty-one days after the day on which the election was held, is imperative, and admits of no exception but the one specified in that section, and therefore when a petition has once been presented it cannot be amended by the addition of other charges against the respondent, and a judge at Chambers has no power under section 21, sub-section 5, to make an order allowing an amendment, which varies the charge originally preferred. Per Lord Coleridge C. J. two classes of offences are included in section 7 of the *Municipal Elections Act 1872*—viz. the employment of voters living within the ward, and of voters living without the ward.

This was an application to set aside an order of Pollock B., dated 16th Jan., allowing the petitioner against the return of the respondent at a municipal election held at Leeds, to amend the petition in two paragraphs by the addition of certain words.

The petition had been presented on 29th Dec. and one ground of objection to the respondent's return was that he had contravened the prohibition in sect. 7 of the *Corrupt Practices (Municipal Elections) Act 1872*. The allegation under this section was that he had employed as paid canvassers persons who were on the register in a particular ward, and the amendment allowed by the judge at chambers was the addition of the words, "and in other wards of the said borough."

Tenant obtained a rule on the ground that the judge had no power to make the order.

Cave and Lockwood now showed cause.—This was a bye election to supply a vacancy caused by the death of a member of the Town Council, representing the North Ward in the Borough of Leeds. The election was therefore not general, but confined to the one particular ward, and the allegation in the petition was that the respondent personally employed and retained in the capacity of canvassers persons who were on the register as burgesses for that North Ward; this was a perfectly good and valid ground of objection under sect. 7 of the Act, but it was discovered subsequently, and after the presentation of the petition, that some of the burgesses so employed were on the register for another ward in the borough; and therefore, this being merely an error of description, and not going to the root of the charge preferred against the respondent, application was made to Pollock B. upon affidavits setting out the above facts, for leave to amend the petition by the insertion of the words, "and in other wards of the said borough," which would supplement or correct the description previously given. No question was raised at Chambers about jurisdiction, and the order was made, and as we submit properly made, under the power given by section 21. There is no doubt that amendment of

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particulars by a judge is allowed to be made: that is implied clearly in the case of the *Cheltenham Election Petition* (19 L. T. Rep., N. S. 820), where the note is as follows: "To induce a judge to allow an amendment of particulars by the addition of names to the list of persons bribed, there must be a strong affidavit of the fact that the cases have just been discovered." There is no suggestion here that the judge cannot amend particulars, the question is wholly as to the terms on which he will allow an amendment of the nature there sought to be made. If he can amend particulars, why can he not amend the petition, especially with reference to matters which are only of the character of particulars. [Lord COLERIDGE, C.J.—There is no specific power given in the Act to amend a petition: there is one and only one case specified, in which a petition may be presented after twenty-one days. Is this a fresh petition? Because if so, it not being within the exception, the court is concluded from allowing it.] No, the amendment does not constitute the petition so amended a new petition. It is true that the power of amendment is restricted by the proviso in subsect. 5 of sect. 21, "subject to the provisions of this Act," so that nothing must be done to cause in effect a contravention of the Act, as, e. g. to allow a new petition to be filed after the time limited. But a petition having been once duly presented the court has seisin as it were of the election and of the objection to it, and has discretion to amend as it may think to be just. We do not ask here for a different charge to be inserted in the petition, one of which we have not given notice already, but we want only to alter the particularity of the offence. So far from inserting anything new, we could get what we desire by striking out words, and those are words which we were not compelled to insert in the first instance, as they simply particularise the ward in which the burgesses alleged to have been retained as canvassers live. Surely the power of the court must be similar to that vested in it by s. 222 of the Common Law Procedure Act 1852 in respect of amendments of defects and errors in any proceeding in civil causes: and even before that Act the court admitted amendments even in penal actions, provided the amendment did not introduce any new substantive cause of action, or new charge against the defendant. See *Maddock v. Hammett* (7 T. R. 55), and *Chitty's Practice* 1, p. 238. [KEATING J.—Have you not made one charge in your petition, and would it not be another and a distinct one to charge the employment of men belonging to a different ward?] It is only giving to the respondent further information as to the same charge. If our allegation had been general the court would have had jurisdiction to allow particulars to be altered by the insertion of facts discovered after the twenty-one days. Are we to be limited now by the particularity of our allegations when we have given notice of the charge generally, and the petition was perfectly good without the words "in the North Ward." All the Act requires is a specification of the class of charge that is to be made. If there is an allegation of bribery by one person, the particulars may be amended by adding the names of others. To restrict an amendment of the nature of the present one would have the effect of causing all petitions to be drawn in the widest possible way, alleging everything and giving the smallest amount of information possible to the respondents. The general

charge is what a man is entitled to know from the petition and not the specific, the latter is in the nature of information to be given in the particulars. The 6th rule says, that "evidence need not be stated in the petition," and what we have here stated is merely evidence, and not a material part of the petition. If there be not power to amend here I submit that there cannot be in any case, not even if there were a clerical error, which this well might be.

Tenant in support of the rule.—The amendment wanted would not be effected by leaving out words, because s. 7 applies to two cases—viz., boroughs with wards and boroughs without. In boroughs divided into wards a voter has only a right to vote when there is a vacancy in his ward. This was a bye election, and therefore the men in respect of whom they now seek to charge us are men who were not voters at all at that election. They were on the register, but they could not vote this time. It will be seen therefore that the charge now sought to be made is a different one altogether from that preferred at first, affecting both the respondent and the men quite differently. Then as to the jurisdiction of the court to allow of an amendment: if the Act of Parliament makes no provision for amendment, and there has been no case of an application for the amendment of a petition except one, the *Youghal case* (1 O'Malley and Hardcastle, 296) where the judge doubted whether he had power to permit it, surely that is a strong argument against the existence of the jurisdiction. [KEATING J. referred to the *Norwich Election case: Stevens v. Tillet* (23 L. T. Rep. N. S. 623; L. Rep. 6 C. P. 147), where Byles J. had struck out allegations which were restored by the court.] Look also at the words of the statute, s. 13, subs. 1. This contemplates no alteration or amendment after the petition has been once presented: for it is to be published forthwith in the borough, and it cannot be that when notice has thus been publicly given of the grounds of the petition they may be varied and added to up to the very day of trial. Subsect. 4 again is strongly in favour of the same view; the securities propose themselves on the faith that they know what the charge against the respondent is: were amendments allowed, the securities might well say, This is not what we were bound for, this is a different charge to what we thought when we proposed ourselves. What is the meaning of limiting the time for the presentation of a petition to twenty-one days after the day of election, if the petitioners may afterwards amend in the manner proposed here. If they are right in their contention they are the only persons in the borough who are able to make this charge. Every one else is concluded by the terms of the 2nd subsection, and it cannot be intended that any such preference should exist. Independently of the wording of the statute itself an argument from analogy will be of value, if we find that in similar cases where the time within which a thing must be done, is limited by Act of Parliament no amendment has been allowed. Such are (i.) 20 & 21 Vict. c. 43, in respect of the three days specified therein, within which magistrates, who are empowered to state a case, must send it up. This has been held to be a condition precedent, which cannot be waived. (ii.) Actions against magistrates, which must be brought within the time limited: and there are no cases of amendments recorded as having been al-

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lowed. (iii.) The Statute of Limitations. In *Goodchild v. Leadham* (10 L. T. Rep. 348; 17 L. J. Ex. 90) application was made to add a defendant after declaration and plea. Since the issuing of the writ the Statute of Limitations had taken effect and barred the claim: and therefore the amendment was not allowed.

LORD COLERIDGE C. J.—I am of opinion that this rule ought to be made absolute, on the ground that the learned Baron had no jurisdiction to make the amendment. That is in my judgment the only question before the court. If it had been a matter of discretion we probably should not have reviewed it, but as here we have no fact on which to review the discretion exercised, we express no opinion as to that. This is a municipal election petition presented and prosecuted under the Act 35 & 36 Vict. c. 60, and we must therefore be guided by the words of that statute and that statute only. The statement as it stood originally in the petition was as follows: "The petitioners further say that the respondent J. Lowley did retain and employ persons who were included as burgesses on the register for the North Ward as canvassers for payment and reward," whereby the election is rendered void. I find in the 7th section of the Act, "no person who is included in a register for a borough or ward thereof as a burgess or citizen shall be retained or employed for payment or reward by or on behalf of a candidate at an election for such borough or ward thereof as a canvasser for the purposes of the election." This probably relates to two classes of offences included under the section, viz. the employment of voters living within the ward, and the employment of voters living without the ward. In the particular case before us, it was a bye election and so confined to one ward. The petition originally contained a perfectly good allegation of a specific charge, and being presented on 29th Dec., the petitioners now want on 14th Jan. to amend by the insertion of, "and in other wards of the said borough." As it was the petition specified one of the offences, as amended it specified both of the offences in the 7th section. Let us see if the court has any power to amend. The enabling clause is subsect. 5 of sect. 21, which says, "The Superior Court shall, subject to the provisions of this Act, have the same powers, jurisdiction and authority with reference to an election petition and the proceedings thereon, as it would have if the petition were an ordinary cause within its jurisdiction." It may be taken therefore that if this be an ordinary cause within its jurisdiction, and it be not restrained by anything, the court would have power to amend; but I am of opinion that the power of the court is restrained, and that the words "subject to the provisions of this Act" do restrain it. In subsect. 2, sect. 13, it is enacted that "a petition shall be presented within twenty-one days after the day on which the election was held," and only one case is mentioned in which an exception is allowed, and that a specific one. That exception has reference to a matter not found out since the election, but perpetrated since, and this to my mind is strong to show that unless in the specified excepted case, which this is not, the petition must be presented within the twenty-one days. Does then the allegation in the amendment here make this a new petition? It is argued that the charge is merely that of employing voters as paid canvassers, and that the amendment only corrects the particulars of the charge preferred. But if my interpretation of sect. 7 be right this is

not a well founded contention for the reasons I have given. That being so this would seem to go beyond the power which the words of the section confer upon us, and would exceed the provisions of the Act which do restrain it, and would also be contrary to the analogy of provisions in other statutes tending in the same direction brought to our notice by Mr. Tennant. I think the meaning of the Act to be, that it is to be ascertained once for all what the petition is, and after publication in the borough no change is to be made in it. The argument as to the position of the securities, which would be altered by the allowance of amendments, is also I think a good one; and it cannot be intended to confer upon persons who have presented an imperfect petition the right which no one else in the borough possesses, of preferring a new one after the proper time. Even if the result should be that petitions will be drawn vaguely, the order of the court as to particulars will possibly correct that in favour of the respondent; but whether that be so or not if the words of the statute are imperative, and I think they are, we must act on them.

KEATINGE J.—I also think that this rule must be made absolute. It clearly appears from a consideration of the Act that the intention of the Legislature was, that a person having been elected should know within twenty-one days whether his election was to be questioned or not: and if yes, upon what grounds. Therefore it was enacted that the petition should be presented within that space of time, and that the respondent might be able at once to know what was the charge against him, and make his preparations to meet it accordingly. Any additional charge is in reality a fresh petition, and so the intention of the Act would be defeated by its admission after the time limited. I agree therefore for the reasons given by the Lord Chief Justice that the court has no jurisdiction.

DENMAN J.—I have had considerable doubts during the argument whether the judge had jurisdiction to allow this amendment, and they are not quite removed. It appears to me to be not an unreasonable contention that the clause in section 7 does not constitute two offences, but only one—viz. the employment of a voter as paid canvasser, and that that offence being the one intended to be met by the Act, and to be alleged in the petition, the words "in the north ward" were a mere matter of description, which might be amended in the particulars. My doubts, however, will not lead me to go against the rest of the court, as to the added words making a new petition, because the very particularity of the petition might lead securities and others to think that there was only one charge to meet.

HONTMAN, J.—I am of the same opinion. There is no express power in the Act given to amend, only the very general section upon which this application is based. The effect of allowing an amendment would be to repeal the Act altogether. If there were no petition existing the matter would after the twenty-one days fall. This is like beginning a new petition. The original statement is as if it were said, "I am not proceeding against you for employing canvassers belonging to B. Ward." Now the petitioner wants to say the canvassers do belong to B. Ward. The charge is quite different, and the petition so amended would be a new one.

Rule absolute.

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REG. v. CREESE.

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Attorneys for petitioner, *Paterson Snow and Burney*.

Attorneys for respondent, *I. G. Darley for Newstead and Wilson, Leeds*.

CROWN CASES RESERVED.

Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

Saturday, Jan. 24, 1874.

(Before Lord COLERIDGE, C.J., MELLOR, J., and PIGOTT and CLEASBY, BB.)

REG. v. CREESE.

Misdemeanor—Fraudulent removal of property by debtor—Assignment before liquidation—Debtors' Act 1869, s. 15, sub-s. 5.—Bills of Sale Act.

A debtor on the 17th Oct. 1873 filed his petition for the liquidation of his affairs by arrangement, and a trustee was duly appointed. In Dec. 1872 he had assigned his property to L. and W., to whom he was indebted (L. having then advanced a further sum of 350*l.* for the purpose of enabling the business to be carried on), upon trust, for the benefit of L. and W. and his scheduled creditors. There were other creditors than those scheduled. On the 14th, 16th, and 17th Oct. 1873, the debtor fraudulently removed portions of the property so assigned to L. and W., and in respect of these removals, he was indicted under the Debtors' Act 1869, s. 11, sub-sect. 5, for having, within four months next before the commencement of the liquidation of his affairs, fraudulently removed part of his property, of the value of 10*l.* and upwards:

Held, that the offence was not proved, for the property was not his at the time of removal, but that of L. and W., the trustees under the assignment.

Secondly, that the assignment required to be registered under the Bills of Sale Act, 17 & 18 Vict. c. 36, and was inoperative against the trustee under the liquidation.

CASE stated for the opinion of this Court by the Chairman of the Worcestershire Quarter Sessions.

On the 7th Jan. 1874, the prisoner, Thomas Creese, was tried before me at the Worcestershire Quarter Sessions, on a charge of misdemeanor, under the 11th section of the Debtors' Act 1869, for having within four months next before the commencement of the liquidation of his affairs, in pursuance of the Bankruptcy Act 1869, fraudulently removed part of his property, of the value of 10*l.* and upwards.

The prisoner was, at the date of the assignment hereinafter mentioned, and for some years previously, the occupier of a farm of considerable extent, called "Fakener's Farm," as tenant to Earl Beauchamp from year to year.

In the month of May 1872 the prisoner was in difficulties, and made a disclosure of his affairs to Mr. Henry Lakin, the land agent of Earl Beauchamp, and to a Mr. William White, both of whom were creditors of the prisoner for moneys previously advanced; and it appeared from such disclosure that the prisoner was largely indebted, and to an amount exceeding the total value of his assets, and would be unable to continue the farm without assistance. Thereupon Mr. Lakin and Mr. White each made a further advance to the prisoner by way of temporary assistance, and Mr. Lakin entered into communication with Messrs. Berwick and Co., of the Old Bank, Worcester, who were the principal creditors, and ultimately an

arrangement was come to which is evidenced by the two documents next hereinafter stated.

The first of these documents (hereinafter referred to as "the assignment") was an indenture dated the 21st Dec. 1872, and made between the prisoner of the one part and the said Henry Lakin and William White of the other part, and duly executed by all the parties, whereby after reciting the tenancy of the prisoner of the said Fakener's Farm, and that he was then indebted to the said Henry Lakin and William White, and to the several other persons and firms whose names appeared in the first column of the schedule thereto in the several sums respectively set opposite to such names in the second column of the said schedule, and being unable to pay such sums, had applied to Messrs. Lakin and White to assist him in making some disposition and arrangement of his affairs, with a view to such ultimate liquidation of his debts as might be satisfactory to his creditors, and that, for this purpose, it had been agreed that he should assign unto Messrs. Lakin and White his tenancy of the said farm, and all other the property thereinafter mentioned, upon the trusts thereinafter declared; and that, in order to enable the business of the said farm to be carried on as thereinafter mentioned, Mr. Lakin had agreed to advance to the prisoner a further sum of 350*l.*, for the purpose of meeting any then pressing demands, and supplying other urgent occasions. It was witnessed that, in consideration of the sums of money then due to Messrs. Lakin and White, and of the further sum of 350*l.* then stated to be paid and advanced by Mr. Lakin, the prisoner thereby assigned all his estate, interest, tenant right, and tenancy in the said Fakener's Farm, and all the live and dead farming stock, corn, grain, hay and crops, implements of husbandry and effects, chattels, and utensils then in, upon, about, or belonging to the said farm; and all the household furniture and effects in and about the dwelling-house then in the occupation of the prisoner upon the said farm or elsewhere, and belonging to the prisoner. And all and every sums and sum of money owing to the prisoner, in respect of the said business, unto Messrs. Lakin and White, upon trust, to sell and convert the same into money at their discretion, in manner therein mentioned, and in the meantime, upon trust, to be and continue tenants of the said farm, and carry on the business thereof, and receive and take the moneys to arise therefrom, and to stand possessed of the moneys to arise from such sale and conversion, and from carrying on the said business; upon trust, in the first place, to pay the rent, tithe, rates and taxes, premiums on fire insurance, and the costs incidental to the assignment, and the current wages and outgoings necessary for carrying on the business of the said farm (including any salary to be paid to the prisoner, or any other person or persons, for managing the said farm), and also the said sum of 350*l.*, so advanced by Mr. Lakin, and costs and expenses of the trustees as therein mentioned. And in the next place in or towards payment, at such times and by such dividends, as the trustees or trustee for the time being of the said assignment might think fit, of the said several sums of money in which the prisoner was then indebted to Messrs. Lakin and White and his other creditors, as thereinbefore recited, together with interest upon any debts upon which it might be necessary or desirable that interest should be paid, in order to obtain time for

payment of the principal (and particularly upon a bank debt to the said Messrs. Berwick and Co.), and should stand possessed of the surplus (if any) of such moneys, upon trust for the defendant, his executors, administrators, and assigns. And it was thereby provided, among other things, that in case of any difficulty arising, as therein mentioned, the trustees should have power to wind-up the said farming business and other matters coming into their hands, either by proceedings in bankruptcy, as in an ordinary bankrupt's estate, or by liquidation, or by any other such means as they might see fit or think best, or might be advised, for the general good of the present creditors of the prisoner, without any let or hindrance from him. And it was also thereby agreed and declared that it was not contemplated that the said assignment should be registered under any Act of Parliament relating to the registration of bills of sale, and that Messrs. Lakin and White should not incur any liability by reason of the same not being registered.

In the schedule to the said indenture the names of sixteen creditors only appeared, whose debts amounted in all to 4210*l.* 9*s.* 10*d.* Among such creditors were the following :

	£	s.	d.
The said Messrs. Berwick and Co. for	2969	11	10
The said William White	473	17	2
The said Henry Lakin	213	1	0
Earl Beauchamp, for rent and tithe.....	271	19	6

The other twelve creditors in the schedule were for smaller amounts.

The assignment comprised substantially all the prisoner's property, and it has never been registered under the Bills of Sale Act. The provision in the assignment for not registering the same was inserted at the request of the prisoner, and for the purpose of saving his credit.

The second of the documents before referred to was an agreement dated the 23rd Dec. 1872, and made between the said Messrs. Lakin and White of the one part, and the prisoner of the other part, and signed by all the parties, whereby in effect the prisoner agreed to serve Messrs. Lakin and White in the capacity of bailiff or manager of the said farm, from the 21st Dec. 1872 until such service should be discontinued by a month's notice of either party, and whereby it was stipulated, among other things, that any purchases and sales which the prisoner might make on account of the said farm should be made only with consent of Messrs. Lakin and White, and that the prisoner was, so long as the service continued, to have a salary of 100*l.* per annum, and to occupy the house on the farm, except three rooms, which were reserved by Messrs. Lakin and White for occupation by any other person whom they might appoint.

The originals of these two documents will be in court on the hearing of this case, for reference if required.

Formal possession was given to Messrs. Lakin and White on the execution of the assignment, and thenceforth the prisoner continued to carry on the farm ostensibly as owner, but in reality as their bailiff and manager, and he did not, to the knowledge of Messrs. Lakin and White, until the time hereinafter mentioned, sell or purchase any stock on account of the farm, without the previous consent of them or one of them.

The said arrangement was communicated to Messrs. Berwick and Co. and to Earl Beauchamp,

and assented to by them. It did not appear at the trial whether the same was or was not communicated or known to any other creditor of the bankrupt.

Before the completion of the said arrangement, the prisoner handed to the trustees a list of debts, which he represented to be all that he then owed. That list comprised the debts mentioned in the schedule to the assignment, and also a number of other small debts, amounting in the aggregate to about 150*l.*, which it was intended to discharge at once out of the 350*l.* advanced by Mr. Lakin. The prisoner, however, knew at the time, and it was the fact, that he was then indebted to other persons not named in the list, and one, at least, of such undisclosed debts, viz., 300*l.* due to a Mr. Oliver Grub, on the prisoner's note of hand, is still unpaid.

All the debts mentioned in the said schedule to the assignment are also still unpaid, except four or five, the largest of which did not exceed 10*l.*

There are other debts of the prisoner still unpaid, which were contracted between the dates of the assignment and the commencement of the liquidation.

The 350*l.* advanced by Mr. Lakin at the date of the assignment, was intended by all parties to be applied, and was applied, as follows, viz., 150*l.*, or thereabouts, in discharging the small debts in the list produced by the prisoner and not included in the schedule to the assignment, and the remaining part thereof in carrying on the business of the farm for the benefit of the trust.

On the 17th Oct. 1873, the prisoner, while still carrying on the business of the said farm as the bailiff or manager of the trustees under the said arrangement, instituted proceedings in the County Court of Worcester, under the Bankruptcy Act 1869, for the liquidation of his affairs by arrangement, and on the 18th Oct. 1873 a receiver was appointed by the court, who thereupon proceeded to take possession of the said farm and the stock and effects remaining thereon.

On the 7th Nov. 1873, at a meeting duly summoned of the prisoner's creditors, it was resolved by a statutory majority, that the affairs of the said prisoner should be liquidated by arrangement, and one Francis Spooner was appointed and is now trustee under such liquidation. In the meanwhile it was discovered that on the 14th, 16th, and 17th Oct. 1873, the prisoner had, without the consent or knowledge of Messrs. Lakin and White, or either of them, removed a large quantity of stock comprised in the assignment, of the value of several hundred pounds from the said farm, and sold the same, and applied the proceeds for the most part in payment of the debts of creditors not named in the schedule to the assignment.

It is not necessary to state in detail the circumstances of such removal, since it has been found by the jury, and is for the purposes of this case to be taken as a fact, that the removal was fraudulent.

It was, however, objected by Mr. Godson, on behalf of the prisoner, that the stock so removed was vested in Messrs. Lakin and White by virtue of the assignment, and, consequently, was not, and ought not to be considered as the prisoner's property, within the meaning of the 11th section of the Debtors' Act 1869.

I declined to withdraw the case from the jury on that objection, being of opinion that the assignment was void against the trustee under the

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liquidation, either under the Bills of Sale Act for want of registration, or under the Bankruptcy Act 1869 as being an act of bankruptcy within twelve months of the commencement of the liquidation, and that having regard to the 15th section of the Bankruptcy Act 1869, and the 3rd section of the Debtors' Act 1869, all property divisible among the prisoner's creditors under the liquidation must be considered as his property, within the meaning of the last-mentioned Act, but I consented to reserve the point.

The jury returned a verdict of guilty, and the prisoner was sentenced to four months' imprisonment, but the sentence was respited, and the prisoner admitted to bail pending the decision upon this case.

The question on which I respectfully desire the opinion of the Court is—Whether the stock comprised in the assignment of the 21st Dec. 1872, and so removed by the prisoner as aforesaid, was the property of the prisoner within the meaning of the 11th section of the Debtors' Act 1869.

(Signed) R. PAUL AMPHLETT,
Chairman of the above Court of
Quarter Sessions.

Godson, for the prisoner.—The conviction cannot be sustained, for the property removed by the prisoner was not his, within the meaning of the 11th section of the Debtors' Act 1869, sub-sect. 5, which enacts "that any person adjudged bankrupt, and any person whose affairs are liquidated by arrangement, in pursuance of the Bankruptcy Act 1869, shall be deemed guilty of a misdemeanor, if after the presentation of a bankruptcy petition against him, or the commencement of the liquidation, or within four months next before such presentation or commencement he fraudulently removes any part of his property of the value of 10*l.* or upwards." By the assignment of the 21st Dec. 1872, the property was vested in Lakin and White; and it so continued to be up to the 17th Oct. 1873. But it was objected (1), that the assignment was null and void as against the trustee for want of registration under the Bills of Sale Act (17 & 18 Vict. c. 36); and (2) that it was null and void as being an act of bankruptcy. As to the first point, this was an assignment for the benefit of all the existing creditors of the prisoner, and not for a selected class only, as appears by the proviso at the end of the deed: "In case of any difficulty arising, the trustees might wind-up the business as they might see fit for the general good of the present creditors of the prisoner," and that being so, it was not a bill of sale that required to be registered: (sect. 7.) Secondly, this assignment was not an act of bankruptcy. This was an assignment not in consideration of a past debt merely, but there was an additional advance also. The case falls within the principle laid down in *Ex parte Fisher, re Ash* (26 L. T. Rep. N. S. 931; 41 L. J. 62, Bank.), that the assignment by a debtor of all his effects, partly as a security for a past debt and partly as a security for a substantial fresh advance, is not necessarily an act of bankruptcy. Here the 350*l.* being a substantial advance to enable the farm to be carried on, the assignment was valid: (*Mercer v. Peterson*, 37 L. J. 54, Ex.) It will be further contended that the deed is avoided by the title of the trustee under the liquidation relating back to the date of its execution; but the doctrine of relation does not apply to criminal cases.

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Jelf, for the prosecution.—First, the property removed was that of the prisoner, under sub-sect. 5 of sect. 11 of the Debtors' Act 1869. Sect. 3 of that Act enacts that "words and expressions" defined or explained in the Bankruptcy Act 1869, shall have the same meaning in the Debtors' Act 1869. The word "property," therefore, in sub-sect. 5 of sect. 11 of the Debtors' Act means property divisible among the debtor's creditors, and the sub-section will then read, "removes any part of his property divisible among his creditors." That this was a bill of sale within the Bills of Sale Act requiring it to be registered, admits of no real doubt. Secondly, if this assignment was an act of bankruptcy, the property removed was the prisoner's at the time of the removal. As to whether the assignment was an act of bankruptcy, the decisions are conflicting. According to the case *Ex parte Fisher, re Ash* (*sup.*), the amount of the fresh advance is to be looked at with reference to the amount of existing debts and the extent of the estate. The circumstances in this case show that it was an act of bankruptcy: (*Lomax v. Buxton*, 24 L. T. Rep. N. S. 137; 40 L. J., 150, C. P.) On the face of the deed it appears that 350*l.* was not a substantial advance: (*Ex parte Cohen*, L. Rep. 7 Ch. Ap. Bank. 20; 25 L. T. Rep. N. S. 473.)

Godson, in reply.

Cur. adv. vult.

CLEASBY, B. read the judgment of the court.—The defendant was indicted under the 5th subsection of sect. 11 of the Debtors' Act 1869, for having, within four months of his petition for liquidation, fraudulently removed a part of his property. And the question was, whether certain property removed by him on the 14th and 16th Oct. (which was within the period specified, and as to which the jury found that the removal was fraudulent) was his property, within the meaning of that provision. It appeared that on the 21st Dec. 1872, the defendant had by indenture, for certain consideration, assigned his farm and all the property thereon to certain persons as trustees, upon certain trusts there mentioned, and it is to be taken that the property removed was part of the property comprised in that deed. The property no doubt passed under the deed, but the deed was not registered, and it was therefore contended for the prosecution that by the Bills of Sale Act the deed was void, to all intents and purposes, against assignees in bankruptcy, and, therefore, at the time of the removal, the defendant was dealing with property upon which the deed did not (under the events which had happened) operate, and that it was therefore the defendant's property, and divisible among his creditors as such, so as to bring the same within the words and meaning of the section. We are all of opinion that the indenture required registration, and so was inoperative against assignees in bankruptcy. It was contended that the deed was a deed for the benefit of creditors, so as to come within the exemption in the Bills of Sale Act. It has been held in the case of the *General Furnishing Company v. Venn* (32 L. J., 220, Ex.), that creditors in the Bills of Sale Act means all the creditors; and, therefore, having regard to the trusts in the deed, viz., First, to pay the 350*l.* advanced by Lakin and White; secondly, to pay certain creditors named, being a selection of the defendant's creditors, and then in trust for the defendant, we are clearly of opinion that it does not come within the description of a deed

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for the benefit of the creditors, as interpreted by authority. It is a deed for the benefit of certain creditors, and of these unequally; and is, besides, a deed not founded upon the consideration of subsisting debts, but upon a new consideration and advance. That being so, as soon as there was a petition for liquidation, the deed was void as against the trustee, and the property comprised in the deed became the property of the trustee. But it does not, in our opinion, follow from this that it was the property of the defendant on the 16th Oct., or at any time between the assignment and the liquidation. The assignment is absolute, and irrevocably transfers the property. There is no imaginable state of things under which the property could return to the defendant. The resulting trust of the surplus, after paying all the debts specified, cannot be regarded as giving the defendant, even contingently, any interest in the goods themselves. In this case, the trustee under the liquidation does not make title to the property through the defendant, as being his at the time of the petition, but claims the goods as having been the defendant's at the time of the assignment, and then the assignment by the Act of Parliament cannot be set up against him. Just as in the case of payments by way of fraudulent preference, the bankrupt voluntarily, and in contemplation of bankruptcy, pays a particular debt. He can never by possibility acquire any right to it; but his assignee in bankruptcy can recover it back, not because it became his (the bankrupt's), but because he ought not to have made the payment, and deprived the estate of the benefit of the amount. If any person had seized or converted the goods after the assignment, the defendant could never have maintained an action, and the assignee, in order to recover, must treat it not as a wrong done to the defendant, but as a wrong done to him as trustee. The learned counsel for the prosecution appeared to feel that this conclusion was unavoidable, and he therefore mainly relied upon a construction of the sub-section in question which if correct might sustain the present indictment. He contended that the proper meaning of the words "his property," in the 5th sub-section, was property divisible among his creditors, and that as the property in this case became divisible among his creditors, the offence was proved. To this argument there are two answers: First, at the time when the act was done it was not property divisible among his creditors, but became so by notice at a subsequent event which might or might not have happened; and you cannot upon general principles (except by virtue of some clear and express enactment) alter the character of an act by something which occurs afterwards so as to make it criminal. But it is not necessary to resort to this answer, because we think the argument of the learned counsel as to the construction of the sub-section in question is not well founded. The argument was based upon a comparison of the words in the sub-section in question with that of other sub-sections, and particularly upon that of the 15th section of the Bankruptcy Act 1869. That section commences as follows:—"The property of the bankrupt divisible among his creditors, and in this Act referred to as the property of the bankrupt," so that in the Bankruptcy Act the words, "property of the bankrupt," means his property divisible among his creditors. The section then specifies

what property is not divisible, and therefore does not come under the word property, viz., property held in trust, and tools of trade, wearing apparel, &c., of a certain value, and afterwards what property is divisible. By the third section of the Debtors' Act 1869, words and expressions in that Act have the same meaning as in the Bankruptcy Act; so that in the Debtors' Act the words, "property of the bankrupt," mean "his property divisible among his creditors." They must be so read in the 5th sub-section, and the offence would consist in removing the property of the bankrupt divisible among his creditors, so as not to apply to trust property or tools of trade, &c. But we were asked, upon the comparison above mentioned, to read the words as not referring to the property of the bankrupt divisible, but to something which is not his property at the time, but afterwards becomes divisible by the operation of the bankruptcy law; a reading of the statute opposed, as we think, to true rules of construction, and violating the principle as to altering the quality of acts, innocent when done, so as to make them criminal by relation, to which we have already adverted. It therefore appears to us, that in the present case the defendant improperly removed the property of the trustees under the deed, and not his own property. The date at which the act was done warrants the conclusion that it was done to evade the operation of the bankrupt laws, which may be said of all cases of fraudulent preference; but another enactment is necessary, in addition to the 16th sub-section of the 11th section, and the three sub-sections of the 13th section, to meet such a case as this. We had a considerable argument, and many authorities were referred to for the purpose of showing that the assignment was an act of bankruptcy, so as to avoid the deed, and so give the assignees a title by relation back to that time. But as we have treated the deed as wholly void against the trustee in liquidation, by virtue of the Bills of Sale Act, it appears unnecessary to consider whether it is capable of being considered as an act of bankruptcy. It is fortunate that we deem this unnecessary, because (after the cases of *Lomas v. Buxton*, 24 L. T. Rep. N. S. 137; L. Rep. 6 C. P. 107, and *Ex parte Fisher, re Ash*, L. Rep. 7 Ch. Ap. 636; 26 L. T. Rep. N. S. 931), being unable in a criminal case to draw inferences of fact, we have hardly materials before us to determine whether the deed was an act of bankruptcy or not. It was suggested, that at all events the defendant, as bailiff with possession, had a qualified property in the things removed, and that this was sufficient, but, independent of other objections, the previous argument of the learned counsel had disposed of this argument, since it could not be contended that this qualified property was divisible among his creditors, so as to come within the section. For the reasons assigned, we think that the defendant, on the 14th and 16th Oct., did not remove his own property, and therefore the conviction must be quashed.

Conviction quashed.

CHAN.]

CLARK v. THE SCHOOL BOARD FOR LONDON.

[CHAN.]

COURT OF APPEAL IN CHANCERY.Reported by E. STEWART ROOPE and H. PRAT, Esqrs.,
Barristers-at-Law.

Jan. 14 and 15, 1874.

(Before the LORD CHANCELLOR (Selborne), and the
LORDS JUSTICES.)

CLARK v. THE SCHOOL BOARD FOR LONDON.

Elementary Education Act 1870 (33 & 34 Vict. c. 75), ss. 19 & 20—Injury to premises not taken under compulsory powers—Remedy of injured landowner—Compensation—Lands Clauses Consolidation Act 1845, s. 68.

Where a school board acquires land as a site for a school, under the compulsory powers given by the Elementary Education Act, and builds a school so as to obstruct the ancient lights of an adjoining landowner, the remedy of the adjoining landowner is by claiming compensation under the 68th section of the Lands Clauses Consolidation Act 1845, and not by bill for an injunction.

THIS was a motion for decree.

The facts of the case were as follows :

The plaintiff was the lessee of some houses in Winchester-court, Pentonville.

The School Board for London, under their statutory powers, took some land to the north of Winchester-court, and in May 1873 they commenced building a school house on this land; and part of the wall of this school house being within four feet of the windows of some of the plaintiff's houses, the plaintiff filed his bill to restrain the board from so building as to interfere with his ancient lights.

Before the bill was filed, the board had purchased the fee of the houses in question, subject to the plaintiff's lease, and had endeavoured to come to terms with the plaintiff for the purchase of his interest, but he asked too high a price, and they were unable to agree.

Malins, V.C. granted the injunction prayed for (see 23 L. T. Rep. N. S. 657), and the board appealed.

On the appeal motion coming on for hearing before the Lords Justices in July last, it was arranged that the plaintiff should give notice of motion for decree, and that it should be heard by the full Court of Appeal.

The case now came on for hearing.

The board had, since the case came last before the court, obtained power to acquire the plaintiff's interest compulsorily, so that the only question remaining between the parties was, which of them was to pay the costs of the suit, but this involved the question which of them was originally in the right.

This question turned upon the construction of certain sections of the Elementary Education Act 1870, the 18th section of which provides that "the school board shall maintain and keep efficient every school provided by such board, and shall from time to time provide such additional school accommodation as is, in their opinion, necessary in order to supply a sufficient amount of public school accommodation for their district."

The 19th section of the Act provides that every school board, for the purpose of providing sufficient public school accommodation for their district, may provide, by building or otherwise, school houses properly fitted up, and improve, enlarge, and fit up any school house provided by them, and

supply school apparatus and everything necessary for the efficiency of the schools provided by them, and purchase and take on lease any land, and any right over land, or may exercise any of such powers.

And by the 20th section of the Act, it is provided that, "with respect to the purchase of land by school boards for the purposes of this Act, the following provisions shall have effect (that is to say), (1) The Lands Clauses Consolidation Act 1845, and the Acts amending the same, shall be incorporated with this Act, except the provisions relating to access to the special Act; and in construing those Acts for the purposes of this section, the special Act shall be construed to mean this Act, and the promoters of the undertaking shall be construed to mean the school board, and land shall be construed to include any right over land." Then follow provisions that the board must give certain notices as to the land they propose to take, and that, having done so, they cannot take the land until they have obtained from the Education Department an order authorising them to put in force their powers under the Act, which order is not to be of any validity unless it has been confirmed by an Act of Parliament, which confirmation the Education Department are authorised to obtain.

The sections of the Lands Clauses Consolidation Act 1845, upon which the decision of the present case turned, are the 18th section, by which the promoters of an undertaking are required to give notice to all the parties interested in any lands which they propose to take; the 21st and following sections, by which provision is made for ascertaining, in case of dispute, the amount of compensation to be paid for the different interests in the land so taken; the 68th section, by which provision is made for settling the amount of the compensation to be paid to any party who is entitled to compensation "in respect of any lands, or any interest therein, which shall have been taken for or injuriously affected by the execution of the works;" and the 84th section, which provides that "the promoters of the undertaking shall not, except by the consent of the owners or occupiers, enter upon any lands which shall be required to be purchased, or permanently used for the purposes, and under the powers of this or the special Act, until they shall either have paid to every party having any interest in such lands, or deposited in the bank, the purchase money or compensation agreed or awarded to be paid to such parties respectively for their respective interests therein."

Glasse, Q.C. and F. A. Lewin, for the plaintiff.

—The only power given to school boards by the Elementary Education Act is to purchase land compulsorily, but the Act gives them no power to erect buildings on the land so purchased in such a way as to interfere with the rights of adjoining landowners. They have power to build school houses on land acquired by them under the Act, but they can only build in the same way as any other landowner. The 20th section, which provides that land shall include "any right over land," shows that the board in this case were bound to purchase the plaintiff's easement before they commenced obstructing his lights. They had power to purchase his easement compulsorily, and his remedy was not by compensation, under the 68th section of the Lands Clauses Consolidation Act, in respect of his land having been injuriously affected by the execution of the works, but he was

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right in filing this bill, and is therefore entitled to his costs. They referred to

The Elementary Education Act 1870 (33 & 34 Vict. c. 75), ss. 19, 20, 21 and 26;

Hutton v. The London and South-Western Railway Company, 7 Hare, 259;

Dawson v. Paver, 4 Rail. Cas. 81;

Peale v. Watson, Wm. Blackst. 922;

Reg. v. The Vestry of St. Luke's, Chelsea, 25 L. T. Rep. N. S. 914; L. Rep. 7 Q. B. 148.

Cotton, Q.C. and Speed, for the defendants.—

The Lands Clauses Consolidation Act is incorporated with the Elementary Education Act, and the plaintiff's remedy was under the 68th section of the Lands Clauses Act, by compensation in respect of his houses having been injuriously affected by the obstruction of his lights. The defendants were always ready and willing to give him such compensation, and he was therefore wrong in filing his bill, which ought to be dismissed with costs. They cited

Simpson v. The South Staffordshire Waterworks Company, 12 L. T. Rep. N. S. 380; 34 L. J. 380, Ch.;

Broadbent v. The Imperial Gas Company, 7 De G. M. & G. 486;

Hutton v. The London and South-Western Railway Company, 7 Hare, 259;

Lister v. Lobley, 7 Ad. & Ell. 124.

Lewin, in reply.

[During the argument, Lord Justice James referred to *Macey v. The Metropolitan Board of Works* (10 L. T. Rep. N. S. 66; 33 L. J. 377, Ch.)]

THE LORD CHANCELLOR (Selborne).—The question which has been argued here is one of some importance, and therefore we think it right to express our opinion upon it. It seems to us that the Legislature, in authorising school boards for important public purposes to exercise these large powers, subject to the supervision and authority of the department of the Privy Council for Education, meant to give them a discretion suitable to the nature and importance of the duties to be discharged by them. That discretion required that the persons entrusted with it should provide what in their honest judgment was the proper and suitable accommodation for the instruction of the children to be educated in the buildings to be erected by them upon the lands so acquired. And it appears to me that it is reasonable to understand that when compulsory powers to take lands for these public purposes are given, it is not absolutely left to their decision, because if they did not provide what a higher authority considered sufficient school accommodation, they could be required to provide more. I cannot but think that it was meant by that, that they should have the full benefit of all the provisions connected with the compulsory powers in the Lands Clauses Consolidation Act, to enable them to erect, according to their judgment and discretion, acting *bonâ fide*, such buildings, on such a space of ground, of such magnitude, and situated on such lands acquired by them, as they might think proper for the public purposes with which they have been charged. And it appears to me that that view is confirmed, not only by the general provisions of the Act, and the particular provisions in other respects of clause 19, but very much by the express words which are found in clause 19, and repeated in clause 20, that for the purpose of the buildings so to be erected by them, they should have power to purchase, not only the land but any right over land. And in the next clause (clause 20), it is said that the land,

within the meaning of this clause, shall be construed to include "any right over land." Those are very large powers; and, accordingly, they appear to me to show that the intention of the Legislature was to give the land which is required, to the school board absolutely, free of any *jus tertii*, which would control their absolute dominion over it for the purpose of the duty which they have to discharge. The right as against his neighbour which a man acquires by reason of the possession of ancient lights, is on the part of that neighbour strictly within the nature of the servitude known to the Roman and to the Civil Law by that phrase, *jus non altius tollendi*, which expresses positive liability, and which cannot be acquired against a neighbour by less than twenty years' user. It is, therefore, strictly within the meaning of these words, a right over land, just like the right to take a water course, or a right of way over land. The expression is a right over the land, whether exercised upon the surface or under the surface. It strikes me that it is about the largest expression that could have been used, if it was the object of the Legislature to show that the land was to be acquired absolutely on the part of anybody for the public service. If so, of course it must be the subject of compensation under the Act, which is as to the right of anyone interfered with; and the sole question which appears to me to be one of nicety, is the question in what mode that compensation is to be given, and whether by the introduction of these words, "any right over land," is included the right within the meaning of the word "land;" and whether there is in addition the power to purchase any right over land where there should be an interference with any servitude of this description, or whether the compensation is to be obtained under those provisions of the Lands Clauses Act, which deal with persons whose lands are not taken, but are injuriously affected. In my opinion, the sound view is, that the application, according to the nature of the subject-matter in the different compensation clauses of the Lands Clauses Act, is not meant to be altered by this special definition in the special Act, that in the word "land" is included "any right over land," or by the express mention that the compulsory powers are to extend over lands. The general Act contains a scheme of provisions applicable to working out the right to compensation, and that scheme of provisions varies according to the nature of the matter. In some clauses, where the purchase of land is meant, when land is to be taken notice is to be given, and if that notice is given, then there is a right to take it, and no injunction may be granted; but if it is attempted to enter without notice, or taking the proper steps, then an injunction may be granted. The interference with ancient lights is not a thing which can come within the expression, "entering upon." The word "entering" is inapplicable to it, and therefore such a clause as that is inapplicable to it. But there are other cases in the Lands Clauses Act, as to compensation to be made, such as a case in which no agreement has been arrived at, where an injurious act is proposed to be done upon lands not taken. That seems to me to be applicable to a case of this kind; and the more especially, because until the thing is done, in many such cases it cannot be known whether it will be injuriously affected, so as to be the subject of compensation or not. I am very glad to find

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that in coming to that conclusion we are not without authority, because the case under the Act for the Thames Embankment is entirely in point—I mean the case of *Macey v. The Metropolitan Board of Works* (10 L. T. Rep. N. S. 66; 33 L. J. 377, Ch.), which seems on all fours in that respect with the present case, for there the Thames Embankment Act, by a definition clause, similar to that which we have to construe here, says that the word “land” is to be construed to include easements and rights over land. In the execution of the works, the Metropolitan Board of Works proceeded to fill up the river in front of the plaintiff, Mr. Macey’s wharf, and it was found that that would destroy a very valuable right over land which he possessed, and he insisted that they should have given the notice, which they had authority to do, and so acquired the easement by purchase; but it was held that that was not so, that their right to enter and execute the works was not in abeyance till they had done the act, and that the nature of the right was such that the proper compensation clauses applicable to it were those which related to persons whose lands were injuriously affected, and not those which related to persons whose lands were purchased under what we call the purchase clauses. That is an authority that appears to be consistent with common sense, and from which, for my part, I do not differ. That, of course, disposes of the right of the plaintiff (if this case had been brought to a hearing without the intervention of an Act of Parliament altering the position of the parties) to maintain the injunction he has obtained, and to obtain a decree; but, it seems to us, looking at everything that has passed, and at the fact that this is an important general question, the decision of which to some extent will affect other cases, and on the other hand, looking at the fact that there is something special in the general form of this Act, in the clauses we have to construe (19 and 20), and particularly in these words as to “any right over land,” I think we shall not be doing wrong in dismissing the bill simply, without costs.

Lord Justice MELLISH.—I am entirely of the same opinion. During the argument I for some time thought it was doubtful whether, according to the true construction of the Act, the meaning was not that the school board were to purchase all such land as would enable them to build their school without interfering with the rights of any third persons, and that it was therefore merely a question of the sum which they were to pay for it; but I am now satisfied there is no ground for that view. I think they are only required, and indeed authorised, to purchase that quantity of land which they want for the purpose of building the school house, including, of course, the house which they are bound to have for the master; and it would have been rather an extraordinary thing, considering that the site and school are to be paid for by the ratepayers, if Parliament had made it necessary that a larger quantity of land should be purchased than was really necessary for the purpose for which it was required. I think, therefore, that they are not authorised, and had no compulsory power, properly speaking, to purchase any land except that land which might be required for the purposes of their new buildings. I think that that is made clear by those words which were pressed so much upon us, namely, “any interest or right over land;” because what the 19th section says is: “If you want to erect a school you may purchase land, and then, in

order that you may be perfectly unfettered in building the school, you may purchase any right which any third person has over that land;” that is, supposing they cannot get the whole of it by voluntary sale, that the owner of the land will not sell it, or the owner of the right over the land will not sell it. Then the next section proceeds to give the compulsory power, and incorporate the various clauses of the Lands Clauses Consolidation Act, and says that land shall include any right over land. I cannot help thinking that they have, under the compulsory powers, not only the land itself, which they acquire, but any right over that land, that is, any easement which any third person has over it; and if it is necessary, then they shall acquire that for the purpose of building the school. I agree entirely with the cases that have been cited. This makes no difference in the forms that are to be adopted for the purpose of getting compensation by a person in the position of the plaintiff; and by the terms of the Lands Clauses Act, his land is to be treated as land which has been injuriously affected.

Lord Justice JAMES.—The bill will be dismissed without costs, and the deposit returned.

Solicitors for the plaintiff, *Lewin and Co.*

Solicitors for the defendant, *Sydney Gedge and Co.*

COURT OF QUEEN’S BENCH.

Reported by J. SHORR and M. W. McKELLAR, Esqrs.,
Barristers-at-Law.

Nov. 15, 1873, and Feb. 16, 1874.

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New street—Highway—Dedication to the public—
18 & 19 Vict. c. 120, ss. 105, 106, and 250; 25 & 26
Vict. c. 102, ss. 80 and 112.

Respondent had leased land for building purposes, and the road between the houses he had built was, before 1863, used for sawpits and building materials. Since then footways on each side had been made by the appellants’ vestry, and paid for by the lessees or owners of the houses. A barrier had been kept by the respondent across part of the carriage-way, and the remainder could be closed by a folding bar. Respondent had occasionally prevented the passage of vehicles, and had once recovered damages for trespass along this road. The freeholders also had given public notice that they objected to this road being used as a thoroughfare. The appellants, without notice to the respondent, resolved to pave, and paved this carriage-way, and summoned respondent for his proportion of the expenses of a new street, under the Metropolitan Management Act 1855, s. 105. The justices decided that this road had not been dedicated to the public; that it was not a new street within that section, and that respondent could be liable only if the appellants had proceeded under sect. 106:

Held, on a case stated, that upon these facts the finding of the justices was conclusive as to the dedication of the road to the public; but that sect. 105 relates to the paving or forming new streets, as may be deemed expedient by the vestry, whether highways or not; that sect. 106 relates only to the repair of streets, not being highways, which have not been paved by the vestry; and that, therefore, the appellants had here proceeded rightly under sect. 105, and were entitled to recover.

THIS was a case stated by two justices for the

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county of Middlesex in petty session, under the provisions of the statute 20 & 21 Vict. c. 43, for opinion of the Court of Queen's Bench.

At a petty session of justices for the county of Middlesex, held at the Vestry Hall, Upper-street, Islington, in the said county, on the 12th Dec. 1872, a complaint made by the vestry of the parish of St Mary, Islington, in the said county, hereinafter called the appellants, against James Barrett, hereinafter called the respondent, for that he, being the owner of thirty-nine houses abutting on and forming part of St. John's-road, in the said parish, being a new street within the meaning of the Metropolis Management Act 1855, and the several Acts amending the same, and within the jurisdiction of the appellants, had refused to pay to them the sum of 427l. 11s. 6d., being the proportion of the expense of making the said road, as determined by the surveyor of the appellants, was heard by the said justices; and they adjourned the further hearing thereof until the 30th Jan. 1873, when they dismissed the same, and ordered that the appellants should pay to the respondent the sum of 21l. for the costs incurred by him in his defence on that behalf; and the appellants, being dissatisfied with this determination, as being erroneous in point of law, did then and there apply to the justices to state and sign a case, setting forth the facts and the ground of their determination, for the opinion thereon of the Court of Queen's Bench. And the said appellants, having duly entered into recognizances to prosecute such appeal, and to submit to the judgment of the court and to pay such costs as might be ordered thereby, they, in accordance with such request, stated and signed the following case for the opinion of the court:

The complaint against the respondent was made under the provisions of the 105th section of the Metropolis Local Management Act 1855, whereby it is enacted that, "In case the owners of the houses forming the greater part of any new street, laid out or made or hereafter to be laid out or made, which is not paved to the satisfaction of the vestry or district board of the parish or district in which such street is situate, be desirous of having the same paved as hereinafter mentioned; or if such vestry or board deem it necessary or expedient that the same should be so paved, then and in either of such cases such vestry or board shall well and sufficiently pave the same, either throughout the whole breadth of the carriage-way and footpaths thereof, or any part of such breadth, and from time to time keep such pavement in good and sufficient repair; and the owners of the houses forming such street shall, on demand, pay to such vestry or board the amount of the estimated expenses of providing and laying such pavement (such amount to be determined by the surveyor for the time being of the vestry or board)."

The word "street," by sect. 250 (the Interpretation Clause), "shall apply to and include any highway (except the carriage-way of any turnpike road), and any road, bridge (not being a county bridge), lane, footway, square, court, alley, passage, whether a thoroughfare or not, and a part of any such highway, road, bridge, lane, footway, square, court, alley, or passage."

It was admitted by the respondent that the resolutions of the vestry of the 7th Jan. 1870, to the effect that the road in question should be made, and that the cost of making the same should be apportioned on the owners of houses abutting thereon, had been

duly made; also, that he was the owner of thirty-one of such houses; that demand for payment of the sum so apportioned was made upon him; that he had refused to pay the same; and that, previously to the year 1861, he had applied to the vestry on many occasions to adopt the carriage-way, and take the same under their jurisdiction, but that subsequently he had changed his mind, and ceased to urge his request.

It was also admitted by both parties that the carriage-way only of part of the said road is referred to as the "street," for the non-payment of the cost of making which the complaint was made, and that the footways on each side have been already made by the appellants, and paid for by the lessees or owners, and are not referred to therein.

It was proved, on the part of the appellants, that a portion of the carriage-way of St. John's Park-road had been made by the vestry, pursuant to resolutions dated the 18th May 1866 and the 1st Nov. 1867, under the provisions of the 105th section of the Metropolis Local Management Act, and paid for by the lessees as owners of houses abutting thereon; that the footpaths on each side, throughout the whole length of the road, had also been made at the cost of the owners and maintained by the vestry, and that the public had free right to use the same; that a portion of the carriage-way of the road was the part which the vestry had resolved to make, and which was then the subject of the proceedings against the respondent; and although a barrier was placed across the carriage-way at one part, there was an open space left for the passage of at least one carriage at a time; and it was admitted by the appellants that the passage of vehicles along this portion of the road had occasionally been refused.

In reply to the said complaint, the respondent contended that the portion of the carriage-way in question had not been dedicated to the use of the public, either by himself or by the freeholders of the land; that this portion of the road did not abut on the property which belonged to him at the time when the appellants resolved upon taking the carriage-way under their jurisdiction, and that he took no part in the steps taken by the vestry to make that part, and charge the costs on the then owners of the houses abutting thereon. That this portion of roadway was not a thoroughfare to any place except by passage, with his consent, through a barrier placed by him there; and that the road was not a street, within the meaning of the 105th section of the Metropolis Local Management Act 1855, but came within the provisions of the next section (106) of that Act, as altered by sect. 80 of 25 & 26 Vict. c. 102. Sect 106 enacts that "The vestry or district board of any parish or district may, if they think fit, by notice in writing put up in any part of any street in their parish or district, not being a highway, declare their intention of repairing the same under this Act, and thereupon the same shall be from time to time repaired by them under the authority of this Act." Provided (as amended by 25 & 26 Vict. c. 102, s. 80) "That no street not being a highway shall be repaired, as in the said section mentioned, unless notice be given to the owners and rated occupiers of the houses in such street respectively; . . . and provided further that no such street shall be repaired, as in the said section mentioned, if within one month after notice has been given as

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aforesaid written notice of objection to such repair, signed by at least two-thirds of the owners or rated occupiers of houses in the said street, shall be given to the vestry or district board."

In support of this contention, the respondent proved in evidence that he had leased about twenty-four acres of land, situate between the Holloway-road and Junction-road, for building purposes, from the Corporation of the Sons of the Clergy; that he had formed the road for the purposes of the houses built on each side of such road; that previous to 1863 and 1864 the road was partly, if not entirely, occupied by sawpits and building materials placed there by him; that from the year 1863 to the present time he had placed a barrier across it, with an open space capable of being also closed by a folding bar, and had frequently during that time by himself or his servants prevented the passage of vehicles along the same; that the freeholders had never given permission or sanction to the dedication of the road, and in fact had never interfered except as hereinafter mentioned; that upon one occasion he brought an action against a person for trespass, who persisted in passing along the road, and judgment having been suffered by default, he recovered damages for such trespass; and that, at his request, a notice from the Corporation of the Sons of the Clergy, the freeholders, was given to the vestry on the 25th April 1870 that the said corporation, as such freeholders and landlords of the estate, of which St. John's Park and St. John's Park-road are part, objected to the said park and road being made public thoroughfares.

The justices found that on this portion of the roadway, which was the subject of the complaint under consideration, there are no side roads or streets whereby or along which any thoroughfare might be made or created, so as to assume a dedication of the existence of any facility to persons to use a portion thereof as a thoroughfare; and that the barrier can and does, when the respondent causes it to be closed, effectually prevent the free passage of vehicles along the whole length thereof.

After hearing the foregoing evidence, the justices were of opinion that the carriage-way of the road in question had not been dedicated to the public, and that, therefore, considering the provisions of the 106th section of the Metropolis Local Management Act 1855, as to streets not being highways, it was not a street within the meaning of the 105th section of the same Act, for the cost of making which the owners of houses abutting thereon are liable, and they made an order dismissing the complaint, and directing the appellants to pay to the respondent the sum of 21l., being the costs incurred by him in answering thereto.

The questions for the decision of the court are: First, whether the respondent, by the steps he has taken to retain his right to the road in question, has avoided a dedication of the same to the public, so that the same has not been dedicated; and, secondly, if the said road has not been dedicated to the public, whether it is a new street within the meaning of the 105th section of 18 & 19 Vict. c. 120.

If the court shall be of opinion that the said road (as to the carriage-way) is not a new street within the meaning of the said 105th section, the order dismissing the complaint is to be confirmed; if the court shall be of opinion to the contrary, an order is to be made on the respondent for the payment

by him of the cost of making such road in respect of the thirty-one houses of which he admits the ownership, as determined by the surveyor of the said appellants, with such costs as may be ascertained by the justices.

Theisiger, Q.C. (with him *Sturge*), argued for appellants, the vestry.—Dedication to the public is a matter of fact for the decision of the justices, and although the case contains some evidence of such dedication, I will not argue the first question left to the court. The second point is whether this road was a "new street" under sect. 105, or a street "not being a highway" under sect. 106 of the Metropolis Local Management Act 1855. If it be the former, the justices were wrong in dismissing the summons; if the latter, no notice has been given under sect. 80 of the Act of 1862, and therefore the owners and occupiers cannot be liable for the repairs. The question raised in *Pound v. Plumstead Board of Works* (L. Rep. 7 Q.B. 183), was whether an old highway could become a new street under this 105th section, by building houses on each side. Blackburn, J., said, at p. 194: "I think that it is plain the Legislature are here using the word 'street' in its ordinary popular and natural sense, and mean a place with continuous houses on each side. Then the interpretation clause enacts that the expression 'new street' shall apply to and include certain streets and places. It does not enact that the word 'street' shall be confined to the things enumerated in that action, but that it shall include them. That is perfectly intelligible. The Legislature, in sect. 105, from the context show that they are using the words 'new street' in the ordinary and actual sense of the word, and it does not follow that because, in the interpretation clause they say the expression 'new street' shall include certain other things, we are to say it does not include its own natural sense." Not only does a street in its natural sense include both a highway with houses on each side, and a place like this which is not a thoroughfare, but also that double meaning may be inferred from sect. 106, which relates only to a street which is not a highway: and also from sect. 96, which speaks of "all streets being highways." If a "street" be not necessarily a highway, sect. 105 clearly relates to the present case, and the justices were wrong. The Public Health Act 1848 (11 & 12 Vict. c. 63) was *in pari materia* with this Act, and by sect. 2 the word street is defined to "apply to and include any highway (not being a turnpike road)." Sects. 69 and 70 manifestly contemplate that a street should not be always necessarily a highway. This court held that an unfinished road, with occasional houses, and not dedicated to the public, was not a street within this Act, in *Reg. v. Vestry of St. Mary, Islington* (E. B. & E. 743), but that decision was not founded on the fact that the road was not a highway. In the Metropolis Management Amendment Act 1862 (25 & 26 Vict. c. 102), s. 112, the definitions for construction of the recited Acts (amongst them the Metropolis Management Act 1855), contain the expression "new street," which "shall apply to and include all streets hereafter to be formed or laid out, and a part of any such street, and also all streets, the maintenance of the paving and roadway whereof had not previously to the passing of this Act, been taken into charge and assumed by the commissioners, trustees, surveyors, or other authorities having control of the pavements or highways in the parish or place in which

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such streets are situate, and a part of any such street, and also all streets partly formed or laid out." It is clear from these two Acts that certain rights over private owners were intended to be given to the vestries, and that in this case the vestry has exercised the right given by sect. 105.

Manisty, Q.C. (with him *Poland*) for the respondent.—It is conceded that this is not a highway, and I admit that it is a street. The words, therefore, of sect. 106 exactly apply; and if this case were included in the previous section, the 106th could have no application at all. Sect. 105 is directed to those streets over which the public have rights, and sect. 106 to those which are private, like that in this case. If such a street as this were included in the application of both sects. 105 and 106, no board would ever adopt the latter, for by sect. 105 they can make the owners pay—under sect. 106 the public must pay. The word "street," without qualification, refers only to places over which the public have a right of passage. This was so held in *Curtis v. Embery* (L. Rep. 7 Ex. 369), upon the definition of the word in the Towns Police Clauses Act 1847. By sect. 3, "street is to extend to and include any road, square, court, alley, and thoroughfare or public passage within the limits of the special Act." In *The Local Board of Health of Hull v. Jones* (1 H. & N. 489), a footway was admitted to be a public highway repairable by the parish; but in the judgment it was stated, at p. 493, if this were not so, how the defendant was to be liable under sect. 69 of the Public Health Act. 1848, it was not easy to see. The question of what a "new street" was, under this section was considered, but not decided by this court, in *Reg. v. Dayman* (7 E. & B. 672). [QUAIN, J.—The point there raised was that decided by *Pound v. Plumstead Board of Works*.] Bacon, V.C., held that a forecourt, which was not dedicated to the public, could not be within the jurisdiction of a vestry under this Act: (*Rolls v. Vestry of St. Mary, Newington*, Weekly Notes, July 19, 1873, p. 168).

Thesiger, Q.C., in reply.—Sect. 105 limits, with respect to new streets, the powers which a vestry has over streets generally; but there is no ground for saying that a new street, according to that section, must be a highway. Sect. 106 refers to streets not highways, and not necessarily new.

Cur. adv. vult.

Feb. 16.—QUAIN, J., delivered the judgment of the court (Quain and Archibald, JJ.).—As to the first question, we think that the evidence set out justifies the finding of the justices, that the street in question had not been dedicated to the public, and we are of opinion, therefore, that the finding of the justices on this point is conclusive, and cannot be disturbed on this appeal. The next question is, assuming that the street has not been dedicated to the public, is it or can it be a new street within the meaning of sect. 105 of 18 & 19 Vict. c. 120? The 18 & 19 Vict. c. 120 has been amended by the 25 & 26 Vict. c. 102, which came into operation on the 7th Aug. 1862. The present street was formed and laid out after the passing of the last-mentioned Act, and is therefore subject to its provisions. The first Act (s. 250) enumerates various things which the word "street" shall "apply to and include." and amongst others "a highway;" and the second Act (s. 112) still further extends the meaning of the word "street," and also enumerates the things which the expression "new

street" shall "apply to and include." But (as was decided in *Pound v. Plumstead Board of Works*: 25 L. T. Rep. N. S. 461; L. Rep. 7 Q. B. 183) the interpretation sections do not exclude the ordinary and popular sense of the words or expressions used. Now we think, in the first place, that this street or part of a street is a street, and a new street, in the ordinary and popular sense of the words. It is a road with houses built on each side of it. These houses seem to have been built in 1863-4, and the footways adjoining the houses have been already paved by the vestry at the expense of the owners, or owners of the houses, and are open to the public. We further think that the part of the street in question is a "new street," within sect. 112 of 25 & 26 Vict. c. 102. That section enacts that the expression "new street" shall "apply to and include all streets thereafter to be formed or laid out, and a part of any such street; and also all streets, the maintenance of the paving and roadway whereof had not previously to the passing of that Act been taken into charge and opened by the authorities having the control of the pavements or highways in the parish in which such street is situate." This definition applies to all "new streets" in the ordinary sense of that expression, and even to old streets the maintenance of the paving and roadway whereof had not, before the passing of the Act, been taken into charge by the authorities having the control of the pavements and highways. We see no language in the Act which confines the expression "new street" to streets dedicated to the public. The Metropolitan Management Acts were passed with sanitary objects in view, and relate to the sewerage and drainage, and the paving, cleansing, lighting, and improvements of the Metropolitan districts. They are, in fact, Public Health Acts as well as Local Management Acts, and being framed with that view, they confer very large and extensive powers on the authorities, for the purpose of promoting the public health. Sect. 105, under which the vestry acted in this case, resembles sect. 69 of the Public Health Act 1868. That section applied to all streets, present and future (except they were repairable by the inhabitants at large), and the object of the enactment is explained by Alderson, B., in these words, in the case of the *Local Board of Kingston-upon-Hull v. Jones* (1 H. & N. 489; 26 L. J. 34, Ex.): "The object of the section is plain; where a road has been made which is not repairable by the parish, it may become a public nuisance or injurious to the public health, because there is nobody bound to put it into a proper state, and the Legislature thought it right that those who owned the property, for the convenience of whom the street is made, should be at the expense of preventing it from being a mischief to the public at large." It is obvious that the mischief may be the same, whether the new street is or is not dedicated to the public, for though dedicated to the public it may not be repairable by the parish; and even though it may be an old highway and so repairable by the parish, it was held in *Pound v. The Plumstead Board of Works*, that when converted into a new street the vestry may pave it under sect. 105, and charge the expense on the adjoining owners. It was argued for the respondent that this street, not being a highway, the vestry should have proceeded, not under sect. 105, but under sect. 106, as amended by sect. 80 of 25 & 26 Vict. c. 102, and such appears to have been

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the opinion of the justices. But it seems to have been overlooked that sects. 105 and 106 relate to two different things—sect. 105 relates to the “paving” of new streets which the vestry deem it necessary or expedient should be paved; and the word “paving,” by sect. 112 of 25 & 26 Vict. c. 102 includes the formation of the roadway as well as paving in the ordinary sense. Sect. 106, on the other hand, relates only to the “repair” of streets, and not necessarily “new streets” not being highways, and which have not been paved by the vestry—for where the new street has been paved by the vestry, under sect. 105, they are bound afterwards to keep it in sufficient repair. For these reasons we think that the judgment of the justices is erroneous, and that it must be reversed.

Judgment for appellants.

Attorney for appellants, *J. Layton*, Vestry Clerk.

Attorneys for respondents, *Crouch and Spencer*.

Tuesday, Jan. 27, 1874.

CAPE v. SCOTT.

Distress—Colour of right—Right of common pur cause de vicinage—Surcharge of cattle.

A claim of a custom from time immemorial that cattle upon adjoining commons strayed from one to the other, is a sufficient colour of right to deprive a commoner of one common of the remedy of distress against trespassing cattle of a commoner of the adjoining common, even although the latter has surcharged his own common.

THIS was an action of replevin for twenty sheep, the goods of the plaintiff.

The defendants secondly pleaded for an avowry and cognizance to the declaration, that the land on which the said sheep were taken was a portion of the common and waste land of the manor of Caldbeck, in the county of Cumberland; and the defendant Scott well averred, and the other defendant Hudson as bailiff well acknowledged as his bailiff and agent, because they said that before and at the time when, &c., the defendant Scott was and still is the possessor and occupier of certain lands and tenements in the manor and parish of Caldbeck, in the said county, the occupiers whereof have for thirty years before this enjoyed as of right, and without interruption, common of pasture over the said common or waste lands of the said manor of Caldbeck, for all their sheep and other commonable cattle, levant and couchant, upon their said lands and tenements so in the possession and occupation of defendant Scott, as aforesaid, at all times of the year as to the said lands and tenements of the said defendant appertaining; and because the said sheep in the declaration mentioned at the said time when, &c., were wrongfully in and upon the said common and waste lands of the said manor of Caldbeck, depasturing and doing damage there, so that the defendant Scott could not enjoy his said right of common as he otherwise could and might have done, the defendant Scott well avowed, and the other defendant well acknowledged the taking of the said sheep in the said common or waste lands of the said manor of Caldbeck, and justly, &c., as a distress for the said damage.

There were further avowries and cognizances claiming the said right for sixty years, and from time immemorial, in the same and other names.

The plaintiff pleaded to these avowries and cognizances of defendants, that the said land in the declaration mentioned was at the time, when, &c., a common thereafter called Caldbeck Common, forming part of the common and waste lands of the manor of Caldbeck, and by and from time immemorial had laid contiguous to a common herein-after called Uldale Common, forming part of the common and waste land of the manor of Uldale, and had never been divided or separated from the last-mentioned common by any hedge or fence whatsoever sufficient to prevent cattle from time to time feeding on either common going or escaping on to the other common; and the plaintiff said that from time immemorial the cattle duly put on either of the said commons, in exercise of rights of common over such common, have gone and escaped, and been accustomed to go and escape, on to the other common, and there to intermix with and feed with the cattle from time to time feeding on such other common; and the plaintiff further said, that he was possessed of a messuage and lands in the parish of Uldale, the occupiers of which, for thirty years before this suit, enjoyed as of right, and without interruption, common of pasture over Uldale Common for all their cattle, levant and couchant, upon the said land of the plaintiff, at all times of the year, as to the said land of the plaintiff appertaining. And the plaintiff said, that being in possession of such messuage and lands as aforesaid, just before the time when, &c., he put the said sheep, being his own sheep, levant and couchant, upon the said land of the plaintiff, upon the said Uldale Common, in exercise of his said right of common, and the said sheep of the plaintiff afterwards, and just before the said time when, &c., of their own accord, and without the knowledge and consent of the plaintiff, went and escaped out of the said Uldale Common, on to the said Caldbeck Common, and intermixed and fed with the cattle then and there feeding on the said Caldbeck Common, remained and continued on the said Caldbeck Common on the occasion aforesaid, without the knowledge of the plaintiff, and then necessarily and unavoidably a little trod down and depastured, &c., and necessarily did damage, &c., as in the said avowries and cognizances respectively mentioned.

There were further pleas alleging the same custom, and claiming the same right for plaintiff by occupation for sixty years, and from time immemorial, in the names of plaintiff and other persons.

The defendants, as to plaintiff's said pleas, said by way of new assignment, that the avowries and cognizances thereinbefore mentioned were not merely in respect of the said matters and acts in the said pleas attempted to be justified, but also in respect of the said sheep mentioned in the said pleas being more than were levant and couchant on the said land of the plaintiff, and also in respect of the sheep put upon the said common of Uldale by all the persons having rights of common of pasture thereon, being more than the number of sheep proportionable to the extent of the said common of Uldale, as compared with the said common of Caldbeck.

The above pleas of plaintiff and the defendant's new assignment were all demurred to.

Bompas, for plaintiff.—A right of common *pur cause de vicinage*, which is the plaintiff's claim in this case, is sufficient to deprive a commoner of an adjacent common of a remedy by distress. It was

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held in *Hall v. Harding* (4 Burr. 2426), that any colour of right in the owner of sheep trespassing upon a common was a good ground for replevin. All the previous authorities are cited and discussed in the arguments of that case, and all the more recent cases may be found in the notes to *Mellor v. Spateman* (1 Wms. Saund. 612). The right of common, *pur cause de vicinage* is explained in *Jones v. Robin* (10 Q. B. 620).

Crompton, contra.—These pleas of the plaintiff merely allege a permission to trespass, which does not amount to a colour of right. There is a great distinction between the relative positions of fellow commoners and of commoners of adjoining commons. In the case of the latter, there is no other remedy for a surcharge but distress.

BLACKBURN, J.—I think we need not trouble the counsel for plaintiff to reply. The question is, whether upon this replevin the avowant is entitled to have the sheep he distrained. In *Hall v. Harding*, which was replevin for sheep of a commoner distrained by another commoner, the plaintiff pleaded a right of common to himself as a tenant of eight acres of land in the parish, for two sheep for every acre, and that defendants wrongfully distrained his sixteen sheep put on the common in pursuance of his said right. The defendants replied, admitting the right claimed, that plaintiff had sixteen sheep upon the common over and above and besides the sixteen which the defendants distrained. Upon a demurrer to this replication, Lord Mansfield laid down, at p. 2432, that "Upon the whole, the right of distraining seems to turn upon this—that wherever there is a colour of right for putting in the cattle, a commoner cannot distrain; because it would be judging for himself in a question that depends upon a more competent inquiry; but where cattle are put upon the common, without any colour or pretence of right, the commoner may distrain them; and, therefore, he may distrain the cattle of a stranger. But here the plaintiff had a colour for putting in his cattle, though, in fact, he might exceed the due number. He might put them in under the idea or pretence of having more acres of land than he really had. And though in the pleadings he has stated his number of acres to be only eight, yet the question as to the right of distraining depends upon the nature of the common and not on the particular facts. In cases where a writ of admeasurement lies between commoners, one cannot distrain the other; he cannot for his own benefit admeasure the right of the other. Therefore, we are all of opinion that this distress was illegal and bad, and the plaintiff must have judgment." In this case the commoner distrained the sheep of the plaintiff, which the plaintiff had put on his own common, and which had strayed on to the defendant's. He does so, because, as he says, the plaintiff put more on his own common than he had a right to do; but this is exactly what Lord Mansfield says is a question which depends upon a more competent inquiry. The reason for that decision applies to this case; here the defendant, by distraining, has judged for himself, and for his own benefit has assumed to admeasure the plaintiff's right. Then it was argued that this alleged right, *pur cause de vicinage*, was a mere excuse for trespass, and could be put an end to at any time by inclosure; and that, therefore, it did not amount to such a colour of right as to justify the replication. Lord Wensleydale distinguishes this right from a custom, in

Jones v. Robin (p. 635): "A custom is the *lex loci*, ancient local law in some known district, as a hamlet, town, or manor, and does not arise from the grant, act, or agreement of the party; whereas this right does, and though not a profit *à prendre*, nor properly an easement, but rather an excuse for a trespass, has its origin from a presumed mutual grant or covenant between the owners of each farm that neither of them or their tenants should sue the other or his tenants, or distrain, or perhaps even drive their cattle away, so long as the farms should respectively lie open to each other. It is releasable like any other private right, and it ought, according to the rules of pleading, to be pleaded as a prescription." Whilst, therefore, these commons lie open and the licence is unrevoked, the colour of right in a commoner of an adjoining common is as good as that of a commoner of the same common. Even if the plaintiff were wrong in putting on too many sheep, and if he thereby injured not only his own commoners but also those of defendants' common, the defendant can have no right to decide the matter for himself by distress. There is no authority for distraining when there is such a colour of right, and it is contrary to principle. There may be some doubt whether the lord of a common can distrain for an overcharge, notwithstanding a colour of right advanced by a commoner. That point we need not determine. Gilbert says, however, in the *Law of Distresses*, p. 23: "Where a man turns in his cattle under some colour of right of common, the lord cannot distrain." Here, at all events, the distress was not justifiable upon the facts stated, and our judgment must be for the plaintiff.

QUAIN, J.—I am of the same opinion, although I had at first some doubts whether this answer to the distress was a sufficient colour of right to come within Lord Mansfield's rule. Mr. Crompton has, however, found no authority for any distinction. It was clearly established by *Dixon v. James* (2 Lutw. 1838), which was followed by *Hall v. Harding*, that the right of distress turns upon whether the plaintiff has a colour of right. Here it is stated that the plaintiff surcharged upon his own common, and that his sheep strayed upon the defendants'. It seems to follow that the defendant has no better remedy against the plaintiff, under such circumstances, than he would have against a commoner of his own common. There is no valid distinction between the two, and a distress is not the proper remedy where there is a colour of right.

ARCHIBALD, J.—I am of the same opinion. It is impossible to distinguish this from the principle laid down in *Hall v. Harding*. The origin of plaintiff's claim may have been a mere excuse for trespass, but it has grown into a right. There being, at all events, a colour of right in the plaintiff, the defendants cannot, according to any analogies in the law, obtain a remedy by distress.

Judgment for plaintiff.

Attorneys for plaintiff, *Bischoff, Bompas, and Bischoff*.

Attorneys for defendants, *Sharp and Ulithorne*.

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Monday, Feb. 2, 1874.

ALLAN v. LIVERPOOL UNION.

INMAN v. WEST DERBY UNION.

Rateability of occupiers of docks and sheds—Preference—Possession of docks board—21 & 22 Vict. c. xcii., ss. 63, 64, 82, 83, and 84—24 & 25 Vict. c. clxxviii., ss. 27, 28, 29, 30, 32, and 35.

By the Mersey Docks Act Consolidation Act 1858, the dock board may appropriate docks, quays, or sheds to persons for the reception of their vessels and goods, provided they and their servants shall be subject to the regulations of the board: and the board may let such quays and sheds on such rents, terms, and conditions as they may deem expedient; but all persons employed shall be in the service of or approved by the board.

By the Mersey Docks (Corporation Purchase) Act 1861, goods which have lain upon any quay or in any shed after a certain time, are liable, by way of penalty, to pay a rental per hour to the board.

The appellants had appropriated to them, under the Act of 1858, certain docks, quays, and sheds; and the board fixed a charge per square yard per annum for the use of the shed space, such charge to commence from the date of occupation. This was a provisional agreement, and made during the pleasure of the board.

When these appropriated premises were not actually in use by the appellants, they were, by direction of the board, and without appellant's consent, used by other vessels and their owners. The board's servants had access to all the premises. The goods of appellants were liable to the penal rent as well as those of other persons, and keys of some of the sheds were kept both by the appellants and the Customs' authorities.

One of the appellants had used some ground within the dock property, as a coal dépôt, for eighteen years. It was allotted to him for this purpose only and upon sufferance, he being bound to give it up at a week's notice; payment to be made for the use thereof at one penny per square yard per week.

Held, that the appellants were rateable for none of these premises.

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This was a special case, stated by consent of the parties under 12 & 13 Vict. c. 45, s. 11, and under an order of Lush, J., dated the 26th Oct. 1872, in which order is included the names of the Mersey Dock and Harbour Board as co-respondents. It has, however, been agreed, by and between all the parties, that the name of the Mersey Docks and Harbour Board shall be omitted from the case, they having undertaken, that if the court should be of opinion that the Mersey Docks and Harbour Board should have been assessed instead of the appellants, and that the name of the board can now be legally inserted in the rate in lieu of that of the appellants, they will admit that all proper notices have been given, and respites made, to enable the court so to insert their name.

By a rate made for the relief of the poor of the parish of Liverpool the 14th May 1872, the appellant was assessed in respect of his alleged occupation (amongst other premises) of certain sheds situate at the Wellington Dock, within the said parish, in the sum of 540l.

The assessment is in the following terms:

Name of Occupier.	Name of Owner.	Description of property rated.	Name and situation of property.	Gross estimated rental.	Rateable value.
Bryce, Allan and Company	Mersey Dock and Harbour Board	Shed...	Wellington Dock	£800	£540

Against this rate the appellant gave notice of appeal to the next Liverpool Quarter Sessions, and thereupon the aforesaid order was made.

The appellant is the managing owner of the Montreal Ocean Steam Ship Company, who own a line of steamers regularly plying to and from Liverpool.

The system of docks at Liverpool is under the control of the Mersey Docks and Harbour Board, hereinafter called "the board," and is managed by them under the provisions of their Consolidation Act 1858 (21 & 22 Vict. c. xcii.), and certain by-laws made thereunder, which Act and by-laws may be referred to as if they formed a part of this case. By the interpretation clause of the said Act, the word "docks" shall mean the present or future docks, basins, locks, cuts, entrances, graving docks, quays, piers, warehouses, sheds, roads, lands, and other works, belonging to or under the management of the said board.

By the 63rd section of that Act, it is enacted:

That the Board may from time to time appropriate particular docks, or portions of the same, to the use of steam vessels, either exclusively or in conjunction with sailing vessels, or to the use of any vessels engaged in particular trades, or to the use of any other vessels or class of vessels, or under any other circumstances which, in their judgment, may render such appropriation expedient.

The 64th section is as follows:

The board may from time to time, if they shall deem it expedient, but not otherwise, and upon such terms and conditions and upon payment of such rent or other sums of money, and subject to such restrictions and regulations as they shall think proper, set apart and appropriate any particular portion of any dock, wharf, quay, warehouse, sheds, or other works, with the appendages thereto, for the exclusive accommodation and use of a canal or railway company, or of any company or firm or individual engaged in carrying on any trade, who shall be desirous of having such exclusive accommodation for the reception of the vessels and goods belonging to or employed and conveyed by them. Provided that every company, firm, or individual to whom such exclusive accommodation as aforesaid shall be afforded, and their vessels, crews, servants, and other persons employed by them or under their control, shall be subject to the general rules and regulations of the board applicable to their docks, wharves, warehouses, sheds, and works, and the vessels entering the same, and the crews and other persons employed in and about such vessels.

By the 82nd section it is enacted:

That the board may construct such dépôts and sheds for the reception of goods, and may construct or erect such steam engines, cranes, hoisting and weighing machines, and other apparatus for facilitating the loading and discharge, for the masting or unmasting of vessels, and tanks for watering horses and cattle, and may provide such other conveniences upon or near the quays as they shall think expedient for the accommodation of the trade of the port of Liverpool; and may make reasonable charges for the use of any such dépôts, sheds, steam engines, cranes, hoisting and weighing machines, and other such apparatus and conveniences as aforesaid, and may let any such sheds, and also any portions of the quays which, with or without such sheds, they may think fit to appropriate as special berths for ships in any particular trade or otherwise, for such period and at and on such rents, terms, and conditions as they may deem expedient.

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By sect. 83 :

And whereas it may be expedient for the purpose of expediting the loading and discharging of the cargo of vessels, that the board should appropriate some of the docks for the reception of vessels, the cargoes whereof shall be loaded and discharged by persons employed by the board : Be it enacted that the board may from time to time set apart and appropriate any one or more of the docks for the purposes aforesaid ; and that, during such time as any dock shall be so appropriated, no portion of the cargo of any vessel lying there shall, without the consent of the board, be loaded or discharged into or from such vessel, except by persons employed by the board, and the board may make reasonable charges for the work so done.

And by sect. 84 :

So long as any dock shall be so appropriated as last aforesaid, all persons employed in any transit or other shed on or adjacent to the quay of such dock, in moving, removing, piling, unpling, cooping, or repairing or doing any other act whatever in connection with any goods for the time being deposited or lying in such shed, or being moved or removed to or from such shed, shall be persons in the service of or approved by the board.

Previously to the month of May, 1862, application was made to the board by the appellants' company for an appropriated berth, and other accommodation, for their said line of steamers, and thereupon the board caused to be sent to them the following letter :

Secretary's Office, Liverpool,
17th May 1862.

Gentlemen,—I beg to inform you that the dock board has appropriated, for the use of the steamers owned by you, the south side of the Wellington Dock, with the sheds attached, affording you a lineal quay space of about 680ft. room, to be reserved for working the last quay ; and has fixed that a charge of 2s. 6d. per square yard per annum be made for the use of the shed space, such charge to commence from the date of your occupation. It is to be understood that this is a provisional agreement, and made during the pleasure of the board. The harbour-master will notify as soon as the premises are ready for your occupation.—I am, Gentlemen, your obedient servant,
DANIEL MASON.

In pursuance of the above letter, and under the authority thereby conferred, and without any further or other authority, the appellants' company have, since May 1862, used and still continue to use for the purpose of the loading and discharging of their said steamers, the berth, quay space, and sheds thereby appropriated to them, paying the charges therein stipulated. The said sheds, which are constructed on the quay, consist of a range of sheds covered by one continuous roof, and subdivided by partitions reaching to the roof into a store shed, a transit shed, and two open sheds. The store shed is at the east end of the range of sheds, and is provided with doors and locks, and is used by the appellants' company for holding stores necessary for their ships when in port ; the transit shed is situate at or about the centre of the said range of sheds, having open sheds at each end of it. There are sliding doors communicating at each end with the open sheds, and one on each side communicating with the roadway and the dock respectively. This shed is used for the reception of goods liable to duty, but on which no duty has at the time been paid. The open sheds are situate one at the east end, and the other at the west end, of the transit shed. On the side next the roadway are sliding doors by which these doorways can be closed from the road (although this is never wholly done except at night). The side next the dock is only partially fitted with sliding doors, there being thirteen spaces and only ten doors,

which slide from end to end ; and to this extent the shed is open, and may be entered at any time by persons passing round the end of the shed, and along the edge of the dock. These sheds are used for the temporary deposit of goods landed from or about to be shipped on vessels lying in the adjoining berth. At the west end of the range is a lockup office, consisting of four rooms, in exclusive occupation of the appellant's company and their *employés*, for the transaction of shipping business. All the sheds are kept in repair by the board.

The Liverpool Docks are used by a great number of lines of foreign going and coasting steamships, and to almost all of these lines berths, with sheds and quay space, are apportioned by the board. When any such berth is not actually in use by any steamer of the line to which the same is specially appropriated, it may be and is occasionally, but really under the direction and by the authority of the dock master, used by other vessels without reward to the owner of such line, and without his consent. Vessels thus permitted to use berths appropriated to particular lines, are also entitled to use and do use the quay space and sheds attached to and enjoyed with such appropriated berth. Any steamer of the line to which such berth has been appropriated, requiring to use such berth, shed, or quay space, whilst the same is being used by such other vessel as aforesaid, is compelled to wait until such other vessel is completely loaded or discharged before she can obtain the use of such berth, quay space, and sheds.

In addition to the use of the berth and sheds last mentioned, it is usual and customary when such appropriated berth is not occupied by a steamer of the appellant's company, for the dock master, without consulting the appellant, to put into the said berth vessels waiting for a berth at the Wellington Dock coal tips ; and such vessels, whilst lying in the said berth, often receive on board their stores, water, and other articles, which are brought alongside through the sheds in carts.

By virtue of the 88th section of the said Act, goods which have been more than forty-eight hours upon any dock quay, are liable to pay a rental to the board of 5s. per hour. Goods so lying in the appropriated sheds are liable to this charge, whether they be the goods of those to whom the sheds are appropriated, or of any other person. Such charge has sometimes, at the instance of the appellants, been exacted by the board from, and paid to the board by, the owners of goods not the property of the appellants, but deposited on landing from the appellant's vessels in the sheds appropriated to them.

When the consignees of goods discharged out of the appellant's steamers desire, as they not unfrequently do, that such goods may remain upon the said appropriated shed or quay space, at an ordinary quay rent, they may make their arrangements with the board only, and pay the rent to the board ; but no such arrangement is made by the board if the quay space is required in connection with the discharge or loading of other vessels. It is only when such goods interfere materially with the working of the appellants' steamers that the appellants call upon the dock board to exact the penal rent aforesaid. The board has not accounted, nor is it accountable, to the appellants for money so received by the board as in this or the last paragraph mentioned.

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The said sheds and quay space, except the store shed, are continually traversed by horses, carts, and workmen engaged in and about the loading, discharging, or repairing of vessels lying in the berth appropriated to the appellants. They are also traversed by all persons going to or from any ships moored outside of the said berth, or to or from that part of the said dock.

Each door of the transit shed has two locks; the key of one lock is kept at the Custom-house, and the key of the other by the appellants. Whenever a vessel is discharging, and at all times during the day, the said transit shed is open, and the servants of the board go in continually and at their pleasure, for the purpose of examining the goods therein, and seeing that the byelaws of the board are observed, or for any other purpose connected with their duties. When the sheds contain goods or ships' stores belonging to the appellants, they are watched at night by watchmen employed by the appellants.

All sailing vessels and steam vessels which come to the port at regular intervals, are loaded and discharged at berths provided with sheds of the same kind as those above mentioned; but the owners or agents of such vessels have no right to the preferential use of any berth or shed, nor are they required to make any payment equivalent to the 2s. 6d. per yard, charged as above-mentioned, for an appropriate berth.

The question for the opinion of the court is, whether or not the appellant is liable as occupier of the shed space, to be assessed to the relief of the poor, and to pay the rate appealed against in respect of such assessment, or any part thereof.

Judgment may be entered in the said court of quarter sessions, in conformity with the decision of this court, and for such costs as this court may adjudge.

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THIS was a case stated under exactly similar circumstances to the last, in order to raise the question of the liability of the appellant, who is the managing owner of the Liverpool, New York, and Philadelphia Steamship Company, to be rated for a coal depot and certain transit sheds, situate at the Huskisson Branch Dock No. 1, of the Mersey Docks, and within the township of Kirkdale, in the appellants' Union. The following are the material parts of this special case:

The rate appealed against was the following:

An assessment for the relief of the poor of the township of Kirkdale, in the county of Lancaster, and for other purposes chargeable thereon according to law, made the 1st July 1872, after the rate of twenty-one pence in the pound, which is estimated to meet all the expenses which will be incurred before the 25th March next:

Name of person rated.	Property in respect of which he is rated.	Owners of property rated.	Gross value.	Rateable value.	Amount of rate at in the £ s. d.
William Inman }	Huskisson Dock.		£	£	£ s. d.
	Coal depôt } Mersey Dock and Harbour Board		126	117	10 4 9
	Huskisson Branch Dock.				
Ditto ...	Transit shed }	Ditto	618	585	45 18 9
Ditto ...	Ditto	Ditto	300	186	16 5 6

The Huskisson Dock, and Huskisson Branch

Dock, their wharves, quays, and sheds, are a part of the estate of the Mersey Docks and Harbour Board (hereinafter called "the Board"), and are wholly within the township of Kirkdale. The said docks are surrounded by a quay, and on different parts of the said quay are large sheds, hereinafter more particularly described, which are placed there for the convenience and protection of the shipper and consignees of goods shipped from or unloaded on to the said quays.

The appellant is the managing owner of the Liverpool, New York, and Philadelphia Steamship Company, and as such may, for the purposes of this case, be taken to be the owner of the said company's line of steamers plying between Liverpool and New York, and commonly called or known as the "Inman Line." On the 22nd Oct. 1861, application was made to the board by the appellant for an appropriated berth, and other accommodation for his said line of steamers, and thereupon the board caused to be sent to the appellant the following letter:

Mersey Docks and Harbour Board, Secretary's Office.
Liverpool, 17th May 1863.

Sir,—I beg to inform you that the dock board has appropriated to the use of the steamers owned by you, one quay and stage berth on the south side of the new Huskisson Branch Dock, with the sheds Nos. 5, 6, and 7, affording you a lineal quay space of about 544ft., and has fixed that a charge of 2s. 6d. per square yard per annum be made for the use of the said shed space, such charge to commence from the date of your occupation. It is to be understood that this is a provisional arrangement, and made during the pleasure of the board. The harbour master will notify you as soon as the premises are ready for your occupation.—I am, Sir, your obedient servant,
W. Inman, Esq. DANIEL MASON.

The appellant subsequently required further accommodation for his said line of steamers, and, accordingly, on the 2nd March 1864, a resolution was passed by the board, which was entered in the minutes of the board as follows:

At a meeting of the committee for management of the docks and quays, held this 2nd March 1864. Present, &c.

The question of the arrangement of the berth on the south side of the Huskisson Branch Dock having been considered, and letters from Messrs. Molvor, Messrs. Bibby, and Mr. Inman having been read—It was resolved, That the berth now occupied by Messrs. Bibby be withdrawn from them. That Messrs. Molvor have the sheds Nos. 1, 2, and 3, with the quay space fronting them, and that the shed No. 4, and its quay space, be added to the berth now occupied by Mr. Inman. That in consequence of this arrangement Mr. Inman is no longer to have the occasional use of the Huskisson Dock; and the berth in the London Dock, now occupied by Messrs. Molvor, is to be withdrawn from them. These resolutions to be carried out by the harbour master as soon as possible.

(Signed) JOHN HARRISON, Secretary.

The said resolution was confirmed by the board, and notice of the resolution and confirmation was given by the board to the appellant. The area of the transit sheds, Nos. 4, 5, 6, and 7, or, as they are called, "shed space," mentioned in the foregoing letter and resolution, and thereby appropriated to the appellant, is 6242 square yards, the annual payment made as rent to the board for the same is 780l.

In pursuance of the letter and resolution above set out, and by virtue of the authority and rights thereby conferred upon him, and of no other authority or rights, the appellant has, since May 1864, used and still continues to use, for the purposes of the loading and discharging of his said steamers, the berth, quay space, and sheds thereby appropriated to him, paying the charges therein

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stipulated. These charges are paid in addition to the ordinary tonnage rates, which are paid by the appellant in respect of the use of the docks by his steamers.

The Huskisson Branch Dock No. 1, is surrounded by a continuous series of sheds or compartments erected on the quay, of the same description as those hereinafter mentioned, which have been used by the appellant as herein mentioned, on all sides except the west, on which it opens into the Huskisson Dock. These sheds or compartments are divided the one from the other by partition walls at right angles to the line of the dock quay. The berth adjacent to and coextensive with such sheds as are used therewith, is sufficient for the berthing at the same time of two of the appellant's steamers. All the sheds are similar in construction and arrangement, and are very spacious and lofty. The walls are of brick and the roof slated, the division or partition walls between the compartments are also of brick. Each compartment has three sliding wooden gates or doors on the side next the dock, and two of such sliding gates or doors on the side next the road. There is in each division or partition a wall separating the compartments the one from the other, and running at right angles to the line of the dock as above mentioned; a similar sliding gate or door, affording access from one to the other, goes along the whole continuous series. Each shed or compartment is capable of being separately closed and shut off from the rest on all sides, or the whole four may have the internal communication with one another open, and be closed on the outside. Each of these gates or doors, whether in the outer or partition walls, is provided with two locks, the object of the two locks is this, viz., that if any goods liable to duty are discharged from the steamers, they may be temporarily placed in some one or more of the sheds as in a bonded warehouse, until duty is paid; and in such a case all the gates of the particular shed in which the goods are so deposited are locked, the key of one lock being kept by the appellant, and the other by the Customs' authorities. The officers of the board do not keep keys of the said shed, but they are entitled at any time in the course of their duty to enter and examine the same. These Customs arrangements are provided for by ss. 77 and 79 in the said Act, and in part seven thereof provisions are made with respect to transit sheds, and warehouses.

Besides the berth, quay space, and sheds appropriated to the appellant by the said letter and resolution, a further space was appropriated to the applicant by the following resolution of the board, dated the 15th Oct. 1856:

Read letter from Mr. W. Inman, agreeing to the conditions on which 400 square yards of ground on the east quay of the Huskisson Dock, opposite the berth occupied by the Philadelphia line of steamships, has been allotted to him for the purpose of storing coals for the use of those steamships, viz.: that it shall be used for the purpose stated, but for no other purpose, upon sufferance only, upon his agreeing to pay one penny per square yard per week for the use of the same, and engaging to remove the coal and clear the ground at his expense at any time, one week's previous notice being given.

On the 27th Jan. 1869, the following resolution of the board was passed and communicated to the appellant:

A report from the traffic manager (District A), stating that the coal bank of Mr. W. Inman, on the land rented by him from the board, situate between the Customs

depôt at the Huskisson Dock and the west wall of the Sandon Graving Docks, has fallen down and gradually encroached on the surrounding space, and a communication from the engineer, stating that the land now occupied by the storage of coal, and by an office-shed for stores, and a quantity of planks, makes a total of 1140 square yards, and suggesting that the rent therefor should be charged from the 1st Oct. 1868; also a letter from Mr. Inman, agreeing to pay rent on the said area, from the date in question, were read and approved—the rate of rent, and terms and conditions of tenancy being the same as heretofore.

At the time of the making of the said rate, the whole space of 1140 yards, as aforesaid, was used by the appellant in pursuance of the above resolutions, as a place for the temporary storage of coal about to be loaded upon and consumed in his said steamers. The said space is not railed round or fenced or covered in, and the board and their servants are at liberty at all times to enter upon and examine the same. It was at the time of the making of the said rate covered with coal, except at the south-west corner thereof, where there are two wooden huts or sheds, one used by the appellant as an office for the accommodation of a clerk engaged about the coals, and the other as a shelter and tool house for the men engaged upon the coals. The former shed rests upon wooden pegs not let into the ground. The latter is supported by four wooden corner props or uprights, which are let into the ground. The said further space is described in the rate as "Coal Depot."

The Liverpool Docks are used by a great number of foreign going and coasting steamers, and to almost all of these lines berths with shed and quay space are appropriated by the dock board. The berths are not always occupied by steamers belonging to the line to which the berth is appropriated, and the berth, with the sheds and other advantages and facilities connected therewith, is then occasionally, by the direction of the dock master acting in the usual course of his duty, used by other vessels without reward to the steamship owner whose berth is so occupied, and sometimes without his consent being asked; although sometimes his consent is asked. In the twelve months immediately preceding the laying of the said rate, no strange vessel was so placed in the appellant's berth, the same being rarely unoccupied by at least one of the appellant's steamers; but during the period in respect of which the present rate was prospectively laid, there have been five occasions on which strange vessels have been placed in the appellant's berth; on three of which the strange vessel was placed in the berth without his consent being asked, and by the authority of the dock master in the usual course of his duty; on the remaining two occasions the appellant's consent was asked and given.

By virtue of the Act of 1861, ss. 27, 29, 30, 32, and 35, goods which have, without the permission of the board, lain upon any dock quay after four o'clock in the afternoon of the second day after landing the same, are liable, by way of penalty, to pay a rental to the dock board at the rate of 5s. per hour; and after four o'clock of the afternoon of the third day after landing, are liable to pay a like rental of 10s. per hour; goods so lying upon appropriated sheds or quay space are liable to this charge, whether they be the goods of those to whom the quay space is appropriated, or of any other person. This rent has on thirteen occasions during the twelve months preceding the making of

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the said rate, but always at the instance of the appellant, been imposed by and paid to the board in respect of goods not the property of the appellant, but deposited in the quay space appropriated to him. The board has never accounted or offered to account, nor is it accountable to the appellant for money so received. They put their powers in force at the request of the appellant, in order to compel the owners to remove their goods from the space so appropriated by the board to the appellants.

When the consignees of goods discharged out of the appellant's steamers, desire, as they not unfrequently do, that such goods may remain upon the said appropriated quay space at the ordinary quay rent, they make their arrangements with the board only, and pay the rent to the board, who appropriate the same for their own purposes, without accounting or being liable to account for the same to the appellant. When such goods interfere materially with the working of the appellant's steamers, the appellant calls upon the dock board to compel the consignee of the goods to remove the same, and they are thereupon removed.

The said sheds when open, and the whole of the quay space appropriated aforesaid to the appellant, are continually traversed by horses, carts, and workmen engaged in and about the loading, discharging, or repairing of vessels lying in or outside the berth appropriated to the appellant and by foot passengers to or from any part of the docks whenever a vessel is discharging, and at all times during the day the said sheds are open, if necessary, and the servants of the dock board go in continually, and at their pleasure, for the purpose of examining the goods therein, or for any other purpose connected with their duties.

All sailing vessels and steam vessels which come to the port at irregular intervals are loaded and discharged at berths, provided with sheds of a similar description to those above mentioned, or of some other construction answering the same purposes; but the owners of such vessels have no right to the preferential use of any berth or shed, nor are they required to make any payment equivalent to the 2s. 6d. per yard charged as above mentioned for an appropriated berth.

The Mersey Dock Board is assessed for the poor rate by the respective township and by other parishes or townships in which their said estate lies, in respect of their property generally, and such assessment is based upon the receipts of the board, as shown in their accounts, which receipts principally arise from general dues levied by the board upon all vessels and goods in the Liverpool Docks; but many questions as to the proper mode of the said assessment and the amount thereof are still open and pending. The basis on which such assessment should be made is contested by the dock board, and has not yet been decided. The payment received by the appellant from the board in respect of the said sheds and depot is deducted from the receipts above mentioned in calculating the assessment of the board as it now exists in the respective township. The appellant has been rated and paid rates in respect of his occupation of the said sheds and coal depot since the passing of the above resolutions.

The question for the opinion of the court is, whether or not the appellant is liable as occupier of the said sheds and coal depot to be assessed to the relief of the poor and to pay the rates appealed

against in respect of such assessment, or any part thereof.

Judgment may be entered in the said court of quarter sessions, as provided by the said order, in conformity with the decision of this court upon the above question, and for such costs as this court may adjudge.

Milward, Q.C. and *Gully* (with Sir J. Karslake, Q.C.), argued for the appellants in both cases.

Littler, Q.C. (with him *Batten*), for the respondents, the Liverpool Union.

Aspinall, Q.C. (with him *Meadows White*), for the respondents, the West Derby Union.

Manisty, Q.C. and *Crompton*, appeared to watch both appeals on behalf of the Mersey Docks Board.

The nature of the arguments will appear from the judgments.

BLACKBURN, J.—In this case there is some difficulty in getting at the facts, but not much as to the law to be applied to them. The rate must always be upon the person who has exclusive occupation; if he can bring trespass against everyone who might interfere with him, he is liable to be rated. On the other hand a lodger, although he may have exclusive possession against all the world except his landlord, is not rateable. He could not maintain ejectment or trespass *quare clausum fregit*, because the landlord retains to himself possession; and on account of his occupation of the whole house, the landlord still continues to be rateable. This was so held in the case of *Smith v. The Overseers of St. Michael, Cambridge* (3 E. & E. 383), where it is stated in the judgment delivered by Hill, J., p. 390: "It is true that the exclusive enjoyment of the rooms is to be given; but that is the case where a guest in an inn, or a lodger in a house, has a separate apartment, or where a passenger in a ship has a separate cabin; in which case it is clear that the possession remains in the innkeeper, lodginghouse keeper or shipowner." The sole question here is, whether the Mersey Docks Board parted with the exclusive possession of the premises occupied by the appellants in these cases? That depends not only upon the words used in the statutes and the documents, but also upon all the facts submitted to our consideration. By the first Act of 1858, sect. 64 expressly enables the board to set apart and appropriate any particular portion of any dock, wharf, quay, warehouse, sheds, or other works, with the appendages thereto, for the exclusive accommodation and use of any individual or company desiring it; but this is accompanied with a proviso that every individual or company to whom such exclusive accommodation should be afforded, and their vessels, crews, and servants, must be subject to the general rules and regulations of the board. These words are such as would be applicable to the case of a lodger in a furnished house, or a guest in an inn, and they contain no expression which amounts to a parting with exclusive possession. There are, certainly, in a subsequent section (82), words more appropriate to a demise; but it is doubtful whether, even by those words, it was intended to provide for an exclusive occupation of such a nature as to render the occupier liable to be rated. The board are authorised by that section to let any sheds and portions of quays they may think fit to appropriate, as special berths for ships, for such periods, and at and on such rents, terms, and conditions as they may deem expedient. But by the following section, during the time of the

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appropriation of any dock for this purpose, no portion of the cargo of any vessel lying therein shall, without the consent of the board, be loaded or discharged into or from such vessel, except by persons employed by the board. This provision, perhaps, renders the occupation of persons renting these docks and sheds more like that of lodgers than any other, and puts the Mersey Docks Board somewhat in the position of a lodginghouse keeper. At all events, what took place in these cases was not so much a letting under sect. 82, as the grant of permission to use the premises under sect. 64. The letters written in both cases are for this purpose precisely similar; the secretary says, "the dock board has appropriated for the use of the steamers owned by you," certain docks and sheds, and has fixed a charge for the use thereof, "to commence from the date of your occupation." Although the word "occupation" occurs in the letter, it must be borne in mind that by the Act of 1861 the board have power to impose a penal rent upon goods which have lain beyond a certain time even upon these appropriated quay spaces, even if the goods belong to the persons to whom the spaces are appropriated. It would be impossible for the board to do this if they had parted with the occupation; it would be inconsistent with exclusive possession by the appellants, and a contradiction in terms. It could not be otherwise than that the board remain in occupation of their premises, and they grant the use of them for the appellants' accommodation; they, however, reserve their rights, and retain possession for the purpose of exercising their statutory powers. Therefore the rateable party must be the Mersey Docks Board. It has been urged against this that the charge of 2s. 6d. per square yard per annum, to be paid by the appellants for the use of their appropriated shed spaces, is a rent for the occupation of these particular premises; but the case finds that the whole of the quay and shed spaces of the docks are equally devoted, when not required by the appellants, to the general purposes of the board; the appellants therefore have no exclusive possession. It has been also argued that, with respect to the transit sheds, the appellants' keys give them a possession which render them rateable; but the Customs' authorities have other keys, and during the daytime the servants of the board have free access to the sheds. This is not sufficient, even if it were otherwise in the case of right to keep the doors locked both by day and night. Here the appellants have no further right to shut out the board than a lodger with a key to his bedroom, or a locked cupboard, would have against his landlord. There remains to be considered upon the Allen appeal, the rateability of the four rooms occupied as offices. It seems to me that these rooms are probably used in the same sense as the quays and sheds, and are held upon the same terms; very likely, if the case were restated, this would so appear, but we must take them as described for our opinion. The words are, "a lock-up office, consisting of four rooms, in exclusive occupation of the appellants and their employées, for the transaction of shipping business." This is clearly an occupation for which the appellants are rateable; and if the board really give them only the use and occupation, without parting with the possession, the rate must be altered another time. One other point is, with respect to the coal depot used by the

appellants in the second case. I was at first impressed with the argument that there was a difference between this and the sheds, but, on looking again, I think there is none. The sections of the last Act, that of 1861, cannot govern the letter and resolution of 1856, by which 400 square yards of ground were allotted to the appellant Inman, for the purpose of storing coals for the use of his steamships, but for no other purpose, upon sufferance only, upon his agreeing to pay one penny per square yard per week for the use of the same, and engaging to remove the coal and clear the ground at his expense at any time, one week's previous notice being given. These words do not amount to a demise; their proper construction constitutes a mere grant of a use on sufferance, and the appellant has no more a sole occupation than if he occupied a warehouse on the ordinary terms, which would continue the warehouseman in possession of the premises. It happens that he has continued in this same occupation for eighteen years; but we can only consider the terms upon which his entry took place. In 1869 there was a report from the traffic manager, which referred to the land now occupied by the storage of coal; and there was a letter by the appellant agreeing to pay rent, as suggested; but "the rate of rent, and terms and conditions of tenancy" were to be the same as theretofore. Upon referring back, therefore, to the agreement of 1856, this occupation appears to be merely on sufferance, and could not, therefore, be rateable. In both these appeals, therefore, the Mersey Docks Board ought to be rated, instead of the appellants, for all the premises referred to, except the four rooms occupied by Mr. Allen as offices. There is a store shed attached to the coal depot, but nothing is found in the case as to its exclusive occupation by Mr. Inman. In the course of time I presume the board will raise their rents, so as to remedy any hardship caused by our decision: but, perhaps, it may be that the rents are now fixed in accordance with their rateability.

QUAIN, J.—I am of the same opinion. Without going into details, I rely upon the general ground that, under sect. 64 of the Consolidation Act 1858, the appellants take no such exclusive occupation as to be rateable for these premises. The words merely give a preferential use to certain ship-owners. The board retain possession, and give up some of their rights only which in themselves do not constitute an occupation.

ARCHIBALD, J.—I am of the same opinion. With the exception of the four rooms used as offices by Allen in the first appeal, which according to this case is an exclusive occupation, I think neither of the appellants ought to be rated for any of these premises.

Judgment for appellant Allan, except as to the four offices, without costs.

Judgment for appellant Inman, with costs.

Attorneys for appellants in both cases, *Gregory, Rowcliffe, and Rawle*, for *Duncan Hill* and *Parkinson*, Liverpool.

Attorney for respondents, the Liverpool Union, *J. B. Batten*.

Attorney for respondents, the West Derby Union, *T. W. Goldring*, for *Holden* and *Cleaver*, Liverpool.

Attorney for the Mersey Docks Board, *Venn* and *Son*, for *A. T. Squarey*, Liverpool.

C. P.]

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[C. P.]

COURT OF COMMON PLEAS.Reported by H. F. POOLEY and JOHN ROSE, Esqrs.,
Barristers-at-Law.

Friday, Feb. 13, 1874.

MILLINGTON v. GRIFFITHS AND OTHERS.

Action for penalty—3 & 4 Will. 4, c. 90—Pollution of well by a gas company—Statutes of Limitation—Prescription—"Well"—"Suffer to be conveyed"—Leave and licence.

Where noxious matter percolates through the soil from gasworks, so as to foul a well, such percolation will render the defendants liable under the statute 3 & 4 Will. 4, c. 90, which imposes a penalty of 200l. on any gas company, "who shall suffer any washings, &c., to be conveyed into any well."

A well which, on account of its having become contaminated, has been disused by the owner for several years, and has been covered over, does not cease to be a well within the meaning of the Act. Non-user, and closing of his own well in consequence of its being polluted, even coupled with the acceptance by the plaintiff of the use of substituted wells of the defendants is not such an abandonment of the former as to alter its character and make it no longer a well, nor can any licence to pollute be inferred from such a state of facts.

Quære per Keating J. whether a man could by deed give an irrevocable licence to pollute a well. A prescription to foul a well will be defeated by variation and excess in the degree of fouling during the prescribed period.

Where an Act of Parliament, making an act illegal, comes into force while the prescription to do that act is running, semble, per Brett J., that the prescription when acquired by due lapse of time will be an answer to an individual, suing as an individual, notwithstanding the statutory illegality.

THIS was an action tried before Bramwell B. at Bedford, in July 1873, and was brought by the plaintiff against the defendants, who are directors of a gas company, for pollution of the plaintiff's well by the refuse from the gasworks flowing into it.

The declaration contained two counts, the first was under sect. 50 of 3 & 4 Will. 4, c. 90, and in it the plaintiff sued for a penalty of 200l. in accordance with the provisions of that statute. In the second count the plaintiff sued in his private capacity for damages from the defendants for the nuisance caused by his well being unfit for use.

The defendants pleaded a variety of pleas, among which were the fifth and sixth to the first count to the effect that the action was not brought within one and two years respectively after the cause accrued, the seventh to the first count that the action was not commenced within six months after the determination of the alleged cause of action; the eighth and eleventh to both counts, pleading leave and licence; and a twelfth plea to the second count, that the alleged cause of action had not arisen within six years; and a thirteenth plea, asserting a right by prescription of twenty years to discharge the refuse of the gas-making into the plaintiff's well. The facts proved at the trial were that the gasworks were established in 1839; that in 1848 the plaintiff sank a well on his premises at a distance of 100 feet from the gasworks; that the water was good up

to 1851, when it began to be tainted; that it was used for washing purposes till 1854, becoming gradually worse until in 1857 it killed the plants that were watered with it, and the plaintiff thenceforward ceased to use the well for any purposes. On the water first becoming polluted the defendants gave leave to the plaintiff to make use of a well on their premises, and when that in course of time got tainted, they opened a second, and gave him access to it, and he had used this last well up to the present time.

In September 1872, some water was taken out of the plaintiff's well, and corked up in a bottle; this was produced at the trial, when it was found to have no smell, but an unpleasant taste, while it was proved that when taken out of the well it was very foul both as to smell and taste. Another bottle containing water taken on the morning of the trial from the same well was also produced, and it was in all respects very bad indeed. One of the defendants had become a director of the gas company in the year 1870, and so to avoid any difficulty about the joint liability of the defendants in this action, the plaintiff's evidence was limited to proving damage done since that date.

The defendants called no witnesses, and the verdict was entered for the plaintiff for the 200l. penalty on the first count, and for 40s. damages on the second count, the learned judge certifying for costs and reserving "leave to the defendants to move to enter the verdict for them, the court to be in the place of the jury, and draw inferences and find facts from the evidence."

Accordingly a rule nisi was obtained on Nov. 6, on the following grounds: First, that there was not sufficient evidence to show that any pollution of the well had taken place since 1870, or that the contamination of the well was occasioned by any of the acts of the defendants since 1870; secondly, that the supposed well was not since 1870 a well within the meaning of 3 & 4 Will. 4, c. 90; thirdly, that the act complained of in the first count was not such an act as is contemplated by 3 & 4 Will. 4, c. 90; fourthly, that there was no proof to take the case out of the several statutes of limitation pleaded; fifthly, that the plea of leave and licence was proved; sixthly, that the plea of prescription was proved.

Bulwer, Q.C. and S. E. Hall showed cause.—On the first point the samples of water produced at the trial showed that pollution had taken place since 1870. If no additional noxious matter had gone into the well between September 1872, and July 1873, the water in the well at the latter date would have been better, and not as bad as or worse than at the former date. Even when corked up in a bottle, the water purified itself to a great extent, in an open well there would have been still greater facility for the escape of the impure elements in a volatilized form. The conclusion irresistibly to be drawn from the foul state of the water in July 1873 is that the pollution had been going on by means of fresh supplies of contaminating matter introduced since the previous September. On the second point the well did not cease to be what it undoubtedly once was, a well within the meaning of the Act, because it was so much polluted as to be unfit for use. If it were otherwise held, the intensity and extent of the nuisance would become the protection of the persons causing it. The third point depends upon the words in the 50th section of the Act, which

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are "empty, drain, or convey or cause to be emptied, drained, or conveyed, or to run or flow, &c." Now I submit that to satisfy these words it is not at all necessary that the refuse should have escaped in a stream, it is enough if it percolated the soil and so reached the well. The case of *Hipkins v. The Birmingham Gas Company*, is exactly in point (1 L. T. Rep. N. S. 303; 6 H. & N. 250) and that was decided in reference to an Act, the words of which are hardly so strong as those in the present Act. The fourth point is answered by the same argument as the first. On the fifth point there is surely no evidence of leave and licence to pollute. The use of other wells belonging to the defendants, and the disuse of the plaintiff's own well, are both merely temporary acts which cannot operate as such a licence as is suggested. The plea of prescription, which is raised in the sixth point, is pleaded only to the second count, and the facts proved are against there having been twenty years' pollution of this well without interruption. The first pollution was no doubt in 1851, but there was a promise to abate the nuisance, and the supply of first one well and then another for the plaintiff to use meanwhile is strong evidence that he was not acquiescing in the continued pollution. Then the Act, which imposes the penalty, was applied to this gas company in 1854, and the prescription will not run against the Act. [BRETT, J.—Will the passing of an Act stop the prescription from running against an individual?] The thing becomes illegal from the moment of the passing, or application of the Act. [BRETT, J.—Prescription will be an answer to an individual, suing as an individual.] The Prescription Act (2 & 3 Will. 4, c. 71), is discussed in *Cooper v. Hubback* (6 L. T. Rep. N. S. 826; 12 C. B., N. S., 456), and correspondence and negotiations are there held to be a sufficient interruption to stop the prescription. So also in *Bennison v. Cartwright* (10 L. T. Rep. N. S. 266; 33 L. J. 137, Q. B.) [HONYMAN, J.—If you complain and do nothing is it not fair to say the more you grumble the more you acquiesce?] On the general question of the responsibility, cast upon the defendants, to keep the noxious matter, so as not to escape and cause injury to others, he referred to *Fletcher v. Rylands* (14 L. T. Rep. N. S. 523; L. Rep. 3 H. L. 330).

O'Malley, Q.C. and *Merewether* in support of the rule.—The most important question is whether in 1870 this was a well within the meaning of the Act. The object of the Act is clearly the preservation of the health of the neighbourhood, and how can that be affected by the state of what once was a well, but has ceased to be used as such for a long time, and been closed? If the contention of the plaintiff be right it might happen that a well had been shut up for fifty years, and the owner had no intention of using it, but had acquiesced in the closing of it, and yet a common informer would be able to come forward and sue for the penalty, which would be a monstrous result. The true view must be that this ceased to be a well when it was found to be utterly polluted in 1857, and when the owner closed it over, and used another instead of it. Again there is no evidence that the water since 1857 has ever been better than it was at that date; and, if so, how can the defendants be said to pollute water that was as bad as possible already? On the first and fourth grounds, on which this rule was obtained, I say that the penal statute must be construed strictly, and that the proof ought to be certain

that the noxious matter in the well has come there from the gas works since 1870. Admitting that the previous pollution had arisen from that source the intervening ground would be saturated, and it would be refuse from that saturated soil that since 1870 would pollute the well, and it was not shown, as I submit it was necessary to show, that the refuse in the well at the time of the action brought had actually started from the gasworks since 1870. As to leave and licence on the second count, though there is no express licence given, yet it is implied from the facts. There was no complaint for nearly twenty years, and the plaintiff accepts the substituted wells up to now; the new wells were on the defendants' land, and the abandonment by the plaintiff of his own well was in consideration of acquiring a right to the use of the substituted ones. A licence with a benefit is irrevocable: (See *Kenloch v. Nevils* 1 M. & W. 794.) If acquiescence is to be of no avail, an informer might sue for the penalty even if the gas company had obtained leave from a landowner for a good consideration to put their refuse into his pond: indeed it is difficult to see how a gas company could safely use a well or pond on their own premises for the purpose, and yet such a thing is a necessity. The pleas of prescription and leave and licence run together, so far that during the existence of the licence the prescription was running. The pollution is proved to have begun in 1851.

KEATING, J.—This was an action brought against the directors of a gas company, to recover a penalty under s. 50 of 3 & 4 Will. 4, c. 90, which provides that any gas company, "who shall at any time empty, drain, or convey or cause or suffer to be emptied, drained, or conveyed, or to run or flow any washings, &c., into any river, brook, or any stream, reservoir, canal, aqueduct, water-way, feeder, pond, or springhead, or well, or into any drain, sewer or ditch communicating with any of them, or do, or cause to be done, any annoyance, act, or thing to the water contained in any of them, whereby the water contained therein, or any part thereof, shall or may be spoiled, fouled, or corrupted, then and in every such case such body, &c., shall forfeit and pay for every such offence the sum of 200l.," and it is also enacted that the penalty must be sued for within six months of the determination of such act of pollution. Upon that section the action was brought, and it appeared that the defendants' company in 1839 established works near the land of the plaintiff, who in 1848 opened a well within 100 feet of the defendants' works, and the well soon afterwards became polluted, and it is admitted to be polluted by the noxious stuff passing from the defendants' works. No doubt there was at that time cause of action against the gas company, and unless circumstances which afterwards took place, and which have been relied on in the argument have qualified it, that liability may still exist. One point is that one of the defendants only became a partner in 1870, and so is not liable for acts done by the company before 1870, and accordingly the first ground on which this rule was moved was that there was not sufficient evidence to show that the contamination of the well was caused by any acts of the defendants since 1870. As to the terms on which the case is referred to us, I think the judge meant to refer to us whether he ought to have directed a verdict for the defendants upon the evidence at the close of the plaintiff's case, and not whether we can find

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facts upon the inference from which a jury might find a verdict for the defendants. There was sufficient evidence to satisfy my mind that the statute was violated by acts done since 1870. First there was the experiment before the jury. A portion of the water was taken in 1872, and found to be much polluted; it was corked up, and found to have purified itself considerably in the space of one year. It is said that the impurity in the well might have arisen from the foul matter at the bottom, and not from any fresh permeation, but I am satisfied that the permeation which undoubtedly had once begun was continued, and that it was the great cause of the evil; and therefore whichever way the references be taken I have no difficulty in saying that pollution has taken place since 1870. Then it is said: "Suppose the well since 1870 has not been a well within the meaning of the Act:" and that supposition is founded on the contention that when the plaintiff found his own well too bad to use, he closed it, and made use of a well on the defendants' premises; that that well became contaminated also, and then the defendants opened another, and the plaintiff availed himself of that; the note of the judge seems to say that this last well is not quite pure; but, however that may be the flow of noxious matter must have been continuing when it was substituted for the one previously used. It is said therefore that inasmuch as the plaintiff had recourse to these other wells he ceased to use his own, and that it was wholly abandoned in 1857; and that the statute means by a well one that is used as such, and that unless it is being used it is not a well. I cannot assent to such a contention. It would be impossible to say when it ceased to be a well, there being no real change in its appearance beyond that of having a wooden cover put over it; and I think that this continued to be a well up to the present time. The third point is that the act complained of was not such an act as is contemplated by the statute, and it is argued that the filth which was sent out from the gasworks in 1870 could not have reached the plaintiff's well in three and a half years. It is enough to say that if it did not actually find its own way it helped forward something else, but there is every probability that some of the actual stuff then emitted reached the well in the time. The fourth ground is not very seriously maintained, and I think it depends upon the first point, which I have already answered. Then as to the plea of leave and licence; what was relied on in support of that plea was that the plaintiff not being able to use his own well, it being so bad, but going to the defendants' well, he must be taken to have given an irrevocable licence to the defendants for ever to pollute his well. But surely this cannot be assumed when looked at by the light of reason and common sense. He would have had to agree to substitute the precarious right of getting water from other wells, for his own pure well; a most unequal exchange. I will not now discuss how far a man could give an irrevocable licence by deed to pollute his well in consideration of a permanent equivalent, because here there is no irrevocable licence, and the notion of it is also inconsistent with the letter of the defendants, in which they said that it was very hard that the plaintiff was pressing them when they were trying to remove the pollution, and asked for time. With reference to the plea of prescription it is contended that the evidence showed that for twenty years before the

action the pollution had continued without interruption. Now it is not necessary here to consider how far a prescription can be acquired to do an act which an Act of Parliament has prohibited, because the prescription is not in my opinion proved. The amount of pollution had gone on increasing, and this excess, clearly shown by the evidence, would have defeated the prescription. I am therefore of opinion that the plaintiff is entitled to the verdict, and this rule must be discharged.

BRETT, J.—The first count in the declaration in this case was for a penalty, and the verdict was entered for the plaintiff, and the case comes before us on a motion to set aside that verdict. It appears that after the evidence for the plaintiff had been given, the defendants urged that the learned Baron was bound to direct a verdict for them, but he overruled this contention, reserving leave to them to move in the terms which have been stated. Now it is said that on such a reservation the court is placed in precisely the same position as the jury, and that it is for the court to say as a fact whether they will find for plaintiff or defendant. But if it is necessary to state my opinion, I think that this is not the meaning of the reservation, for if it were, the defendants might break away from the contention which they had maintained at the trial, and say now that there was something for the jury. It means that after the court has considered the facts proved, and such minor facts as can be by inference arrived at, it is for them to say whether the judge was bound to direct a verdict for the defendants. How does the first point stand? The writ in the action was issued on the 15th of June, an examination of the well took place just before the trial on the 23rd July, and pollution was then found to exist; the inference is that the same pollution existed on the 15th June. The pollution was undoubtedly from gas, and the gasworks are 100 feet off, and they were at work till June. Ordinary percolation seems therefore quite enough to account for the result; I should have gone further, and inferred that it started from the works since 1870. It is argued against this, that it is consistent with the facts that it had not escaped since that date, but that the works had been hermetically sealed since then. But this, if it were a fact, was one especially within the knowledge of the defendants, and they might have proved it if they could. But besides, there is the evidence of the bottle, and once more the circumstance that the defendants' attorneys say nothing to suggest this view, but in effect admit that the pollution is going on. Secondly the defendants say this was not a well within the meaning of the Act. But it is admitted that it was a well before 1870; and it remained the same in appearance up to the trial. A well is an artificial sinking till you find water, and this was such. It is said that it ceased to be a well, because so polluted that it could not be used, and the owner agreed to use the well of the defendants and closed his own; but there is no evidence of such an agreement that a judge could have directed a jury to find it, and if you ask me as a jury to find it, I say you ask me to find that the private owner was an idiot. As to the mere fact of covering and nonuser that does not change the thing, it still remains a well, and there is nothing in the Act about user at all. On the third ground I shall only say that percolation is "suffering to be conveyed," and the

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fourth is answered by the first. So as to the plea discussed in the fifth point, and pleaded to the second count, which is founded on the private rights of the plaintiff, there is no evidence of licence. Sixthly on the question of prescription: It was argued by Mr Bulwer that you could only prescribe for a legal thing, that it must be legal through all the time of the prescription; it is unnecessary here to decide the point absolutely, but I think it would not be so. However the variation of the amount of the pollution is important as to this plea, for because you have allowed so much, a man cannot therefore take so much more. Here the evidence tends to show that the pollution has gone on increasing, and the defendants ought to show that it has not gone on increasing in the same ratio as it did at first, if in truth it has not done so. But that takes us back to the period between 1854 and 1857, and there is therefore evidence that it increased within the prescribed period. On all the grounds therefore I think the plaintiff was entitled to succeed.

HONYMAN, J.—I am of the same opinion. As a jury I should say that none of the defences set up were made out: and the defendants' counsel cannot profess that even upon his view the matter is put beyond a doubt in his favour. Scientific suggestions have been made as to the rate at which this noxious stuff would travel, and doubts raised as to whether it could have traversed the intervening space within the limited time; but if this question could be resolved in the defendants' favour they ought to give us direct evidence on the subject. We must rather infer against them that they cannot do so, and the evil complained of is practically admitted as to source and effect, by their letter, which has been referred to. The other objection, that this ceased to be a well, is about as reasonable as to say that a stable locked is not a stable. I see no distinction in this case, from that of *Hipkins v. The Birmingham Gas Company* (*ubi sup.*), and I agree with the rest of the court that this rule must be discharged.

Rule discharged.

Attorney for plaintiff, *W. Maynard* for *Barber* of *Biggleswade*.

Attorneys for defendants, *Johnson* and *Wetherall*, for *Chapman* of *Biggleswade*.

Thursday, Feb. 5, 1874.

ABBOTT v. BATES.

Apprentice—Necessaries—Evidence of custom to explain the terms of a deed—Technical meaning known to one only of two contracting parties.

Where in a deed of apprenticeship the master covenanted to find meat, drink, lodging, and all other necessaries and certain wages;

Held that he was not entitled to set-off the wages due to the apprentice against the cost of clothes and washing supplied to him. A custom to do this could not be supported, as it would contravene the terms of the indenture. A custom among the masters to interpret the word "necessaries" as excluding clothes and washing in apprenticeship indentures would not bind the apprentice, he not being a person in the trade who would have knowledge of the word bearing a meaning other than the ordinary one.

A custom to control the meaning of a word in a deed

between parties must be a custom of trade known to the parties, and must be definite and not variable.

THIS was an action brought on an indenture of apprenticeship to recover wages payable under it. The defendant pleaded by way of set-off a claim for clothes supplied to the apprentice during the service.

The action was brought on 6th March 1873, and was tried before Quain J., at the summer assizes held at Manchester in 1873, when a verdict was given for the defendant. A rule was obtained in Michaelmas Term pursuant to leave reserved to enter the verdict for the plaintiff for 30*l.*, or for a new trial on the ground that evidence as to custom was inadmissible, and that there was no evidence to go to the jury thereof, and that upon the evidence given with regard to the alleged custom the judge ought to have directed a verdict for the plaintiff, and on the ground of misdirection in admitting evidence as to custom, and leaving the same to the jury, and in directing them that such custom would control the contract, and also on the ground that the verdict was against the weight of the evidence.

The defendant was a horse trainer, and the plaintiff, Thomas Abbott, was bound to him as apprentice for five years from 31st Dec. 1867. The apprenticeship deed contained the following clause: "The master finding unto the said apprentice sufficient meat, drink, and the undermentioned yearly wages, lodgings, and all other necessaries during the said term." When the boy had served his time, there was due to him according to the rate mentioned in the deed 30*l.* for wages, but the master refused to pay him anything, alleging that he had supplied him with clothes to the amount of 35*l.*, and that he was therefore entitled to retain the wages to recoup himself.

At the trial the defendant, to explain the word "necessaries," under which the plaintiff contended he had a right to be found in clothes and washing by the master, called a number of other trainers, who all said that it was the custom for the boys to pay for their clothes and washing. It was admitted that ordinarily "necessaries" would include clothing, but contended that in the special trade of a trainer, it was by universal custom otherwise. The defendant objected to the admission of this evidence, but the judge received it, reserving leave to move as above stated.

Baylis (C. Russell, Q.C., and F. P. Tomlinson with him) showed cause.—The best evidence of the meaning of the word "necessaries" is that of practice. What is usually done under these indentures of apprenticeship? This is a very common form of indenture, and under it a certain course of conduct has been pursued which throws light on the intention of the parties. "Necessaries" is a shifting term; it differs in its application to different classes. There is abundant authority for receiving evidence of the meaning of words which are used not in their common, ordinary sense. When words have a recognised meaning, and that is altered, it is allowable to prove the special or technical or trade meaning. Such cases are

Smith v. Wilson, 3 B. & Ad. 728;

Clayton v. Gregson, 5 Ad. & E. 512;

Grant v. Maddox, 15 M. & W. 737;

Ashforth v. Redford, L. Rep. 9 C. P. 20;

Alexander v. Vandervee, L. Rep. 7 C. P. 530.

The court now controls juries in what they find to

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be necessities: (see *Ryder v. Wombwell*, 17 L. T. Rep. N. S. 609; L. Rep. 3 Ex. 90.) [HONYMAN, J.—You must show that “necessaries” is a word known in the trade and as having a particular meaning.] We do show that among trainers “necessaries” does not include clothes and washing. Again, the position of the word in the clause, not following “meat and drink,” shows that it has reference to “lodgings,” and clothes are not likely to be comprised in the necessities of lodgings. [KEATING, J.—The evidence seems to be that the custom of paying for his own clothes varies according as the boy has wages or not. Is there any case which shows that a word varies in meaning according to whether there is something else in the contract?] In *Brown v. Byrne* (3 E. & B. 703; 23 L. T. Rep. 154), the deduction of discount upon freight was dependent on the custom at the port of delivery. A passage in Starkie on Evidence, 4th edit., p. 649, supports the contention that we are entitled to give evidence of the meaning of the indenture generally; and then as to “necessaries” we have to show what it does not mean, and that we do by the evidence of the universal practice of all in the same trade.

Herschell, Q.C. (*Hopwood* with him) in support of the rule.—The whole fallacy here is treating this as evidence of custom in a trade. This is not a trade contract at all, but it is entered into with some one outside the trade, and all that can be said is that these trainers have put their construction on the contract. They say you shall not have what this seems to give you, because on similar contracts we have not given it to others. It must be admitted that this is seeking to construe a contract differently from its ordinary legal construction, and usually this is sought to be done when it is between people in a trade. They are said to be speaking as it were a foreign language, and evidence is admitted to expound it. The judgment of Coleridge, J. in *Brown v. Byrne* (*ubi sup.*), shows it to be so. Now there being here no trade contract or local matter where a word might be used in a local sense, I contend there can be no evidence of custom to alter the ordinary meaning, because there is nothing to show that both parties must have known the extraordinary meaning. No question was asked about the plaintiff's knowledge, and no suggestion as to it was made in summing up to the jury; the only thing they were asked was, “Was there a custom in the trade?” Now in *Kirchner v. Venus* (12 Moore P. C. 399), Lord Kingsdown, speaking of evidence of this kind, says, “It is admitted only on the ground that both parties are cognisant of the custom;” and in *Clayton v. Gregson* (*ubi sup.*), because some of the parties resided out of the district it became a question whether the word was used in the special sense. Here “necessaries” is admitted not to be a trade word at all; it is alleged that the traders understood it in a particular way in trading with people who did not know, but this is not such evidence of custom as to permit the rules of interpretation to be relaxed; the relaxation is to enable the intention of the parties to be carried out, inasmuch as they use a word in the sense that both understand. But again, the custom that the defendant would set up is not universal, and on the authority of *Hunfrey v. Dale* (7 E. & B. 266), unless the custom is so universal that any person trading must have known it, and must have

used the word in its trade sense, you can give no evidence of custom so as to control the contract. So far here from being universal it is variable, and there is no case of a custom being recognised, where in a contract worded in one way a term means one thing, and in another another. Further, if the meaning put on a word contradicts its natural meaning, the inconsistent meaning cannot be upheld. (See *Yates v. Pim*, 6 Taunt. 446.) Now is not saying “I give no clothes” a contradiction of “necessaries”? The first point, then, is that no foundation was laid for evidence of custom controlling the contract, because it was not shown that the word had a meaning in the trade, and the parties did not contract upon the understanding that it had. Then I say that there was nothing to go to the jury, and if there was the verdict was wrong. Also that custom was not admissible, but that if it were no evidence of a universal custom was given.

Feb. 12.—KEATING, J.—This was an action on an indenture of apprenticeship, whereby the master covenanted to find “sufficient meat, drink, wages, lodging, and all other necessities” for the plaintiff during his service, and was a claim for wages, to which the master set-off the expenses incurred in providing the apprentice with washing and clothing. It was admitted that “necessaries” would ordinarily include clothing and washing, and it was a question whether evidence could be given to show that in this case they were excluded. The learned judge at the trial received evidence directed to this point. It is unnecessary to consider whether he was right in so doing, because I am of opinion that the evidence given did not establish such a custom as to bind the defendant. A custom to be effectual in this way should be a custom of trade, but with reference to the word under consideration here, the evidence completely failed to show that. One witness said the word “necessaries” was never used in the trade, and so there was and could be no custom as to the word in the trade. What the evidence went to show was that where there was a covenant in the indenture to give wages and “necessaries,” it was on the footing that the wages were set-off against the clothes and washing. This is no custom; or if it were a custom it would be one to contravene the terms of the indenture, which cannot be. The set-off therefore cannot be supported, and this rule must be made absolute to enter the verdict for the plaintiff.

GROVE, J.—I am of the same opinion. None of the elements on which custom is based can be established here. It cannot be taken that the plaintiff and defendant covenanted on the basis of the custom, for it was not suggested that the alleged custom was known to any but the trainers. But it was not shown that any definite custom existed, and the custom here set up varied in different cases. Under these circumstances it is difficult to see how there could be a custom which gave a definite sense to the word “necessaries” to control the ordinary meaning. Certainly here there was not such a dealing in the trade as to call the attention of the plaintiff that he was dealing in a special trade on special terms.

HONYMAN, J.—The main ground on which I think the plaintiff is entitled to succeed is, that the defendant has endeavoured to show that “necessaries” had a technical meaning, but has wholly failed. On the contrary, he proved that

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the word was quite unknown. All that his evidence amounted to was that trainers were in the habit of withholding the clothing and washing, wholly irrespectively of the terms in the indenture. I think the rule should be made absolute.

Rule absolute to enter the verdict for the plaintiff for £30.

Attorney for the plaintiff, *Hodgson*.

Attorney for defendant, *Mark Shephard*.

EXCHEQUER CHAMBER.

Reported by JOHN SHORTT, Esq., Barrister-at-Law.

Tuesday, Feb. 3, 1874.

(Before Lord COLERIDGE, C.J., BRAMWELL, PIGOTT, and CLEASBY, BB., and DENMAN and GROVE, JJ.)

GOVERNORS OF ST. THOMAS'S HOSPITAL v. THE CHURCHWARDENS AND OVERSEERS OF LAMBETH.

Rating—Hospital for sick—Rateability where no beneficial occupation.

St. Thomas's Hospital was founded by royal charter for the relief and sustenance of poor sick and infirm people, and vested in the mayor, commonalty, and citizens of London. The patients pay nothing for their maintenance or the medical services rendered to them. There is a medical school connected with the hospital, and its students pay certain fees, which are wholly devoted to the expenses of the medical school, and are not paid to or in any way accounted for to the governors of the hospital.

Held (affirming the judgment of the Court of Queen's Bench), that the hospital was liable to be rated, and not at a merely nominal sum.

CASE.

1. THIS was an action of *replevin* brought by the plaintiffs against the defendants, for the taking and retaining of certain goods and chattels of the plaintiffs; and by consent of the parties, and by order of Master C. Manley Smith, dated the 13th June 1873, according to the Common Law Procedure Act 1852, this case was stated for the opinion of the Court of Queen's Bench, as to the rateability of St. Thomas's Hospital. The distress complained of was levied by reason of the non-payment of certain rates made by the defendants hereinafter mentioned. Upon the distress being levied, the plaintiffs entered into the usual *replevin* bond, and brought their action of *replevin*.

2. St. Thomas's Hospital was founded by King Edward the Sixth, in the fifth year of his reign, by charter or letters patent, bearing date the 12th Aug., whereby the king granted the hospital to "the Mayor and Commonalty and Citizens of the City of London," as a place and house for poor people, to be there relieved and sustained, and willed and granted that the net revenues of the possession of the said hospital (over and above the stipends of certain officers and ministers therein mentioned) should be expended for the benefit and maintenance of the poor sick and infirm persons of the said hospital and house of the poor. And by another charter, or letters patent of the said king, in the seventh year of his reign, bearing date the 26th June, the said king vested the ordering, management, and governing of the said hospital in "the said Mayor and Commonalty and Citizens," and the government and conduct of the said hospital were further established and confirmed by an Act of Parliament (22 Geo. 3, c. 77), and still more

recently by an Act (25 & 26 Vict. c. 4), under which last-mentioned Act the present site was acquired, and the new hospital built on the Albert Embankment. And the several charters may be referred to by either of the parties hereto, as forming part of this case.

3. The hospital was built on the Southern Embankment of the Thames (partly on land in the said parish reclaimed from the river, which had not been previously rated, because it had not been occupied, and partly on land which had been previously occupied by rateable houses and buildings), at an expense for lands and buildings of about 500,000*l*. It consists of nine blocks of buildings, and the following is a short description of each, and the mode in which they are used.

Block 1, being the one nearest to Westminster-bridge, contains a counting house, committee rooms, court rooms, and other offices for the civil administration, rooms for the treasurer to reside in, which, however, are not occupied; rooms for three porters to reside in, whose duties are spread over the whole of the hospital.

Block 2 contains four wards for patients, with all necessary adjuncts, rooms for the matron to reside in, rooms to accommodate about forty probationer nurses, who are trained to act as such under Miss Nightingale's Fund.

Block 3 contains four wards for patients, with all necessary adjuncts and a surgery, and the casualty department.

Block 4 contains the matron's office and linenry; three wards for patients and all the necessary adjuncts, a surgery, and the ophthalmic department.

Block 5 contains the steward's offices and entrance hall, chapel (which has not been consecrated), and rooms for resident medical officers and dressers.

Block 6 contains the kitchens, &c., three wards for patients, with all the necessary adjuncts, and the dispensary.

Block 7 contains four wards for patients, with all the necessary adjuncts, and the outpatients' department.

Block 8 contains seven wards, with all the necessary adjuncts, rooms for the residence of the steward, chaplain, and apothecary, respectively.

Block 9 contains the medical school building, consisting of museum, medical, anatomical, and chemical lectures, theatres, library, chemical and physiological laboratories, dissecting rooms, *post mortem* rooms, and mortuary; also the refreshment rooms for the medical students; a carpenter's, bricklayer's, and gardener's shed, as constant work is required to keep the building in good order; and a three-stall stable with loose box, coach houses, harness rooms, &c., which stable, &c., are not occupied.

4. The hospital contains altogether 569 beds for poor sick and infirm persons.

5. It is necessary that the persons who reside on the premises, viz., the officers and servants employed by the governors, should do so in order properly to attend to the patients, and their apartments are not more than sufficient for their proper accommodation.

6. The buildings were erected to be used, and have been used, as a hospital for the benefit and maintenance of poor sick and infirm persons, which buildings contain proper accommodation for a medical school in connection with the said hos-

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pital, and for the purposes described in paragraph 3. The patients pay nothing for their maintenance, or for the care bestowed upon them, or for services rendered to them while in the hospital.

7. The medical staff consists of eighteen physicians and surgeons, assistant physicians, and assistant surgeons, and they receive a small sum a year each as a honorarium out of the funds of the hospital, and they also receive fees from the students attending the hospital for lectures delivered and instruction given to them there. The students pay no fees to the governors, and the medical staff do not account in any way to the governors for the fees paid by the students to them, and the amount of the honorarium paid out of the fund of the hospital has no relation to the amount of the fees paid by the students. These students' fees vary from year to year, but amount to about 4000*l.* a year, of which about 2000*l.* is divided amongst the medical staff, the remaining 2000*l.* being expended by them in paying various expenses connected with the instruction of the students. The probationer nurses do not pay any fees. They are lodged free of expense, but are maintained out of the Nightingale Fund—a fund having no connection with the hospital, and if they did not render their services without payment some additional nurses would have to be employed and paid by the governors. Neither the treasurer nor any other governor receives any remuneration for administering the affairs of the hospital, but the clerk and other officers are paid for their services in connection with the hospital.

8. In the month of September 1871, the new hospital was opened for the reception of patients.

9. The gross value inserted in the rates hereafter mentioned was 13,080*l.*, and the rateable value 10,900*l.*, being the amounts to which on appeal the general assessment sessions the assessment for 20,722*l.* gross, and 17,580*l.* rateable value respectively were reduced.

10. On the 7th Oct. 1871, the churchwardens and overseers of the poor of the said parish made a poor rate at 1*s.* 5*d.* in the pound for the half year ending the 6th April 1872, and they charged the plaintiffs, under sub-sect. 9 of sect. 47 of 32 & 33 Vict. c. 67, with 386*l.* 0*s.* 10*d.*, being a proportion of the same rates as from the 25th Dec. 1871, on the said sum of 10,900*l.*

11. On the 6th April 1872, the churchwardens and overseers of the poor of the said parish made rates, charging the plaintiffs as follows, with 726*l.* 13*s.* 4*d.* for the poor rate, being 1*s.* 4*d.* in the pound on the same said sum of 10,900*l.*, with 90*l.* 16*s.* 8*d.* for the lighting rate, being 2*d.* in the pound on the same sum, with 272*l.* 10*s.* for the general rate, at 6*d.* in the pound on the same sum, with 90*l.* 16*s.* 8*d.* for the sewers' rate, at 2*d.* in the pound, on the same sum, and with 113*l.* 10*s.* 10*d.* for the Metropolitan Consolidated Rate, at 2½*d.* in the pound on the same sum, for the period up to the 29th Sept. 1872. The poor rate was made under the statute of Elizabeth, and the lighting rate, general rate, sewers' rate, and Metropolitan Consolidated Rate, were made under the Metropolis Local Management Act and other Acts amending the same, including the Metropolitan Board of Works (Loans) Act 1869.

12. The defendants seized, took and detained the plaintiffs' goods for the purpose of obtaining payment of the rates before mentioned.

13. The plaintiffs, although occupying the hos-

pital as before mentioned, contend that it is occupied by them for a purpose which yields no value at all, and that as they are absolutely precluded from using it in any manner that would be productive of value, it has no rateable value; in other words, that they have no beneficial occupation.

14. They also contend that if the hospital is rateable, it only has a nominal rateable value.

15. The defendants contend that, even assuming that the plaintiffs are bound to use and occupy the building as a hospital, and are restrained by the circumstances of their trust from making a pecuniary profit from their occupation, yet that the hospital buildings are rateable property, and are rateable in the hands of the plaintiffs as the occupiers thereof, at their rateable value, as defined by the Valuation (Metropolis) Act 1869, sect. 4, and that the case falls within the principle of *Jones v. The Mersey Dock and Harbour Board Trustees* (11 H. of L. Cas. 443).

16. It is agreed by and between the parties, that the before mentioned questions in dispute shall be decided on the merits; that no objection that an action of *replevin* will not lie, or is not the proper form of action, or that such question ought to have been raised on appeal against the valuation list or rates, the parties being desirous that such questions should be decided on this case by the court, if the court should think fit so to do, or by the Exchequer Chamber or House of Lords, and that no questions but the following shall be raised:

The questions for the opinion of this court are: First, whether the plaintiffs are liable to be rated in respect of the hospital before described; and, if so, whether they are liable to be rated at more than a nominal sum? If the judgment of the court should be that such hospital is liable to be rated at any more than a nominal sum, then the valuation list is to be confirmed, and the rates mentioned in paragraphs 10 and 11 are to stand as on an assessment of the amount fixed by the assessment sessions as the rateable value, viz., 10,900*l.*, and judgment is to be entered for the defendants with costs. If the court should be of opinion that the plaintiffs are not liable to be rated, or to be rated only in a nominal sum, then judgment is to be entered for the plaintiffs, with costs.

The Court of Queen's Bench held that the plaintiffs were liable to be rated in respect of the hospital, and were liable to be rated at more than a nominal sum; and gave judgment for the defendants, with costs. On this judgment error was now brought.

The plaintiffs' points for argument were, first, that the plaintiffs are not the beneficial occupiers of the hospital contained in the case; secondly, that as the plaintiffs occupy the hospital for a purpose which yields no value at all, and are prohibited from using it any manner that would be productive of value, it has no rateable value; thirdly, that the plaintiffs' use of the said hospital being limited and controlled by royal charter, confirmed by Act of Parliament, as described in the case, the plaintiffs are not liable to be rated in respect thereof; fourthly, that the plaintiffs are not rateable in respect of the said hospital; fifthly, that if rateable at all, they are only rateable in a nominal sum.

The defendants' points for argument were, first, that the principles laid down in the case cited in paragraph 15, and in those cases in which those principles have subsequently been confirmed

EX. CH.] GOVERNORS OF ST. THOMAS'S HOSPITAL v. CHURCHWARDENS, &c., OF LAMBETH. [EX. CH.]

and applied, govern this case; secondly, that the property is capable of beneficial occupation, and that the fact (if it be a fact) that the plaintiffs by the terms of their trust have to use and occupy them for a particular purpose, from which they do not derive pecuniary emolument, makes no difference; thirdly, that the facts stated in the case show that pecuniary profit is in fact derived from the use of the hospital as such.

A. Wills, Q.C. (with him *A. L. Smith*), on behalf of the Governors of St. Thomas's Hospital, contended, first, that they were not rateable at all in respect of the hospital; or, secondly, that if rateable, they should only be rated at a nominal sum. Down to the year 1864, the law was, that institutions not productive of actual profit to the occupiers, were not rateable. Where the object was purely one of charity, it was held not rateable, as in *Rees v. St. Luke's Hospital* (2 Burr. 1053), and other cases. In the year 1864, the decision of the House of Lords in *Jones v. The Mersey Docks and Harbour Board* (11 H. of L. Cas. 443), altered what was previously considered to be the law; but it is submitted that that case is distinguishable from the present. The trustees of the Mersey Docks were enabled by Acts of Parliament to raise large sums of money out of and by means of their occupation of the docks, though the money so raised was not for their own benefit, but that of their *cestuis que trusts*; but the occupation of the hospital confers no such power in the present case, but rather necessitates unremunerative expenditure. In that case there was a beneficial occupation, though the benefit was not that of the trustees; here there is no beneficial occupation whatever; the purposes for which the hospital exists peremptorily forbid any beneficial use of it on the part of the governors or any other persons than the patients there received. [Lord COLERIDGE, C.J.—Lord Westbury, in *Jones v. The Mersey Docks, &c.* (*ubi sup.*), considered that everything is rateable which is capable of a rateable value. He says, p. 501: "Occupation to be rateable must be of property yielding, or capable of yielding, a net annual value, that is to say, a clear rent over and above the probable average annual costs of the repairs, insurance, and other expenses, if any, necessary to maintain the property in a state to command such rent. It is in this sense that I understand the words, 'beneficial occupation,' wherever it is said that to support a rate the occupation must be a beneficial one. For, on principle, it is by no means necessary that the occupation should be beneficial to the occupiers. It is sufficient if the property be capable of yielding a clear rent over and above the necessary outgoings;" and Lord Westbury's decision has since been interpreted in that sense, and with approval, by the Court of Queen's Bench in *Reg. v. St. Martin's, Leicester* (16 L. T. Rep. N. S. 625; L. Rep. 2 Q. B. 493).] The only exemption allowed by the case of *Jones v. The Mersey Docks, &c.*, is in the case of property in the occupation of the Crown, or in that of persons using it exclusively in and for the service of the Crown; but, though all other property must appear in the rate book, it is not inconsistent with the opinion of the House of Lords in that case, that where no actual profit is derived from the occupation, the land should be rated only at a nominal sum. This view is supported by the language used by Lord Westbury in the subsequent case of *Greig v. The University of Edinburgh* (L. Rep. 1 Sc. App. 354):

"There may be another ground of non-liability, namely, where the property has no rateable value. Now, I do not mean by anything that I say on this occasion to prejudice at all the proper consideration of that question. For it may possibly be held that if property is occupied by persons for a purpose, yielding no value at all, and they are resolutely prohibited from using it in any manner that would be productive of value, it may, I say, possibly be held, that there is no rateable value in that property; and that in that sense, therefore, it ought not to be assessed to the poor rate." [Lord COLERIDGE, C.J.—Must not that language be taken to have reference to some such case as that referred to by Lord Cranworth in *Jones v. The Mersey Docks, &c.* (11 H. of L. Cas. 507), when speaking of the meaning of beneficial occupation: "It was not meant to impose the duty of contributing to the relief of the poor on any one, merely because he might be the occupier of a barren rock, neither yielding, nor capable of yielding, any profit from its occupation."] It is submitted, as a principle of rating, that regard should always be had to the actual purposes for which the land is used, not those for which it might be used, in estimating the annual rent which the hypothetical tenant would give for it. The hypothetical tenant, in the present case, must be supposed to use the buildings for a hospital; the amount at which they should be rated ought, therefore, to be merely nominal. In *Jones v. The Mersey Docks* (p. 511), Lord Chelmsford said: "With respect to exemption arising from the Act itself, it is obvious that as the occupier is to be assessed according to his ability, if he derives no benefit of any kind from his occupation, he has no ability in respect of it, and, consequently, cannot be rateable. . . ." (p. 519.) By the Act, the taxation is to be on every occupier according to the ability of the parish; the productive occupation of the several occupiers within the parish make up the aggregate ability. If an occupier derives no benefit of any description from his occupation, it forms no part of the general ability of the parish, but if it is productive (although not profitable), there is nothing in the Act which requires the overseers to follow the produce in its subsequent application. The receipt of it constitutes the visible ability of the occupier. As was said by Lord Tenterden in *Reg. v. The Inhabitants of St. Giles, York* (3 B. & Ad. 579), 'If any profit be made, the application of it when made is immaterial as to the question of rateability.' This seems to me to be the true distinction which ought to have guided the decisions, and not that between private benefit and public purposes, from the adoption of which all the contrariety in the cases on the subject of beneficial occupation has arisen." [BRAMWELL, B.—It is a fact in the present case, that the fees paid by the students who attend the hospital amount to about 4000*l.* a year, and that about half of that is divided amongst the medical staff. The amount paid by the students may be merely an inducement to the medical men who attend, but is it not a profit derivable from the occupation? Then see what Lord Chelmsford said, at p. 520: "That the absence of private benefit is no ground of exemption, appears from the case in which trustees of chapels who received profit from letting the pews, although they applied it entirely to the purposes of the chapel, were held rateable; and in the recent case of *Reg. v. Sterry* (12 A. & El. 84), the trustees of a

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school, purchased from funds raised by charitable subscriptions and bequests, were held rateable in respect of the school, because no child was admitted to the school without an annual payment of 12*l.*, although the average annual expense of each was 20*l.*" Does not the principle of that case apply here? Sect. 14 of 43 Eliz. c. 2, enacted that "the said justices of peace, at their general quarter sessions to be holden at the time of such taxation, shall set down what competent sums of money shall be sent quarterly out of every county or place corporate, for the relief of the poor prisoners of the King's Bench and Marshalsea, and also of such hospitals and almshouses as shall be in the said county." This furnishes an argument against the rateability of hospitals, as it cannot be supposed that the Legislature intended with one hand to take rates from them and with the other hand to give them back. [Lord COLERIDGE, C.J.—I do not think that by "hospitals," in that enactment, is meant hospitals for the sick, such as St. Thomas's Hospital; but hospitals for retired soldiers and sailors, and such like.] St. Thomas's Hospital was called a hospital before and at the time of the passing of the Act of Elizabeth; it is so called in the charter of Edward VI.

Manisty, Q.C. (with him *F. M. White*), *contra*, were not called upon.

Lord COLERIDGE, C.J.—We are unanimously of opinion that the judgment of the court below should be affirmed. It appears to us, without going at length into the various cases which were elaborately discussed in *Jones v. The Mersey Docks, &c.* (*ubi sup.*), that the principle of law laid down in that case by Lord Westbury and Lord Cranworth, distinctly and, if I am not mistaken, by Lord Chelmsford by implication, has clearly expounded and construed the statute of Elizabeth. That was affirmed, if it needed affirmation, in the subsequent case of *Greig v. The University of Edinburgh* (*ubi sup.*), to the judgment in which case Lord Cairns and Lord Colonsay were also parties. The principle of these two decisions seems to us clearly to include the case before us, and it is our duty to follow the ruling of the House of Lords. If the House of Lords can be made to see any distinction between those cases and the present, it is for the counsel for St. Thomas's Hospital to induce them to do so; he has not succeeded in persuading us.

The other learned judges concurred.

Judgment affirmed.

Attorneys for the plaintiffs, *Cookson, Wainwright, and Pennington*.

ELECTION PETITIONS.

Reported by F. O. CUMF, Esq., Barrister-at-Law.

TAUNTON ELECTION PETITION.

(Before GROVE, J.)

Monday, Jan. 12, 1874.

Parliamentary election—The relation of candidate and agent—What constitutes agency—Association of candidate with canvassers—Previous election petition, the then petitioner being the now respondent—Evidence—Telegrams—Production by post office.

To establish agency for which a candidate would be responsible, he must be proved to have by himself or by his authorised agent employed the persons whose conduct is impugned, to act on his behalf, to have to some extent put himself in their hands,

or made common cause with them for the purpose of promoting the election.

Whether the relations so existing were sufficient to make the candidates responsible for their alleged illegal acts is a question of degree; and in order to enable the judge to decide it in the affirmative, the evidence of corrupt practices must establish affirmatively to his reasonable satisfaction that the acts complained of were done.

Canvassing openly with the full knowledge of a candidate who does not interfere, but without his express authority, does not constitute a man an agent.

The nature of this petition, and of the evidence will sufficiently appear in the judgment.

C. Russell, Q.C., W. G. Harrison, and Collins appeared for the petitioners.

Ballantine, Serjt., H. Giffard, Q.C., J. O. Griffiths, and Chandos Leigh for the respondent.

Russell, Q.C., having opened his case on the evidence, referred to the points of law. He read the various sections of the 17 & 18 Vict. c. 102, (the Corrupt Practices Act 1854), bearing upon the case and said the law was formerly administered by Parliamentary committees; but there were obvious reasons why that was not the best tribunal: their decisions were not invariably consistent, and the door was left open a good deal to corrupt practices and an evasion of the punishment the law intended for such practices. But under the present law, and under the decisions of Martin B., and Blackburn and Willes, JJ., the law had been reduced to the simplicity of a code, and was perfectly intelligible. The result now was, and he would lay it down in two propositions that where there existed, at a given Parliamentary election, general corruption of any kind, whether it be by bribing in the ordinary sense of the word, or by treating, and from whatever quarter it emanated, if it be general corruption, that election was void at common law; and, next, that any one single act of corruption established, whether it be one single act of bribing or one single act of corrupt treating brought home to those for whose acts the candidate was responsible, also voided the election. This proposition would not be disputed, he apprehended, on the other side; and then the important question came, who were the persons that were said to be in a position so that they could make the candidate responsible for what they did, even although the candidate might not only have not sanctioned or consented to what they did, but even in the most express terms might have forbidden their doing it. In the *Norwich case* (19 L. T. Rep. N. S. 615), Martin, B., ruled that any person authorised to canvass was an agent, and that it did not signify whether he had been forbidden to bribe or not. If he bribed the election was void. Mr. Justice Blackburn, whilst admitting that no precise rule could be laid down as to what constituted evidence of being an agent, laid it down as a principle that if a person with the knowledge of a candidate or his agents, acted in furthering his election and in trying to get votes for him, that tended to show that the person so acting was authorised to act as an agent. Mr. Burman was appointed expenses agent of the respondent under 26 & 27 Vict. c. 29, s. 2, which provided that no payment except in respect of personal expenses of a candidate should be made by or on behalf of any candidate before, during or

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after the election, on account of, or in respect of such election otherwise than through the agent, and any person making payments otherwise than through the agent was guilty of a misdemeanor. Sect. 4 required a detailed statement of all election expenses incurred by or on behalf of any candidate, including his own expenses, to be rendered within two months after the election. The auditor in this case, through a mistake, thought that they were not entitled to have a copy in full of the election accounts. However, they now substantially had it, and the importance would depend mainly upon the names and items which did not appear. The object of the statute was to provide as stringently as might be that there should be some responsible person whose name should be given to the public, and who should be known as the person through whom payments were made in respect of the election. In order, therefore, to enable the Legislature to trace to its source the moneys which had been disbursed at the election, of course it followed that the object of the Act was entirely and completely defeated if, instead of being a full and true account of actual disbursements, it was a sham. It would be proved conclusively that a number of persons seen in constant communication with Mr. Burman were disbursing money, paying it in treating, arranging for treating, and disbursing money for bribing. The name of John Rollings did not at all appear in the account though he and a dozen others, whose names were not in the account, would be brought forward and shown to have been in daily communication with Mr. Burman and others on the part of the respondent. It was strange that he did not find the personal expenses of the candidate set out. Probably it was an oversight. [GROVE, J.—Do you mean that if a candidate lives at an inn he is to state how much he spends per diem? No, but the total amount. [GROVE, J.—Does not that mean the expenses relative to the election? If he buys a suit of clothes during the election? I apprehend it is intended to cover his expenses of his hotel bill. [GROVE, J.—You may allege that if he buys a suit of clothes it is a bribe to the tailor.] That was quite conceivable. He found a sum of 135*l.* 16*s.* paid to William Hall, Parliamentary election agent, of Shoreham, and the only attorney receiving payment under the head of payments to agents was Mr. Taunton 50*l.* A rather curious thing was the entry of the names of six personation agents, four of whom were apparently paid ten guineas each, and the two others eight guineas each. [GROVE, J.—For watching the polling? He presumed so; but although the functions of a personation agent would require a knowledge of the voters, for some mysterious reason these gentlemen were not in that position, but almost all were strangers to the place. As many as four were attorneys from a distance—a very singular fact in the absence of explanation. [GROVE, J.—What is your theory? I am sure I don't know. I can propound no theory. [GROVE, J.—One would think that, whether corrupt or not, it would be to the interest of a candidate to have persons who knew something about the voters].

Ballantine, Serjt., dealing with the question of agency, said he approached that part of the case with great diffidence, because it was impossible not to notice that even the most eminent judges had approached it in the same spirit, and no very

clear definitions had been given. He apprehended that the real fighting question in the case would be agency, supposing that certain acts turned out in any way to be illegal; not that he admitted that there had been any such acts. The only mode he was able to adopt was the exhaustive process. He could tell a great many things which were not agency, and bring out by that means something like a definition on that point. *Channell, B.*, in the *Shrewsbury case* (19 L. T. Rep. N. S. 499), referring to an argument that a principal would be liable for the unlawful acts of his agents, guarded himself against admitting such a principle upon the ground, he presumed, that while it might fairly be assumed that a principal would wish a lawful act to be performed, nothing could be assumed against a principal in relation to an unlawful act. [GROVE, J.—The remarks of *Channell, B.*, simply affected the question how far canvassing might prove agency. It was a nice point, from two points of view—as to fact and as to the impression which this case had produced on his mind. He was afraid that he did not understand the *Shrewsbury case* in the sense the learned serjeant attached to it. It was supposed in election cases that a candidate, having instructed certain persons to manage his election, was responsible for their acts, although he might not only not have authorised those acts, but even told his agents to take care to avoid them. *Blackburn, J.*, in the *Bowdley case* (19 L. T. Rep. N. S. 676), said that an agent made the candidate responsible for the acts of the sub-agents as well as the agent, even though the candidate did not know and was not brought into personal contact with those sub-agents. That applied more to the present case than any he knew.] He was aware that that question would arise in this case. Having briefly referred to the *Tamworth case* (20 L. T. Rep. N. S. 181), he said that at *Wigan*, *Martin, B.* (O'M. & H. 191) said if he were satisfied that the candidate honestly intended to comply with the law, and meant to obey it, and did not act contrary to it, and intended that no person employed in the election should do any act contrary to law, he would not unsettle him, upon the supposed act of an agent, unless the act was established to his entire satisfaction. In the *Londonderry case* (Printed Judgments, p. 278) *O'Brien, J.* quoted some words of *Willes, J.*, and said it was clear that the employment of a man as messenger was not sufficient to constitute him an agent, and would not concur in the opinion that any supporter of a candidate who chose to ask others for their votes, to make speeches in his favour, and to force himself upon the candidate, was an agent, or that the candidate should be held responsible for the acts of one from whom he actually endeavoured to disassociate himself. He would also rely strongly on the *Staleybridge case* (19 L. T. Rep. N. S. 660), from which he quoted. [GROVE, J.—In another case *Blackburn, J.* declined to give a definition, saying it was a matter of fact.] In the *Tamworth case*, *Willes, J.* described treating (20 L. T. Rep. N. S. 181). It did not necessarily imply anything like culpability. There could be no definition upon the subject of agency which would be applicable to every case, or probably even to any case; the circumstances of each case being peculiar and more or less different from those of others. Therefore one must look

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at the position of the party against whom the agency was sought to be proved, and the views which he had in relation to the election, and to any actual facts which could be proved to satisfaction. In dealing with the question of agency—which, as he had put it, could not be dealt with abstractedly—his Lordship would seek to be assisted by the manifest motives proved to be operating on the mind of the alleged principal. If a man was known to be a loose man in these matters at former elections—known at any time to be corrupt, it could be imagined that a person acting for him, and affecting to represent him, would part with money out of his own pocket without any direct authority, hoping that he would get repaid. On the other hand, if it was shown to be utterly impossible that the money would be returned, he ventured to think that his Lordship would hesitate to assume that the money would be advanced and paid away.

GROVE, J.—In this case the petitioners, John Marshall and Walter Chorley Brannan pray that it may be determined that the election of Henry James, Q.C., for the borough of Taunton on the 13th Oct. 1873 was and is null and void on the grounds, so far as are material to the trial had before me, that the respondent, by himself, by his agents, or by other persons on his behalf, was guilty of bribery; that by himself or agents he was guilty of treating, and that general bribery and treating were practised at the election, by reason whereof the election was void. In so far as relates to bribery and treating by the respondent himself, the learned counsel for the petitioners, in his opening speech, admitted that there were no proper grounds for making any personal imputation. On this head I may at once say that nothing has transpired in the course of the inquiry to derogate from the high character which the respondent has always borne, and which Her Majesty's Attorney-General ought to bear. With regard to general bribery, treating, and corruption, so as to taint the whole constituency, and thus render the election void, the point was scarcely pressed in the reply of the counsel for the petitioners, and I am of opinion that no such general corruption has been proved in this case. Undoubtedly painful disclosures were made applying to a portion of the constituency—small in reference to the whole, but not absolutely inconsiderable—which showed by the mere exhibition of the witnesses themselves that there are a certain number of voters who for a small bribe or supply of drink would promise their votes to either of the candidates (whether they would have kept the promise was another matter) and some of whom had reached the last stage of degradation that they gloried in their shame. I see no reason, however, for coming to the conclusion that extensive bribery or corruption prevailed at the election. I come now to the point on which the great contest took place—did the respondent, not by himself or by any conscious authority, but by the hands of an agent or agents, or those acting on his behalf for him on his responsibility, so bribe or treat that the election must be declared void. The law of agency as applied to election petitions has been expressed by different learned judges. Some have likened it to the relations of master and servant, another to the employment of persons to run a race, but no exact definition, which met all cases, has, so far as I am aware, been given, and two

learned judges—Blackburn, J. and the late Willes, J.—have pointed out the difficulty of arriving at one. All agree that the relation is not the common one of principal and agent, but that the candidate may be responsible for the acts of one acting on his behalf, though the acts are beyond the scope of the authority given, or indeed in violation of his express injunctions. So far as regards the present question, I am of opinion that to establish agency for which the candidate would be responsible, he must be proved to have by himself, or by his authorised agent, employed the persons whose conduct is impugned, to act on his behalf, or have to some extent put himself in their hands or to have made common cause with them—all these or either of these—for the purpose of promoting his election. To what extent such relation may be sufficient to fix the candidate must be a question of degree and of evidence to be judged of by the election tribunal. Mere non-interference with parties who, feeling an interest in the success of the candidate, may act in support of his candidature, is not sufficient, in my judgment, to saddle the candidate with any unlawful acts of which the tribunal is satisfied he or his authorised agent is ignorant. It would be vain to attempt an exhaustive definition, and possibly exception might be taken to the approximate limitations which I have endeavoured to express. It must also be borne in mind in these cases that although the object of the statute by which the tribunal of election judges was created was to prevent corrupt practices, still the tribunal is a judicial and not an inquisitorial one; it is a court to hear and determine according to law, and not a commission armed with powers to inquire into and suppress corruption. To use the language of that eminent judge the late Mr. Justice Willes, "No amount of evidence ought to induce a judicial tribunal to act upon mere suspicion, or to imagine the existence of evidence which might have been given by the petitioner, but which he has not thought it to his interest actually to bring forward, and to act upon that evidence, and not upon the evidence which really has been brought forward." The second principle, which is more particularly applicable to circumstantial evidence, is this, that the circumstances to establish the affirmative of a proposition where circumstantial evidence is relied upon must be all proved. Baron Martin had said that he would not act upon anything as to which there possibly might be a mistake or error, but that he thought it right, when an election was sought to be impeached, not because of an act done by the candidates, but for an act which the candidates had forbidden, to require to be convinced that the act relied upon by the petitioners to unseat actually took place, and that if he were satisfied that the candidates intended honestly to comply with the law and meant to obey it, and to do no act contrary to law, their very desire and object being that the election proceedings should be pure and honest, he would not unseat such persons on the supposed act of an agent unless there were as he believed, circumstances consistent with the affirmative, and that there must be some one or more circumstance believed by the tribunal, if you are dealing with a criminal case, inconsistent with any reasonable theory of innocence; and when you are dealing with a civil case (otherwise expressed, though probably the result is for the most part the same), proving the probability of the

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affirmative to be so much stronger than that of the negative that a reasonable mind would adopt the affirmative in preference to the negative." Baron Martin says, "I will not act upon anything as to which there possibly may be a mistake or error; but I think I do right when an election is sought to be impeached, not because of an act done by the candidates themselves, but for an act which they have forbidden, in requiring to be convinced beyond possibility of error that the act relied upon by the petitioners, which is to unseat the members, did actually take place. If I am satisfied that the candidates intended honestly to comply with the law, and meant to obey it, and that they themselves did not act contrary to the law, their design and object being that the proceedings in reference to the election should be pure and honest, I will not unseat such persons upon the supposed act of an agent unless the act is established to my entire satisfaction." He says in another place, "I think I am justified when I am about to apply such a law, in requiring to be satisfied beyond all reasonable doubt that the act of bribery was done, and that unless the proof is strong and consistent, I should say very strong and very cogent, I ought not to affect the seat of an honest and well-intentioned man by the act of a third person. When I came to apply my mind to the evidence, I should require to see, in the first place, that there is agency. In the second place, I should require to be satisfied and certain, that there could be no mistake with respect to the alleged act." Now without expressing myself in equally strong terms with those used by the learned judge last quoted, I am at all events of opinion that the evidence of corrupt practice must establish affirmatively to the reasonable satisfaction of the judge that the acts complained of were done. I now proceed to consider the evidence in this case. A man of the name of Rollings, whose acts of bribery and treating were complained of, was stated to have been seen, and witnesses were called who said that they had seen Rollings, either accompanying Sir Henry James during his actual canvass, or so in company with him as to lead to a reasonable inference that he was aiding him in his canvass. The best of these witnesses was Sarah Ward, who seemed a respectable woman, and was very positive; but, on cross-examination, she admitted that she had only seen their backs. The other evidence was slender; and after Sir Henry James had been examined and most emphatically contradicted it, and even stated that if he had met Rollings in the street he did not know him, and that most certainly he never canvassed with him or with his sanction for him, it was admitted by the counsel for the petitioners that the fair result of the evidence was that there was not enough to satisfy me of any agency, deduced from personal canvass with the candidate himself; and this admission was carried to other persons in the same category, and I decide that on the whole case there was no reasonable evidence to satisfy me of agency by personally accompanying the candidate on his canvass. It was admitted on behalf of Sir Henry James that Mr. Burman, a saddler, resident in this town, was in the fullest sense his agent, and one for whose acts he was responsible. On behalf of the petitioners, an innkeeper, named Smith, was called, who deposed, so far as his relations with Burman personally were concerned,

that being sued for 28*l.*, he went to Burman and asked for assistance, and that Burman referred him to Rollings. He further states that he, Burman, referred to the election, but not particularly, that he, Smith, said he would support Mr. James if he could get the assistance he required, that before the election he had a conversation with Burman, and asked him if it was right for him to go on drawing beer at the order of Rollings; that Burman said it was all right: "You go on drawing and you shall be made all right." That Burman, in reference to a transaction, presently to be spoken of, between Smith and Rollings, and alleged to be corrupt, said there must be some security as a matter of form. That with reference to the same transaction Burman said, "I will see Rollings and make it all right." Smith's transactions with Rollings and his wife were, stating them shortly, that Rollings advanced him 16*l.* on the security of some timber, which was stated to be a mere matter of form, and which in his first day's evidence, he, to my mind, obviously put forward as a bribe under the form of a business transaction, but on the second day he alleged that it was a real business transaction, though he admitted that the loan influenced his vote. A further corrupt transaction deposed to by Smith and his wife, and partly corroborated by his daughters, was a payment of 5*l.* for drink to be supplied, and which was alleged to be supplied to voters. It was also shown that Mrs. Smith had paid about the time a 5*l.* note to a respectable witness named Burrage, but as this was not identified with any note shown to have been in the possession of Rollings, it could hardly be called a corroboration. It was further said that to avoid detection Rollings had suggested an alteration in a bill, so as to apply the balance of the payment of the 5*l.*, for which credit was given, to the expenses of the hustings which Smith had constructed for Rollings, and which alteration was made. It will be obvious that Smith came forward under circumstances to throw the greatest suspicion on his testimony; he came forward as an informer to corrupt practices in which he had been a party. He had induced his daughter knowingly to make a false and fraudulent alteration in a bill to enable Rollings to obtain repayment from the respondent, or from some agent of his, on false pretences, and he also admitted having bribed five voters by money, supplied by a Mr. Small. He was further shown to be in the power of Mr. Brannan, one of the petitioners, who held a bill of sale from him, and his antecedents, so far as pecuniary transactions went, were far from satisfactory. I have, therefore, to look at his evidence, not as that of a credible witness, but to examine if it were circumstantially true, or likely to be invented. It was corroborated by his wife in many particulars, to whom some of the above observations apply, and to some extent by two daughters, aged respectively fourteen and seventeen, one of whom said she saw Rollings give a 5*l.* note to her mother, who opened it, and showed it to her, Rollings telling her mother to keep it quiet; and the other stated that she prepared the altered bill knowing the object of the alteration, and that she prepared three bills with and without the credit of the 5*l.*, after having made her statement to Mr. Blake, the attorney for the petitioners—the original bill said to be entered in a book,

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and the other purporting to be a copy of that said to be declined by Rollings; and the third was said to be altered at Rollings's suggestion. This last was marked B, and this only was admitted by Rollings to have been received by him. In support of Smith's veracity it was alleged that his wife had detected a conspiracy in some way to injure a Dr. Farrant and a Mr. Brannan (at least so far as I understood it), this Mr. Brannan being one of the petitioners, and that the latter got possession, apparently through a man named Herbert Poole, of the main facts relating to Smith's conduct, and that thus he was forced, as it were, against his will, to give evidence. But as it was admitted by petitioner's counsel that this 5*l.* was paid by Dr. Farrant and Mr. Brannan to Poole, and as neither Farrant, Brannan, nor Poole were called as witnesses for either side, the matter remains a mystery and unexplained. Smith also deposed to having received from Mr. Small, a timber merchant, who lived at Bridgewater, but had a house at Taunton, a sum of 8*l.*, 5*s.* of which he paid in bribes to voters—two of whom he named, and the remaining 3*l.* he said he gave into his wife's custody. Mr. Small was said by the petitioner's counsel to have disappeared. I stated that upon proper affidavits I would grant an order for his appearance. This was not applied for, nor was he called on his *subpoena*, so that there is no evidence at all to connect him with the respondent, even assuming Smith's evidence to be true. One of the five men said to have been bribed was called, but his evidence appeared to me utterly unworthy of credit. In addition to what I may term the Smith case, evidence was adduced to show that Rollings had treated to a small extent, and made corrupt promises of bribes to voters, and to connect him with the respondent, he was said to have been seen frequently in company with Burman; it was said also that he was seen to go with him in and out of certain rooms, called committee rooms (Sir Henry James had no committee in the ordinary election sense of the term), where registers of voters were kept, both in the day and in the night. It would take too long minutely to dissect this evidence, some of it was of little value, some of it was given apparently very fairly. One witness, Jane Cox, whose evidence certainly impressed me very much, was shown by the burial and grave certificates either to have perjured herself, or to have been so grossly mistaken as to dates, as to make her evidence of no value. It is also to be observed that though doubtless many of the witnesses speak to different times, yet many of the observations might apply to the same time, as the dates were by many of the witnesses not accurately fixed, and the occasions might therefore appear in the evidence to be multiplied by the same transaction being spoken to by different witnesses. Some of the witnesses speak to seeing them go into the room at a period before the key of the room was given up by the owner, Dr. Cornish, and the room taken possession of for the use of the respondent. Other evidence of small bribes and offers of bribes and treating was adduced by the petitioners, as committed by Stuckey and Govier, who were said to be agents for whom Sir Henry James was responsible. The best of those cases was that deposed to by a man named James Mogg, formerly in the Artillery, but who had received his discharge with the highest character, and who gave his evidence with remarkable apparent truthfulness. He

stated that on opening the door of a cellar he unexpectedly came upon Govier, and a voter, and overheard a conversation which, if he be accurate, amounted to a promise of a bribe. I believe in the witness's honesty, and curious as the story is, I am inclined to believe in his accuracy, and, that being so, small as the incident is, the question of Sir Henry James's seat might in this case depend on the question of Govier's agency. No evidence of his agency was given by the petitioners beyond his having paid three witnesses small sums for services connected with Sir Henry James's candidature. I shall speak further on of the question of Govier's agency. Such was an outline of the petitioner's case, and no doubt a *prima facie* case, which certainly made an impression upon me, was made, viewing in the light of probabilities the evidence, which, from the character of the witnesses—at least many of the witnesses—could not be regarded as altogether incredible. Upon Mr. Serjt. Ballantine opening the case for the respondent he said nothing of calling Rollings as a witness. Rollings was president of a society called the Agricultural Labourers' Union, connected with the London Labour Representation League, two delegates of which have been shown to have come with the privacy and aid of Rollings to speak at the election, apparently in favour of the respondent's candidature. He was, therefore, not an adverse witness, and though the question of agency did not depend on the veracity of his (Rollings's) testimony, the not calling him made it seem so probable that those who instructed the learned counsel feared damaging disclosures from him as to his connection with the respondent, or with Burman, that I suggested to the learned serjeant that his evidence might be of importance. Rollings was called, and I have no reason to regret my interposition, as the truth, I believe, has more fully appeared. For the respondent were called himself, Mr. Biron, Rollings, Burman, Cornish, Collard, who contradicted Jane Cox, and Turner, whose name has been mentioned, besides the Vicar of Taunton, to contradict some evidence of general drunkenness. Sir Henry James disproved to my entire satisfaction any agency, by canvassing, on the part of Rollings, Turner, Stuckey, and Govier, and as far as he was concerned he denied all agency but that of Mr. Burman. Rollings contradicted Smith emphatically, stating that the timber transaction was a pure business sale, and that he had only received one account, viz., that with the charge of 6*l.* 6*s.* for the hustings. He denied the treating, except that he might have given half a crown once or twice to people at public houses, and stated that what he had done in furtherance of Sir Henry James's candidature was done because he thought that candidature most in furtherance of working men's interests, of whom he considered himself a representative. He denied all relations with Burman except casual meetings. Some points of his evidence in cross-examination were not satisfactory. He, however, showed by vouchers that he had dealings to a tolerable extent—one series of accounts with a London fruiterer amounting to 94*l.* Mr. Burman was then called, and gave his evidence in a singularly candid and apparently truthful manner, producing his books, counterfoils, &c., and shrinking from no inquiry in the searching cross-examination to which he was sub-

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jected. He also exhibited *indicia* of veracity in incidental matters—he had seemingly not looked over his books for the purpose of his examination, and he forgot many points which on further consideration he explained; he made admissions which might have seemed *prima facie* to bear against himself, and he was evidently a most truthful and honest witness, or a consummate actor; no hint or insinuation was made as to anything injurious to him in his antecedents; he admitted having had three short interviews with Smith, which he explained, and he entirely denied the portions of Smith's evidence which implicated him directly. He said that he had had a dispute with Smith with reference to a Chancery suit, and had accused Smith of fraud, so that their relations were, according to him, anything but amicable, and that on his refusal of an application by Mrs. Smith to assist her husband, when as she told him he was going to be taken into custody by Rollings for taking the timber, she protested with an oath that she would unseat Sir Henry James, a statement which she virtually admitted, only denying the oath. He also stated that he had seen Rollings but rarely during the election, and had not employed him directly or indirectly in its promotion. It will be obvious that this case does not necessarily depend on the veracity of Smith or Rollings further than in so far as the former directly contradicts Mr. Burman, and though it is due to Rollings to say that his antecedents and the circumstances under which he appeared were far more favourable than those of Smith, I hesitate, for reasons which it would take very long to explain, to decide between them, and it is unnecessary for the decision of this case. As to the statements of Smith directly implicating Mr. Burman, they are uncorroborated. I believe the wife says he mentioned having seen Mr. Burman, but that corroboration is infinitesimal—it is enough to say that if I believe Mr. Burman's evidence all agency traced through him is displaced, and I do believe Mr. Burman's evidence. I cannot imagine that such unassailable evidence is a piece of accomplished acting; and, if it were so, he would not be likely to be a man who would put himself in the power of such a man as Smith, and for a very trifling consideration. With regard to the cases of Turner, Stuckey, and Govier, I am inclined to believe Turner's evidence; and though I regret that Stuckey and Govier were not called, I am of opinion that neither they nor Turner were proved to be agents for whose acts the respondent was responsible. Govier was stated by Mr. Burman to have assisted him as volunteer in paying some of the petty cash accounts; but there was no evidence in my judgment to fix him with agency in promoting the respondent's election, even giving a wide latitude to the relation. One other point was urged much more in reply than in opening the petitioners' case, by Mr. Russell, that the respondent and his agents, by having mixed themselves up with and availed themselves of the aid of members of the Labour League, were bound by their acts as by the acts of agents. I do not find that any of the corrupt acts charged were shown to have been committed by the Labour League as a body, or by any representative of theirs, and I am further of opinion that neither the respondent nor Mr. Burman did more than not interfere with persons who were assisting the candidate for motives of their own.

Mr. Burman, it is true, paid a printer's bill with some items in it which had been ordered by the Labour League, but they were not ear marked, and I believe his statement that he was ignorant, up to the time of his examination, that he had paid for them. I am therefore of opinion that the petitioners have failed to prove agency, and that Sir Henry James was duly elected, and I shall report to that effect to the Speaker. There are some matters connected with this petition, and the mode of obtaining evidence in support of it, which call for remark. Mr. Marshall's conduct was not assailed—all that he was reproached with was putting himself too carelessly, and without inquiry, into the hands of others. With regard to Mr. Brannan, his pecuniary relations with Mr. Smith, and his joining with Dr. Farrant, in giving 15*l.* to Poole, were apologised for by his counsel in the opening of the case. Some most unpleasant disclosures were made by witnesses called by the petitioners as to the mode in which evidence had been collected in an improper way by three men, Phillips, Woolley, and Barham, and though the witnesses were some of them very unreliable, still the charge being broadly made, and no attempt being made to answer or explain them, neither of the three men I have mentioned, nor Mr. Blake being called or even tendered for cross-examination, the impression left on my mind was a painful one. I have not, however, to try this issue, and the only bearing it can have on this inquiry is on the question of costs. Mr. Ellis, the London agent, appears not to have participated in the proceedings to which I refer. Mr. Blake, the country solicitor, is a very young man, but he is responsible for the conduct of the petition, and taking the whole matter into consideration, I am quite clear that there is, to say the least, nothing to take the case out of the usual rule, that costs follow the event, and I adjudge that they be borne and paid by the petitioners.

Saturday, Jan. 17, 1874.

The Post-office will not be ordered to produce for inspection telegrams sent by and to candidates and their agents unless strong grounds are shown why the judge should interpose his authority.

Russell said that a question would arise as to the production of certain telegrams on certain dates, which were now here on *subpoena*. They had reasons for the inspection of those telegrams. The officials were very properly unwilling to let them be sent unless required for a judicial inquiry. The course pursued at the Bridgwater inquiry was to allow one counsel on each side to examine them. [GROVE, J.—It is a somewhat awkward thing without showing strong grounds. It is important that the privacy should be kept up.] This course keeps up the privacy. [GROVE, J.—I don't like the idea. I think there should be some limit to the examination. It is almost like asking a postman to open private letters.] I cannot conceive why there would be any difficulty. [GROVE, J.—I can; it is analogous to the Post-office.] Before, when telegrams were sent through the agency of private companies, they were equally bound in honour, unless the telegrams were required for judicial inquiries, not to disclose the contents; and there is no obligation binding upon the Government which was not binding upon them. We have a perfect right to call for every com-

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munication to and from candidates and agents. [GROVE, J.—But you must prove the agency. The rule if laid down may be of great importance. I should like to take the opinion of the two other election judges, and that I cannot do before Tuesday.] If the rule of exclusion should be laid down it would open a very wide door for frauds and contrivances. [GROVE, J.—I am not aware of any power to produce documents on *subpoena* for inspection, but only for evidence. What do you ask for?] Any telegrams to and from the persons whom we allege to have been acting as agents in the election. I should suggest that we furnish a list of persons, to and from whom we say telegrams have passed.

Ballantine, Serjt.—We do not at all concur.

Tuesday, Jan. 20, 1874.

GROVE, J.—I have received an answer from my learned brothers whom I had consulted respecting the matter of the telegrams, and their opinion is very strong, coinciding with the opinion I rather intimated on Saturday, that I ought not, decidedly ought not, to interfere to compel the Post-office officials to produce these telegrams. I don't wish to go into the reasons for the decision, and for this reason, that I am not by this saying that a case may not arise where strongly specific grounds are shown in which a Judge may interpose his authority, but certainly this is not such a case. I am merely saying this to prevent this decision operating in other cases.

Russell.—There are one or two particular telegrams as to which we should have desired to make a specific inquiry, but unless we got a full right of inspection of any telegrams passing through persons who are agents in this matter it would be practically useless, and therefore I shall make no application to your Lordship.

GROVE, J.—I take it that the Post-office official who came here declines to produce the telegrams on his own authority. If on any occasion these officials chose to do acts of their own accord it must be upon their own responsibility. I don't compel or invite them to do it.

Monday, Jan. 19, 1874.

It is not open to petitioners to show that persons employed by the respondent at the election which is the subject of the inquiry were charged with corrupt practices at a prior election to the knowledge of the respondent, the petition with reference to such prior election having been disposed of without any decision having been arrived at with reference to such charge.

SERGEANT EDWARD WILLIAM COX was the first witness placed in the box.

Russell: You attend here upon *subpoena*?—I do.

You were in 1868 Conservative candidate for the borough of Taunton?—Yes.

And, as we know, the other candidates were Mr. Barclay and Mr. James in the Liberal interest?—They were.

You had previously been a candidate in the Conservative interest in the election of 1865?—I had.

After the election of 1865 Lord William Hay and Mr. Barclay were returned in the Liberal interest?—They were.

Do you recollect whether there was, in the first instance, a petition presented against Mr. Barclay, which was afterwards withdrawn—at the 1865 election?—Yes.

Ballantine, Serjt., objected to the reception of the evidence. [GROVE, J.—I cannot take any

more than that the petition was withdrawn. It seems to me that if any arrangement was made it is contrary to the spirit of the Act.] I understand that my learned friend is speaking of the election of 1865. [GROVE, J.—How do you propose to make the evidence relevant, Mr. Russell?]

Russell replied that he was going to put in a copy of the proceedings, the petition itself, the particulars delivered by the then petitioners who brought the petition at the instance and expense of the present respondent. He would identify the names of those persons in the petition charged with corrupt practices with those retained by the present respondent; also a copy of the recriminatory charges to show that the persons involved in those charges had also been retained on the present occasion.

[GROVE, J.—Is it to be assumed that because a person was charged, for aught we may know wrongly, with corrupt practices, it is evidence to damage his character in future proceedings?]

The way in which it is sought to use it, and we are bound to urge it, is that the proceedings on that occasion ought to have put the respondent and his agents and advisers on their guard as to the character of the persons they employed. [GROVE, J.—How do I know that it did not put them on their guard?]

Because those persons charged on that occasion were again employed on the present occasion. [GROVE, J.—But it is not decided at present whether they were corrupt or not. You assume that because they were charged with being corrupt on the last occasion, they must be corrupt now.]

I don't ask your Lordship to assume anything, only to say that this is evidence which should tend to bring your mind to a certain conclusion. [GROVE, J.—Whatever suspicion I may have in my mind I can only admit what is legal evidence, but you may say that people would not charge people with being corrupt unless they had some ground for it. I have not a tittle of evidence that they were corrupt. The law assumes that every man is innocent until he is proved guilty, and you are now asking me to assume that they are corrupt.]

I am only respectfully submitting the fact that certain persons were charged by the present respondent in the particulars delivered against Sergeant Cox as having been guilty of corrupt practices, and that that is evidence implicating the respondent as having a knowledge that they were corrupt persons. [GROVE, J.—I cannot possibly admit that without going into a whole collateral inquiry into the circumstances which led to these charges, and why the petition was withdrawn; and that would seem to be an endless inquiry, and would occupy perhaps another fortnight.]

What I want to convey to your Lordship is, that in the petition presented the respondent was the moving party, that he was a party to the whole of the proceedings, that that inquiry was conducted at his cost, and that his agents, employed in the furthering of that petition, delivered particulars incriminating certain persons in corrupt practices. I propose to prove that amongst the persons so included in these particulars are persons as to whom we have already given, and with respect to whom we shall give, further evidence as to corrupt practices in the present petition. I have considered it very anxiously, and I should not offer this evidence unless I was bound to do so. I also propose to prove to your Lordship that at the end of the petitioners' case the defendant in the petition did

not go into the case, that the Judge made an order that the respondent should pay the costs, and that that order has not been acted upon, but that the present respondent bore the costs of the first petition.

W. G. Harrison.—Acting on behalf of the petitioners in this case I should extremely regret to seem to press any evidence on this point unduly, but the way in which it occurs to my mind is this—that the employment of agents known to be corrupt is in itself an offence, as showing corruption on the part of the persons so employing them. I submit the evidence is admissible if we can show that on a previous occasion certain persons were, with the knowledge of the respondent, charged with corrupt practices, at a previous election in which he was concerned; and the employment by him of such persons at a subsequent election would be evidence that he had adopted, to his knowledge, corrupt practices.

GROVE, J.—In this case I entertain a rather strong opinion that the evidence is inadmissible. It is, in fact, asking me to admit evidence, tending to affect my mind, that certain persons are likely to be corrupt because their names were included in a list of particulars by the gentleman who is now respondent. As it stands there is no evidence at all that those persons were corrupt. A practical objection is that it is a collateral issue that I should have to try, viz., the whole circumstances attending that last petition, how far the charges were properly made, whether the charges were established, or whether they were entirely groundless. I should have to go into all that before I could apply that evidence to the present case.

Attorney for the petitioners, *E. C. Ellis.*

Attorney for the respondent, *T. R. Holmes.*

Evidence rejected.

V.C. MALINS' COURT.

Reported by T. H. CARSON and F. GOULD, Esqrs.,
Barristers-at-Law.

Thursday, Feb. 26 1874.

QUINTON v. MAYOR, &c., OF BRISTOL.

Parliamentary powers—Street improvement—Compulsory sale—Lands Clauses Consolidation Act, 1845.

A corporation were authorised by Parliament to take lands compulsorily, for the purpose of widening and improving a street. They gave notice of their intention to take certain houses which occupied a site larger than that required for the actual width of the proposed improved street, though part only of the houses would necessarily be required.

Held that the owners of the houses could not require the corporation to take that part only of the site of the houses, which would form part of the street. This was a motion on behalf of the plaintiffs, to restrain the Mayor and Corporation of Bristol from compelling them to sell the whole of certain houses in Baldwin-street, and Saint Nicholas Steps in the city of Bristol.

The plaintiffs were the trustees, or feoffees of a charity, and the houses in question were part of the hereditaments owned by the charity, and called "Saint Nicholas Church Lands."

By a provisional order, dated 20th May 1868, under the hand of the Home Secretary, made in pursuance of the Local Government Act 1858,

which order was confirmed by the Local Government Supplemental Act 1868 (No. 5), the Local Board of Health for the District of Bristol were empowered to put in force for the purpose of widening, altering, and improving Baldwin-street and Corn-street in Bristol, the powers of the Lands Clauses Consolidation Act 1845, with respect to the purchase and taking of lands otherwise than by agreement.

The schedule annexed to the order, showing the lands and buildings intended to be taken by the corporation, included three houses, and a cellar and premises, being the above-mentioned premises, owned by the plaintiffs as representing the charity.

The corporation had given the plaintiffs notice to treat in respect of the premises, but it appeared that the whole width of the street, as altered, would not require the entire site of the houses, and the plaintiffs therefore declined to sell to the corporation a larger portion of the houses than would be required for the actual width of the street.

The corporation having given notice to the plaintiffs that a jury would be summoned to assess the value of the premises, the plaintiffs, on the 12th February 1874, filed their bill, stating that they believed that if the defendants were permitted to purchase the entirety of the premises the effect would be that the corporation, who were the sanitary authority, would appropriate the entire prospective improved value, and thus make a profit on a resale after the completion of the proposed improvements to the loss and detriment of the charity estate.

Cotton, Q.C., Shebbeare, and Glen for the motion.—Although the defendants have parliamentary power to take the whole land, yet it is only for the purpose of widening and improving the street. The whole site of the houses is not wanted for that purpose, and although we could oblige them to take the whole we are at liberty to waive that right.

Eversfield v. Mid Sussex Railway Company, 3 De G. & J. 286; 1 Giff. 153; 52 L. T. Rep. 202.

Pearson, Q.C. and Ford for the corporation.—There is a difference between a corporation which exercises its power for the public benefit, and a railway company, which seeks its own profit by the adventure. They cited:

Galloway v. Mayor &c. of London, L. Rep. 1 Eng. & L. App. 34; 14 L. T. Rep. N.S. 865.

Cotton, Q.C. replied,

The VICE CHANCELLOR, after referring to the cases of a similar description with respect to railway companies, said that at first he had thought that similar principles would apply as regarded corporations. It was clear that taking away from a house such a portion as the corporation proposed to take, would render the house useless. The houses were, however, in this case taken, not for the purposes of profit, but of improvement, and he was of opinion that the railway cases did not apply, but that the present case was governed by *Galloway v. Mayor, &c., of London* (*ubi sup.*), where Lord Cranworth, in giving judgment, after stating that persons seeking the aid of Parliament towards forming a railway were bound to show that what they proposed to do was of such public importance as to make it reasonable that they should interfere with the rights of private property, said: "But in the case of a public body, like the Mayor and Corporation of the City of London, undertaking

Q. B.]

MUSGRAVE v. THE INCLOSURE COMMISSIONERS FOR ENGLAND AND WALES.

[Q. B.]

improvements in the metropolis, the matter is very different. When they have made a new or widened an old street, they will necessarily have incurred a very great expense, for which they can get no return. The new or improved street is dedicated to the public, and, unlike the railway, yields no profit to those by whom it has been made. In order to meet this difficulty, and to enable corporations to reimburse themselves, the course has been to authorise them to take compulsorily, not only the buildings actually necessary for forming the streets or other projected improvements, but also other neighbouring lands and buildings, the value of which, and the proper mode of dealing with which, the Legislature considers to be connected with and dependent upon the projected improvements." Lord Chelmsford also said, "The word 'street' does not mean the mere roadway, but (as correctly defined by Mr. Bolt in his argument) a thoroughfare with houses on both sides. Therefore, when the Legislature empowered the Mayor and Corporation to take lands, houses, and buildings, for the purposes of the Act, it did not confine them to the mere width of the intended road, but gave them authority to take as much land as might be necessary for the formation of the street itself, by the erection of houses or buildings on each side." His Honour was of opinion that the fair meaning of the Act was that the corporation should have power to take the houses in question, and if they thought fit to let the sites.

Motion refused.

Plaintiff's solicitor, *Travers Burges*.

Defendants' solicitors, *Abbott, Jenkins, and Abbott*, for *Clarke and Sons*, Bristol.

COURT OF QUEEN'S BENCH.

Reported by J. SHORT and M. W. McKELLAR, Esqrs.,
Barristers-at-Law.

Wednesday, Jan. 28, 1874.

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Inclosure of commons — Rights of pasturage — Rights usually enjoyed by lord or his tenants — Evidence — Provisional order — Jurisdiction of valuer or assistant commissioner where no objection made to claim — General Inclosure Act (8 & 9 Vict. c. 118), ss. 27, 48, 56, 77.

Plaintiff was lord of the manor of K., and seised of certain farms, parcel of the said manor. He was also owner of the soil in certain tracts of waste land, which it was proposed to inclose. The tenants of the farms had from time immemorial exercised over the waste certain rights of pasturage. The Inclosure Commissioners, by their provisional order, directed that a certain portion of the waste should be allotted to the lord in respect of his right and interest in the soil, exclusively of his right or interest in all or any of the mines, minerals, stone, and other substrata under such land.

Held, that the provisional order being silent as to the inclusion or exclusion of "any right of pasturage which may have been usually enjoyed by the lord or his tenants" (8 & 9 Vict. c. 118, s. 27), such rights of pasturage, if any existed, were not to be considered as included in the provisional order, or as compensated for by the

portion of the waste allotted to the lord of the manor:

Held, also, that the quasi rights of pasturage enjoyed by the tenants of the farms, though technically merged in the ownership of the waste, were in fact "rights of pasturage usually enjoyed by the lord or his tenants," within the meaning of sect. 27 of the General Inclosure Act, and in respect of which the lord was entitled to a further allotment under sect. 77 of the Act.

Plaintiff, having claimed rights of pasturage over the waste in respect of all the farms, some of these claims were objected to, but in the case of one claim no objection was made. This unobjected to claim having been disallowed by the valuer and assistant commissioner:

Held, that the claim not having been objected to, the valuer and assistant commissioner had no jurisdiction to examine its validity, and disallow it.

THIS was an action upon a feigned issue pursuant to sect. 56 of the General Inclosure Act (8 & 9 Vict. c. 118).

The feigned issue was as follows: In the Queen's Bench, the 9th July, A.D. 1866, Cumberland (to wit), whereas Sir George Musgrave, Bart., was at the time of his making the claims hereinafter mentioned, and from thence hitherto has been, and still is lord of the manor of Kirkoswald, in the township of Kirkoswald, in the county of Cumberland, and as such lord, claims to be seised in his demesne, as of fee of, and in certain lands within, and parcel of the said manor (that is to say), certain lands containing together about 257a. 2r. 13p., and comprised in a certain farm called the Mains Farm, certain other lands containing together about 181a. 2r. 38p., and comprised in a certain farm called the Demesne Farm, certain other lands containing together about 109a. 3r. 14p., and comprised in a certain farm called the Housegills Farm, certain other lands containing together about 159a. 3r. 5p., and comprised in a certain farm called the High Bank Hill Farm, certain other lands containing together about 422a. 1r. 17p., and comprised in a certain farm called the Fog Close Farm, certain other lands containing together about 335a. 0r. 17p., and comprised in a certain farm called the Park House Farm, and certain other lands called the Woodlands, containing together about 84a. 1r. 30p., and of which certain portions containing together about 11a. 0r. 20p., form part of the said farm called the Park House Farm, and the remaining portions do not form part of the said last mentioned farm; and whereas, under and according to the provisions of the Acts for the inclosure, exchange, and improvement of land, certain proceedings were duly had and taken for the inclosure of certain commons within and parcel of the said manor (that is to say), four certain commons called respectively Harescough Fell, Viol Moor, Tod Bank Hill, and Berry Moor, that a certain valuer duly appointed and acting in that behalf under the said Acts determined in the matter of the said inclosure (amongst other claims), certain claims duly made by the said Sir George Musgrave, of rights of common of pasture upon each of the said commons for all his commonable cattle, levant and couchant, upon his said respective lands; and whereas the Inclosure Commissioners for England and Wales afterwards duly empowered Nathan Wetherell, Esq., an

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assistant commissioner under the Acts, to re-hear and determine (amongst other claims) the said claims of the said Sir George Musgrave, and the said Nathan Wetherell, Esq., did accordingly duly and according to the said Acts, re-hear and determine the said claims of the said Sir George Musgrave, and upon such re-hearing did determine and decide in respect of the said claims of Sir George Musgrave, as follows (that is to say), that his said claims in respect of his said lands, in his said farm called the Mains Farm, should be disallowed as to all the said commons, that his said claims in respect of his said lands comprised in the said farm called the Demesne Farm, should be allowed as to the said common called Harescough Fell, and disallowed as to the said commons called Viol Moor, Tod Bank Hill, and Berry Moor, that his said claims in respect of his said lands comprised in the said farm called the Housegill's Farm, should be allowed as to the said commons called Harescough Fell and Viol Moor, and disallowed as to the said commons called Tod Bank Hill and Berry Moor, that his said claims in respect of his said lands, comprised in the said farm called the High Bank Hill Farm, should be allowed as to the said commons called Harescough Fell and Berry Moor, and disallowed as to the said commons called Viol Moor and Tod Bank Hill, that his said claims in respect of his said lands, comprised in the said farm called the Fog Close Farm should be disallowed as to all the said commons, that his said claims in respect of his said lands comprised in the said farm called the Park House Farm, should be allowed as to the said commons called Harescough Fell and Viol Moor, and disallowed as to the said commons called Tod Bank Hill and Berry Moor, that his said claims in respect of his said lands called the Woodlands, should so far as regards the said portion thereof, forming part of the said farm called the Park House Farm, be allowed as to the said commons called Harescough Fell and Viol Moor, and that the residue of his said last-mentioned claims should be disallowed. And whereas, the said Sir George Musgrave claims to be interested in the said commons, and is dissatisfied with the said determinations and decisions of the said assistant commissioner, so far as his said claims were thereby disallowed. And whereas, the said Sir George Musgrave, duly caused notice of such dissatisfaction to be delivered according to the provisions and requirements in that behalf, of the 56th section of 8 & 9 Vict. c. 113, and everything has been done and has happened, and all times have elapsed, necessary to entitle the said Sir George Musgrave to bring an action upon a feigned issue against the Inclosure Commissioners for England and Wales, for the determination of the several matters in respect to which he is so dissatisfied as aforesaid. Now the said Sir George Musgrave affirms, and the Inclosure Commissioners for England and Wales deny as follows, that is to say: First, that the said Sir George Musgrave is entitled to common of pasture upon the said common called Harescough Fell, for all his commonable cattle, levant and couchant, upon his respective lands, comprised in the said farms called respectively the Main's Farm and the Fog Close Farm, and upon such of his said lands called the Woodlands, as do not form part of the said farm called the Park House Farm. Secondly, that the said Sir George Musgrave is entitled

to common of pasture upon the said common called Viol Moor, for all his commonable cattle, levant and couchant, upon his said respective lands, comprised in the said farms called respectively the Main's Farm, the Demesne Farm, the High Bank Hill Farm, and the Fog Close Farm, and upon such of his said lands called the Woodlands, as do not form part of the said farm called the Park House Farm. Thirdly, that the said Sir George Musgrave is entitled to common of pasture upon the said common called Tod Bank Hill, for all his commonable cattle, levant and couchant, upon his said respective lands, comprised in the said farms called respectively the Main's Farm, the Demesne Farm, the Housegill's Farm, the High Bank Hill Farm, the Fog Close Farm, and the Park House Farm, and upon the said lands called the Woodlands. And fourthly, that the said Sir George Musgrave is entitled to common of pasture upon the said common, called Berry Moor, for all his commonable cattle, levant and couchant, upon his said respective lands, comprised in the said farms called respectively the Main's Farm, the Demesne Farm, the Housegill's Farm, the Fog Close Farm, and the Park House Farm, and upon the said lands called the Woodlands. Therefore, &c.

The action came on for trial at the Cumberland Summer Assizes, 1866, when a verdict was by consent entered for the plaintiff subject to the opinion of the court on a special case to be settled by an arbitrator.

The following were the facts found by the arbitrator:

5. The plaintiff is lord of the manor of Kirkoswald, which is co-extensive with the township of Kirkoswald, in the parish of Kirkoswald, in the county of Cumberland, and as such lord he is seized of four tracts of waste land, parcel of the manor, and lying within the township of Kirkoswald, called Harescough Fell, containing 2343a. 1r. 10p.; Viol Moor, containing 127a. 1r. 3p.; Tod Bank Hill, containing 7a. 2r. 25p.; and Berry Moor, containing 12a. 2r. 33p.; subject to such rights of common, of pasture, or rights of pasture as can be legally established over them.

6. The plaintiff is also seized of certain farms and lands situated in the said township and manor of Kirkoswald, viz.: 1, A farm consisting of lands called respectively High Mains and Low Mains; 2, a farm called Fog Close, or Fog Closes, sometimes called The Fog, and consisting of lands called respectively High Fog Closes and Low Fog Closes; 3, a farm called the Demesne Farm; 4, a farm called Housegills, sometimes High Housegill and Low Housegill; 5, a farm called Park's Farm, sometimes Park House Farm, consisting of lands formerly called respectively Park's Farm, and Lodge Park Farm; 6, a farm called High Bank Hill; and 7, certain woodlands.

7. These farms and woodlands, together with the manor of Kirkoswald, have been held by the plaintiff and his ancestors for many years last past. No evidence was adduced to show that the manor had ever been held under a title separate and distinct from the farms and woodlands. Several of the leases (produced at the trial and set out in the appendix to the case) refer to the farms and woodlands as portions of the demesnes of the manors, and all the farms and woodlands are in fact demesnes of the manor.

8. The township of Kirkoswald is divided into

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the High Quarter and Low Quarter. The High Quarter comprises Harescough Fell, Viol Moor, and Tod Bank Hill; the Low Quarter comprises Berry Moor and the farms and woodlands of the plaintiff above mentioned.

9. An inclosure of the four tracts of waste was commenced under the General Inclosure Act (8 & 9 Vict. c 118) in the year 1860, and is still pending.

10. The defendants issued their provisional order under sect. 27 of the Act dated 25th April 1861.

The provisional order was as follows :

No. 36.—Provisional order of the Inclosure Commissioners for England and Wales.

Whereas persons interested in certain lands called or known as Harescough Fell, Viol Moor, Tod Bank Hill, and Berry Moor, situate in the township of Kirkoswald, in the county of Cumberland, being land subject to be inclosed under the provisions of the Acts for the inclosure, exchange, and improvement of land, and proposing to inclose the same under the said Acts, have made due application to the Inclosure Commissioners for England and Wales to sanction such inclosure.

And whereas it has been made to appear to the said commissioners that the persons making the said application represent at least one-third in value of the interest in the said lands.

And whereas the said commissioners on the statements contained in the said application, thought the inclosure of the said lands might be found to be expedient, and accordingly referred the said application to John Job Rawlinson, Esq., an assistant commissioner duly appointed under the said Acts.

And whereas the said assistant commissioner, after having caused due notice to be given as required by the said Acts, and having inspected the said lands, held, pursuant to the said notice, a meeting on the 19th day of March 1861, at the house of George Arnison, Harescough, in the said township, to hear any objections which might be made to the said proposed inclosure, and any information or evidence which might be offered in relation thereto, and inquired into the correctness of the statements in the said application, and otherwise into the expediency of the said proposed inclosure.

And whereas the said assistant commissioner duly reported in writing to the said commissioners the result of his inquiries as to the statements contained in the said application, and his opinion as to the expediency of the said proposed inclosure, with his reasons for such opinion, and annexed to his report a sketch of the said lands.

And whereas Sir George Musgrave, Baronet, as lord of the manor of Kirkoswald, is entitled to the soil of the said lands.

And whereas we, the said commissioners, are of opinion that the said proposed inclosure would be expedient, and in case the necessary consents be given, and the requisites of the said Acts be otherwise complied with, intend to certify in our annual general report the expediency of such inclosure upon the terms herein after mentioned.

Now, therefore, in pursuance of the power given to us by the said Acts, we, the Inclosure Commissioners for England and Wales, do, by this provisional order under our seal, declare the following to be the terms and conditions on which we are of opinion that the said proposed inclosure should be made, that is to say—

That four acres on Berry Moor, at such spot as the valuer shall select, be allotted for the labouring poor.

And that one-sixteenth part in value of the said lands, to include the ground where the limestone crops out, be allotted under the provisions of the said Acts to the said Sir George Musgrave, as lord of the said manor, in lieu of his right and interest in the soil of the said lands, to be enclosed, exclusively of his right and interest in all mines, minerals, stone, and other substrata under the same.

That a right to enter the said lands when inclosed for the purpose of opening, working, or winning such mines, minerals, stone, and other substrata, be reserved to such lord, compensation to be made by the person exercising such right for any damage to the surface which may thereby be done.

And that there be reserved to the said lord of the manor all manner of game upon the said lands to be inclosed, together with the right of hunting, hawking, and fowling over the same, with full power and authority to enter upon the said land for the convenient exercise of such rights.

In witness whereof we have hereunto set our official seal this 25th day of April, 1861.

11. The claims of persons claiming to be interested in the said tracts were duly delivered to the valuer appointed in the said inclosure, and amongst them the plaintiff claimed rights of common of pasture over all the said four tracts, in respect of all the said farms and woodlands above mentioned.

The following was the claim of the plaintiff :

No. 37. Plaintiff's claim without schedule.

To the valuers acting in the matter of the inclosure of Harescough Fell, Viol Moor, Tod Bank Hill, and Berry Moor, situate in the township of Kirkoswald, in the county of Cumberland.

I, Sir George Musgrave, of Edenhall, in the county of Cumberland, do hereby give you notice, that I am seised in my demesne as of fee of the messuages or tenements, farms, woodlands, cottages, hereditaments, and premises situate in the township and parish of Kirkoswald aforesaid described in the schedule hereto annexed; and I claim to be entitled to common of pasture upon the said commons about to be enclosed for all my commonable cattle, levant and couchant, upon my said messuages or tenements, farms, woodlands, cottages, hereditaments, and premises set forth in the said schedule, and all other my hereditaments and premises situate in the parish or township of Kirkoswald, in the county of Cumberland.

And I do further give you notice, that I am lord of the manor of Kirkoswald aforesaid, and I further claim that I am entitled as such lord of the said manor to one-sixteenth part of the said commons and of the commonable right and interest therein.

GEORGE MUSGRAVE.

Dated this 23rd day of January, 1863.

The schedule referred to comprised the farm lands, &c., of the plaintiff, setting out the names of the closes and of the occupiers, and the names, extent, and rateable value of each field.

The plaintiff's claim in regard to the said farms and woodlands was objected to in the following form : " Your claim is objected to for Harescough Fell, Viol Moor, Tod Bank Hill, for the Main Farm, Demesne ditto, High Bank Hill ditto, Woods, for the Parks Farm by Waltou; Housegills by Joseph Longrigg. Objected to for Harescough Fell and Tod Bank Hill."

13. The valuer's determination, on hearing the said claims, disallowed certain of them and allowed others. All the claims made in respect of the Mains Farm were disallowed.

14-22. The plaintiff gave notice of dissatisfaction with the valuer's determination. Upon appeal from the valuer's determination, the assistant inclosure commissioner to whom the matter was referred, determined, under sect. 25 of the Act, as follows : That the claim of the plaintiff in respect of the Mains Farm, containing 257a. 2r. 15p., be disallowed; that his claim in respect of the Demesne Farm, containing 181a. 2r. 38p., be allowed over Harescough Fell, and that the remainder of the claim be disallowed.

23. The plaintiff being dissatisfied with so much of the determination of the assistant commissioner as disallowed his claims in respect of the said farms and woodlands for rights of common of pasture, or rights of pasturage, over any of the said tracts of waste, brought this action against the defendants, under sect. 56 of the said Act.

24. In regard to the Mains Farm, containing

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257a. 2r. 15p., in respect of which the entire claim was disallowed by the assistant commissioner.

The arbitrator found:

25. That Mains Farm is situate about three or four miles from Harescough Fell. The tenants who held the farm prior to the year 1826 are dead. In the year 1826 John Longrigg took the farm and held it till 1859. George Carruthers then took the farm, and held it until the year 1866.

26-28. In the year 1828, Longrigg turned a mare from the Mains for one summer to Harescough Fell, and also sent some young horses to the Fell at the same time, and they were sent there on more than one occasion. He also sent a pony to the Fell in the summer of the years 1844 and 1845. He also sent from the Mains sixteen or eighteen sheep to the Fell for one summer, when he sent the mare there. George Carruthers also sent some sheep from the Mains to Harescough Fell during the whole summer of 1859, and also during the years 1860, 1861, and 1864.

29. Occasionally during the eight years ending about the year 1844 Longrigg turned some sheep from the Mains to Viol Moor, and wintered them on the Mains. They were driven to Viol Moor sometimes through the parks and sometimes through Housegills. Longrigg did not keep a Fell flock. The way-going sheep on the Mains were not sent to Harescough Fell, because there was better pasture on the Mains.

30. In the year 1858, about two years before the commencement of the present inclosure, the plaintiff entered into an agreement with G. Carruthers for letting him the farm and Carruthers thereupon covenanted to keep it up and maintain the right of the plaintiff upon Harescough Fell by sending yearly, and every year more or less, stock to depasture on the portions of the waste belonging to the High and Low Quarters.

31. Leases referred to in the appendix were put in evidence, by which the Mains Farm was let "together with all pastures, feedings, commons of pasture, and husbandry ways thereunto belonging." In one of the leases dated 28th September, 1727, the Lodge Park and the Mains were leased subject to an agreement, that the tenant shall have liberty at all seasonable times of the year to drive cattle and carry lime through the lands, now in lease to David Graham, as soon as the said lease shall expire, to and from the Fell. Another lease, dated 7th April, 1753, by which the farm called Old Parks was leased for fourteen years, contained a proviso that it should be lawful during the term, to and for the farmers of the Lodge Park and Mains and their agents and servants to carry lime from the Fell through the said farm, and likewise drive the sheep through the same to and from the Fell. [The case set out other old leases, and evidence of acts of user, to prove the exercise by the tenants of the right of pasturage in respect of each of the farms.]

34. Leases of Old Parks Farm, dated 1767, 1776, 1779, 1785, 1791, contain a proviso that the tenants of that farm should allow the farmers of the Mains and of Fog Close the privilege of a way through the said farm in as full and ample a manner as they had heretofore used and enjoyed the same.

[The paragraphs next following had reference to the other farms.]

51. It was contended on the part of the plaintiff that in the circumstances stated in this case, he is

entitled, independently of any evidence of enjoyment of pasturage by himself or his tenants, to claim as a person interested, in respect of a right of pasturage for all cattle, levant and couchant, on the said farms and woodlands. That, at all events, he is entitled so to claim in respect of such right of pasturage on the demesne lands.

52. That in the event of the court determining that proof of any enjoyment is necessary to support the right, it has been shown by the facts so found that the occupiers of the farms have in right, and on behalf of the plaintiff sufficiently used and enjoyed the privilege of depasturing the wastes, and that it is not necessary for him to prove such enjoyment of pasturage as is required by law in the case of commoners claiming rights of common over the lords' wastes, and that it is sufficient for him to give such evidence of enjoyment as would in the case of a right once found to exist be sufficient to rebut an intention to abandon the right, and that at all events these propositions are true of the demesne lands. And it was further contended that as all the four tracts are waste of the same manor, it must be held that they are all subject to the same rights of common or rights of pasturage as between all the owners of common right land situate within the manor.

53. In regard to the woodlands, it was contended by the plaintiff that the conversion of land which theretofore enjoyed a right of common of pasture over the waste into woodland, and the non-exercise of any rights of common which might have been appendant or appurtenant to such converted land, is not evidence of the relinquishment of such right, and that notwithstanding such conversion and non-exercise the rights still exist at the present day.

54. On the part of the defendants it was contended that the leases which were produced from the custody of the plaintiff are not legal evidence to show that the farms above mentioned are demesne land of the Manor of Kirkoswald, or that any of the farms are entitled to rights of pasturage over the wastes of the manor.

55. It was further contended on the part of the defendants that, inasmuch as the plaintiff is the owner of the said farms and woodlands, and also of the wastes over which his alleged rights of common or pasture are claimed in respect of such farms, all his rights in the tracts are merged in the freehold, or exerciseable only in respect of his ownership of the soil, and that such alleged rights do not separately exist in law. It was further contended that the plaintiff's right, if any, cannot exist independently of user; that the early acts of user were infrequent, and wanted notoriety; that the few animals turned on would have escaped the attention of the commoners, and would not have challenged enquiry; that in the year 1826 the cattle from the farms were not turned on as of right, but in consequence of the want of pasture on the farms, and that no person under the circumstances ventured to object to the trespass; and further that the suspension of the exercise of the right for many years in succession is fatal to the claims, and that the user of late years took place illegally and solely in consequence of the inclosure of Kirkoswald wastes, or other wastes in the neighbourhood having been contemplated or commenced, and that such user must be discarded from consideration.

56. It was further contended that the right of pasturage, if any, cannot be extended beyond the

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particular tract or tracts of waste over which it has been actually exercised, and that no user in respect of any of the farms or woodlands has been shown over Tod Bank Hill, nor over Berry Moor, except as to High Bank Hill Farm.

57. And lastly, that the conversion of land to plantations, and the continuous exclusion therefrom of all commonable cattle, and the severance of the plantations from the farms of which they were originally parcel, is conclusive evidence of an abandonment of all rights of common or pasturage in respect of such plantations, if any such rights ever existed.

The questions for the opinion of the court are

First, whether the leases, or any of them, are admissible in evidence to show that the farms of the plaintiff are demesne lands of his Manor of Kirkoswald, or to show that in respect of such farms he is entitled to rights of pasturage over the said four tracts of waste, or any of them; secondly, whether the Provisional Order of the Inclosure Commissioners for England and Wales, issued in the matter of the Kirkoswald Inclosure of the 25th April, 1861, has not debarred the plaintiff from the rights and interests under the inclosure claimed by him in the present action; thirdly, whether the valuer had any jurisdiction to disallow the claim as to Berry Moor; fourthly, whether the Assistant Commissioner had any jurisdiction to disallow the claim as to Berry Moor; fifthly, whether the rights of common of pasture, or rights of pasturage claimed by the plaintiff in the waste land of his manor, are not merged in the freehold of the waste land, or exercisable only in respect of his ownership of the soil, and whether by reason of such merger he is not precluded from claiming any rights of pasturage in the waste in respect of the farms and woodlands, which together with the said waste land are now vested in him; sixthly, whether in order to establish the rights of pasturage claimed by him, it is not necessary that the plaintiff should prove such exercise and enjoyment of the rights as is required by law in the case of commoners claiming rights of common of pasture over the lord's wastes, or whether the plaintiff is entitled to such rights independently of any such user or enjoyment; seventhly, whether the conversion by the plaintiff of portions of his land into plantations, and his continuous exclusion therefrom of commonable cattle, is not sufficient evidence of the relinquishment or cesser of the rights of pasturage, if any, which theretofore existed in respect of such converted land; eighthly, whether the plaintiff, in case he has established a right of pasturage over one or more of the tracts of waste in respect of his said farms and woodlands is not entitled in respect of the same farms and woodlands to similar rights over all the four tracts so lying within and parcel of his said manor; ninthly, and whether in respect of the said farms and woodlands, or any of them, the plaintiff is entitled to rights of common, or rights of pasturage over the said four tracts of waste, or any of them, so far as he has claimed such rights in this action; tenthly, and generally upon the facts above stated, how the verdict upon the several issues in the said action ought to be entered.

Manisty, Q.C. (with him *Kemplay*, Q.C.) for the plaintiff. Sect. 27 of the General Inclosure Act (8 & 9 Vict. c. 118), enacts that "the commissioners, by provisional order under their seal,

shall set forth the terms and conditions on which they shall be of opinion that the inclosure should be made. . . . And in case the lord of the manor should be entitled to the soil of the land proposed to be inclosed, shall specify the share or proportion of the residue of the land which, after provision made for the payment of expenses in case the expenses shall, under the provisions hereinafter contained, be so directed to be paid by sale of land, and after deducting the allotments to be paid for public purposes, shall be allotted to the lord of the manor in respect of his right and interest in the soil, either exclusively or inclusively of his right or interest in all or any of the mines, minerals, stone, and other substrata, under such land, or inclusively or exclusively of any right of pasturage which may have been usually enjoyed by such lord, or his tenants, or any other right or interest of such lord in the land to be inclosed as the case may appear to the commissioners to require, or as the parties interested with the approbation of the commissioners may have agreed, &c." The provisional order made by the commissioners in the present case allotted to the lord of the manor a portion in respect of his interest in the soil of the waste only; but he is also entitled to an additional allotment in respect of the right of pasturage belonging to lands held by his tenants. Besides his right to an allotment in respect of his property in the soil of the waste, he is entitled to come in under sect. 77, as a "person interested," just as if he were not owner of the soil in the waste. Sect. 77 enacts that "after the several allotments hereinbefore directed shall have been set out and made, and after making provisions for all or any part of the expenses of the inclosure by sale of lands, in case all or any part of the expenses shall be so directed to be paid, the valuer acting in the matter of the inclosure shall divide, allot, and award, all the remainder of the land to be inclosed unto and amongst the several persons who shall be interested therein, and in such shares and proportions as he shall adjudge and determine to be proportionate to the value of their respective rights and interests which shall have been claimed, and allowed under the provisions hereinbefore contained." The two separate rights which the lord of the manor has are carefully distinguished and provided for by the Act. Sect. 76 provides "that after the several allotments hereinbefore directed shall have been set out and made, and after making provision for the payment of the expenses by sale of land, in case the expenses shall be so directed to be paid, the valuer acting in the matter of any enclosure shall allot and award to the lord of the manor so much and such part of the land proposed to be enclosed as shall in the judgment of the valuer be equal (quantity and value considered), to such part of the residue of such land as shall be proportioned to his right or interest therein, according to the directions of the provisional order of the commissioners, in lieu of his right and interest in the soil of the said land, exclusive of any other allotments which may be made to such lord in lieu of or in satisfaction for any other rights or interests in such lands to which he may be entitled, and which shall not have been included in the estimate in such provisional order of his right and interest; and in case it shall have been declared by such provisional order that the

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right or interest of the lord has been estimated exclusively of his right or interest in all or any of the mines, minerals, stone, and other substrata under the land to be enclosed, then the valuer shall and may on the request in writing of the lord, reserve or award to the lord such rights and easements for searching for, working and carrying away such mines, minerals, stone, or other substrata, which shall not have been included in such estimate of his right and interest, subject to such provisions for compensation for damage to be done to the surface in the exercise of such rights and easements as by the valuer, with the approbation of the commissioners, shall be thought reasonable and as shall not be inconsistent as to the terms of such provisional order." By sect. 27 the provisional order may either include or exclude such a right as that in respect of which the lord now claims; if the provisional order does not expressly include it, it must be taken to be excluded; and, no allotment having already been made in respect of it, the lord is entitled to claim under sect. 77, like any other person interested. In *Arundell v. Viscount Falmouth* (2 M. & S. 440), a lord of the manor was held entitled to an allotment under an Inclosure Act in respect of his demesnes of the manor, over and above the allotment awarded to him by the Act in respect of his right as lord of the manor; the 21st section of that Act, giving him a right to compensation for, and in full satisfaction of his right as lord of the manor to the soil in the common and waste lands, and sect. 29 providing that after the several allotments previously directed should have been made, the commissioners should allot the remainder among "the several proprietors thereof" and "persons interested therein" in such proportions as the commissioners should determine to be a full satisfaction for their several and respective lands and grounds, rights of common, and other rights and interests therein. Lord Ellenborough, C. J. said, "In a liberal sense of these words, the lord is interested in a twofold way: First as lord of the soil; and secondly, in respect of that estate which in the hands of another person would be entitled to a right of common, and although the lord, being owner of the soil of the waste cannot in strictness claim a right of common over it in respect of his demesnes, inasmuch as during the unity there would be a merger of that right; yet he has such an interest in respect of his estate as the commissioners may well contemplate, and under the words of this Act may lawfully assign him a compensation for it." Le Blanc, J., said, "The 29th section does not, as many of these clauses do, enact that the residue shall be divided among the other proprietors, but that it shall be divided among the same proprietors and persons interested therein; and further that it shall be in such proportions as the commissioners shall determine to be a full compensation for their land, rights of common, and other rights. Under this clause, therefore, can we say that the lord is excluded? and if not excluded he must have an allotment in lieu of his rights." As to the next question, viz., whether the evidence proved that this was a right of pasturage usually enjoyed by the plaintiff, over the several wastes in respect of the Main farm, and entitling him to an allotment in respect thereof, it is submitted that the old leases referred to, and set out in part, in the appendix to the case, and the recent user both

furnish ample evidence to support the plaintiff's claim, and to show that an ancient right of pasturage was *de facto* enjoyed. As to the third question viz., whether the valuer and assistant commissioner had any jurisdiction to disallow the claim in respect of Berry Moor, there having been no objection made to it, this depends on the construction to be put on sects. 48, 55, and 77 of the Act. Sect. 48, after providing that a statement of all claims shall be delivered to the valuer, enacts that "the valuer shall give notice on the church door, . . . and shall in such notice limit such time for the delivery of objections to claims as the commissioners, under the circumstances, of each inclosure shall think reasonable, and by order under their seal direct; or in case no direction shall have been given by the commissioners in this behalf, then such time as the valuer shall think reasonable, not being less in any case than twenty-one days after such notice shall have been given; and every person who shall object to a claim shall deliver his objection in writing to the valuer, and also deliver a copy of such objection at the place of abode of the claimant or his agent within the time limited for delivery of objections to claims as aforesaid; and no objection to any such claim shall be received by the valuer after the time so limited for the delivery of objections to claims, unless for some special cause to be allowed by the commissioners; and after the time limited for the delivery of claims shall have expired, the valuer shall cause fourteen days' notice to be given of the time and place of the meeting for the examination of such claims, and for the attendance of all parties concerned therein; and at such meeting the valuer shall proceed to examine into and determine such claims, and shall and may allow or disallow the same in whole or in part, and make such order therein as shall to him appear just," subject to appeal to the commissioners. Sect. 55 provides that "after the valuer shall have heard and determined all claims and objections which shall have been made in the matter of an inclosure, he shall cause a schedule of such claims and objections, and of his determination thereon, to be deposited, and to remain for thirty days at the least for the inspection of all persons interested therein, at some public place within the parish in which the land to be inclosed or the greater part thereof shall be situate," the claims being liable to be re-heard by the commissioners or by an assistant commissioner. These enactments give no power to the valuer or commissioners to take into consideration objections not made. Where no objection is made the claim should be allowed, the only question to be determined in such case being the amount of land to be allotted in respect of the claims made, as provided for by sect. 77.

Herschell, Q.C. (with him *F. M. White*), for the defendants, contended that the terms of the provisional order precluded the lord of the manor from claiming an allotment in respect of the rights of common connected with the farms. By sect. 27 of the General Inclosure Act the provisional order of the commissioners is to specify the share of the land to be allotted to the lord of the manor "in respect of his right and interest in the soil, either exclusively or inclusively of his right or interest in all or any of the mines, minerals, &c., or inclusively or exclusively of any right of pasturage which may have been usually enjoyed by such lord or his tenants, or any other right or interest of

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such lord in the land to be inclosed as the case may appear to the commissioners to require," &c. The right of pasturage enjoyed in respect of the farms was a right or interest in the soil. The provisional order may either include or exclude rights in mines and rights of pasturage. It is submitted that whatever is not excluded is included. Here the provisional order excludes minerals; therefore, on the ordinary principle, it must be taken to include rights of pasturage, and if that is so, it furnishes a complete answer to all the claims of the plaintiff. [DENMAN, J., referred to *Lloyd v. Powis* (4 E. & Bl. 485), where, at the trial of an issue under the General Inclosure Act, to try the defendant's title to certain rights of common, it appeared that the owner of the messuages, &c., had been entitled to common in respect thereof, but that, fifteen years before the framing of the issue, he became owner of the manor and so of the soil of the waste; that after this the pasturage was enjoyed as before, and the messuages and manor both became vested in the defendant. A direction to the jury that defendant must fail as he could not have common on his own soil, was held erroneous, inasmuch as defendant had an interest which, though not strictly a right of common, might be popularly so described in an issue framed under the statute.] The mere enjoyment by the lord of a manor of a right to pasture his cattle on his own soil is not properly described or intended to be described by the words of sect. 27, "Any right of pasturage which may have been usually enjoyed by such lord or his tenants"—words intended to apply to some rights of the lord which he had acquired independently of his right as owner of the soil. [BLACKBURN, J., referred to *Musgrave v. Forster*, L. Rep. 6 Q. B. 590; 24 L. T. Rep. N. S. 614.] In that case, where the Inclosure Commissioners were held authorised to make it a condition of the inclosure of a waste that the right of sporting should be severed from the soil, and the tenement thus created should remain in the lord, whilst the soil was allotted to others, the provisional order expressly excluded the lord's "right and interest in the game, and in all mines," &c.; and Blackburn, J., in delivering the judgment of the court, said: "It might be a matter of doubt whether, under the General Inclosure Act, as it was originally passed, the commissioners would have power to impose such a condition. The difficulty in so construing the Act is, that the right of the owner of the soil to take game is a general incident to the property in the soil, a mode of enjoying that property, and is not therefore aptly described as a 'peculiar right,' which is the phrase in sect. 26, nor as an 'other right or interest in the land,' which is the phrase in sect. 27, though it is in the power of the lord to sever it from the soil, and so create in another a peculiar right of this kind; and it might be said that the power of the commissioners to impose terms and conditions under the first Act is limited to imposing terms and conditions relating to rights already existing and not to those to be created by the inclosure itself. But this difficulty seems to be completely removed by sect. 1 of 11 & 12 Vict. c. 99, which enacts that it shall be lawful for the commissioners in their provisional order 'to set forth any special agreement or matter concerning or affecting the land, to be inclosed, and to make the same a condition of such inclosure.' Those

who passed this enactment seem to have discovered that the words of the former Act might be construed as restricting the power of the commissioners to imposing conditions of a particular kind only, and therefore enacted that their power should be in that respect unrestricted." In *Arundell v. Viscount Falmouth* (*ubi sup.*) Lord Ellenborough, in the passage already cited, distinguishes between a "right" and an "interest." [BLACKBURN, J.:—I confess I am unable to appreciate the distinction which he there makes.] As to the next question, the lord of the manor, in order to establish his claim, must show that the right of pasturage has been "usually enjoyed" by him or his tenants; proof of a merely occasional user or enjoyment will not be sufficient. Now the evidence relied on shows only casual acts of enjoyment, and it is these acts of enjoyment which should be regarded rather than the provisions of the leases set out in the appendix to the case. [BLACKBURN, J.:—Usual enjoyment must be taken to mean such a usage as would prove a prescriptive right.] As to the last point, it is submitted that the valuer is not precluded from disallowing a claim solely because no objection has been made to it. Sect. 48 provides that "after the time limited for the delivery of claims shall have expired, the valuer shall cause fourteen days' notice to be given of the time and place of the meeting for the examination of such claims," not simply claims objected to, "and for the attendance of all parties concerned therein; and at such meeting the valuer shall proceed to examine into and determine such claims," i.e., all the claims delivered, "and shall and may allow or disallow the same in whole or in part, and make such order therein as to him shall appear just." There is nothing whatever in the language of this enactment to restrict the jurisdiction of the valuer to an examination and allowance or disallowance of those claims only which have been objected to. If he is satisfied that there is no foundation for a claim made, he may refuse to allow it, though no objection has been made to it. He is a public officer, whose duty it is to determine the rights of the parties who come before him, and to make such order in respect thereof as to him shall seem fit.

Manisty, Q.C. in reply.

BLACKBURN, J.:—I think we are able to deliver judgment in this case now, though the facts are a little complicated, and there may be some small points which will require to be settled afterwards. The first question, which is one of some general importance, is whether the form of the provisional order has not debarred the plaintiff from making any claim in respect of the rights claimed by him in the present action? The lord of the manor has a general veto in case of a proposal for inclosure; a certain majority of the commoners must also consent before an inclosure can be effected, and the Inclosure Commissioners must make a provisional order which contains the terms which they are prepared to sanction. Then the 27th section of the Act says that, "in case the lord of the manor shall be entitled to the soil of the land proposed to be inclosed," the commissioners, by their provisional order, "shall specify the share or proportion of the residue of the land which, after provision made for the payment of expenses, &c., and after deducting the allotments to be made for public purposes, should be allotted to the lord of the manor in respect of his right

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and interest in the soil, either exclusively or inclusively of his right or interest in all or any of the mines, minerals, stone, and other substrata under such land, or inclusively or exclusively of any right of pasturage which may have been usually enjoyed by such lord, or his tenants, or any other right or interest of such lord in the land to be inclosed as the case may appear to the commissioners to require, or as the parties interested, with the approbation of the commissioners, may have agreed," &c. Now we have to see first what is the meaning of the words "right of pasturage which may have been usually enjoyed" by the lord or his tenants. The lord is, by supposition, owner of the soil in the waste which it is proposed to inclose, and, as such, would have the minerals under it. The Legislature has provided that his right to the minerals may be either included or excluded in the allotment made to him in respect of his right and interest in the soil. Afterwards come the words "any right of pasturage which may have been usually enjoyed by such lord or his tenants." What is the meaning of that? The owner of the soil, unless there is something to show the contrary, would have the ownership of the rights of pasturage over it. When his right is subject to the rights of common of other persons, he still possesses it, but must exercise it subject to those other rights. But it may be that besides the right of pasturage which he has as owner of the soil, the lord of the manor as proprietor of other lands with a right of common attached to them, has practically another right of pasturage for himself or his tenants over the same soil; though, according to the general principles of English law the dominant and servient tenements being in the same owner, there cannot in strict law be a separate right of common at all, as that is merged in the ownership of the soil. But where the land in respect of which a right of common exists is in a person other than the lord, and the lord when he gets it back, instead of taking a transfer to a trustee for himself, takes a transfer to himself, he thereby gets a *quasi* right of common, and *de facto* continues to exercise the same rights of common as were exercised whilst the land was in a separate person. The tenants of these farms did, in fact, enjoy rights of common just as if the lord had not been the owner of the common land. That being so, I cannot but construe the Act of Parliament when it speaks of "any right of pasturage which may have been usually enjoyed by such lord or his tenants," otherwise than as meaning such rights of pasturage as have been enjoyed in such a manner as—were it not for the technical rule of the law as to the effect of the merger of the dominant and servient tenements—would prove and establish a user beyond the memory of man of a right of common of pasturage over the land. That, I think, is what is meant by the statute; that the Inclosure Commissioners, in their provisional order, may make an allotment to the lord of the manor in respect of his right and interest in the soil in the waste, including any rights of pasturage which he may have of the nature which I have described, so as to have done with the whole thing at once. But the commissioners, in their provisional order, may also say: We will make an allotment to you in respect of your right and interest in the soil, but we will exclude any rights

of pasturage which have been usually enjoyed by you or your tenants in respect of these farms, just as if the legal estate had been vested in a trustee, so as to keep the estate in the waste and the estate in the farms separate and distinct. The Inclosure Commissioners, in their provisional order, may do either of these things. The first question we have to consider is whether in the provisional order in the present case they have included or excluded these rights of pasturage. I go thus far with Mr. Herschell's contention, that if the provisional order had said that this allotment was in lieu of these *quasi* rights of pasturage as well as of the lord's right and interest in the soil, then upon this issue we might hold that he has lost his right to further compensation for these *quasi* rights of common, because they were taken into account in the allotment made under the provisional order. It is important to see, therefore, whether these rights of pasturage were included or excluded by the provisional order. The provisional order is framed in these terms: "That four acres in Berry Moor at such spot as the valuer shall select be allotted for the labouring poor, and that one sixteenth part in value of the said lands, to include the ground where the limestone crops out, be allotted under the provisions of the said acts to the said Sir George Musgrave, as lord of the said manor, in lieu of his right and interest in the soil of the said lands to be enclosed, exclusively of his right and interest in all mines, minerals, stone, and other substrata under the same. That a right to enter the said lands when inclosed, for the purpose of opening, working, or winning such mines, minerals, stone, or other substrata, be reserved to such lord, compensation to be made by the person exercising such right for any damage to the surface which may thereby be done; and that there be reserved to the said lord of the manor all manner of game upon the said lands to be inclosed, together with the right of hunting, hawking, and fowling over the same, with full power and authority to enter upon the said land for the convenient exercise of such rights." The provisional order is absolutely silent as to rights of pasturage, if any there may be, which have been usually enjoyed by the lord or his tenants. Then the question really comes round to this—if there are in existence any such rights of pasturage, and the provisional order does not say anything as to their being either included or excluded, which are we to take to be the case? I have come to the conclusion that where nothing is said on the subject by the provisional order, these rights of pasturage cannot be taken to be included. Where we find a right of pasturage existing, which but for the technical objection which I have mentioned would be a separate right, I think that unless there is something in the provisional order showing an intention to include such a right, we ought not to hold it to be included. I think, therefore, that the allotment made by the provisional order is exclusive of the rights of pasturage which have been usually enjoyed by the lord or his tenants—"usually enjoyed" meaning enjoyed so long as would have established the right as against the rest of the commoners, that is, generally, for a time whereof the memory of man runneth not to the contrary. We have next to consider whether this right of pasturage was "usually enjoyed." I cannot agree with Mr. Marshall that by this is meant an enjoyment without any interruption. When the

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question of the value of the respective interests comes to be dealt with under sect. 77, it would be a fair matter to submit to the consideration of the valuer that though this right of common existed, yet the fact showed that for a number of years the owners did not think it worth exercising, and therefore it could not be of much value. That is a matter which the valuer might well be called on to consider. But I cannot think that when once it is shown that the right has so long existed, the mere fact that it has been neglected, and allowed to fall into desuetude for some years, deprives the owner of all rights to compensation in respect of it. Let us see, then, what is the evidence that the right of pasturage was "usually enjoyed." First, as to the Mains Farm, there is proof of a user since 1826, though slight, of the right of pasturage over the Fells, proof of user in 1828 and 1845, and quite recently. Then we have a long series of leases tending to prove the same thing, though of themselves they would not establish it. Being more than thirty years old, and coming from the proper custody, they must be taken to have been granted and executed as described. The modern user taken with these ancient documents shows that probably the user was an ancient one. Taking that view of the matter, I think there is evidence of ancient user so far back as the year 1677, and evidence of modern user, though, it is true, slight; further, the subsequent non-user is explained by the fact of there being no Fell flock. From this evidence I think we should come to the conclusion that the tenant had, for about 200 years, a right of pasturage on the high Fells, and the reasonable inference is that the right was an immemorial one. The right of pasturage over the high Fells, therefore, did exist in respect of the Mains Farm. [His lordship then went, *seriatim*, through the claims made over each of the tracts of waste land, in respect of each of the farms.] Then as to Berry Moor, the third question arises, could the valuer or assistant commissioner, properly of his own mere motion, disallow the claim made with regard to the Berry Moor, there having been no objection made to the claim? At first I was under the impression that he could do so. But when we come to look at the 77th section of the Act, we see that all claims are first to be allowed or disallowed; and when all are settled, and not till then, comes the time when allotments are to be made in respect of the "respective rights and interests which shall have been claimed and allowed under the provisions hereinbefore contained." That removes the difficulty; and we are now to consider whether the claim in respect of Berry Moor was "allowed." Now, when the Act carefully provides that all parties interested are to be allowed to appear and object to any claims made, and no persons appear and object to this claim, it must be regarded as allowed, and accordingly, the valuer and assistant commissioner had no right to enter into the question and reject the claim. The lord of the manor, is, therefore, entitled to an allotment in respect of his claim over Berry Moor.

DENMAN, J.—I am of the same opinion, and do not think it necessary to add anything to the judgment of my brother Blackburn, with which I agree in every point. I will only say, with regard to the provisional order, as to the form of which it is important to lay down a general rule,

that the mere omission to mention any right ought not to be taken as an inclusion of it.

ARCHIBALD, J.—I am of the same opinion.

Judgment for the plaintiff.

Attorney for plaintiff, J. L. Morris.

Attorneys for defendants, White, Borret and Co.

COURT OF COMMON PLEAS.

Reported by H. F. POOLEY and JOHN ROSE, Esqrs.,
Barristers-at-Law.

Friday, Jan. 23, 1874.

MAUDE (pet.) v. LOWLEY (resp.) (No. 2).

Municipal election petition—Limit of particulars—Time for delivery of.

After the filing of a municipal election petition, the following order was made by a judge at chambers, viz., that the petitioners do within a week deliver to the respondent particulars of all the persons alleged to have been bribed or treated, by whom, when, and where. And of all the persons alleged to have been retained and employed as canvassers, and by whom, and when, and where. And of all persons to whom money was paid or agreed to be paid, on account of the conveyance of voters to the poll, and by whom and when and where such moneys were paid or agreed to be paid.

On appeal to the court,

Held, that the order, if varied by the addition of dates, and by the words "as far as is known" being inserted at the end of each sentence, was reasonable and ought to be confirmed.

RULE calling on the respondent to show cause why an order of Pollock, B., dated 16th Jan. 1874, should not be varied.

A petition having been lodged against the return of James Lowley, as town councillor for a ward of the borough of Leeds, and the trial thereof being fixed for the 3rd Feb., an application was made on the preceding 16th Jan. at chambers, to the learned judge above-mentioned for particulars of the charges in the petition; the matter was argued, and the following order made:

I do order that the petitioners, or their attorney, or agents, do within a week deliver to the respondent, or his attorney, particulars of all the persons alleged to have been bribed or treated, by whom, when, and where. And of all the persons alleged to have been retained and employed as canvassers, and by whom, and when, and where. And of all persons to whom money was paid, or agreed to be paid, on account of the conveyance of voters to the poll, and by whom, and when, and where such moneys were paid or agreed to be paid.

(Signed)

C. E. POLLOCK.

16th Jan. 1874.

The above rule having been obtained,

Arthur Charles showed cause.—Three classes of persons are referred to in the petition—viz., persons bribed, canvassers, and persons employed in the conveyance of voters to the poll. First, it is objected by the petitioner that these particulars were ordered too soon. But that was in the discretion of the learned judge to determine, whose decision should be treated as final unless strong reasons are shown for the contrary. The time for allowing particulars has, in different cases, varied from three to five and six days. No time is fixed in the rules. [Field, Q.C., for the petitioner, offered a week excluding Sunday. Lord COLERIDGE, C.J.—That seems to the court reasonable.] Then secondly, as to the particulars of bribers and persons bribed.

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Beal v. Smith (19 L. T. Rep. N. S. 565; L. Rep. 4 C. P. 145), was relied upon by the petitioner at chambers. But all that was actually decided there is that this court will not interfere with the discretion of a judge at chambers. So it is, to that extent, now in favour of the respondent. Bovill, C.J., seemed to intimate that he would have made a different order, for he said that he would not interfere with the discretion of the learned judge at chambers, but that justice might require further time. [Lord COLERIDGE, C.J.—Moreover, you have in your favour the very high authority of Willes, J., who was opposed to the application.] The affidavits are not set out in the report of the case, and the order was much more extensive than the present one. And it is noticeable that one of the learned judges, said to have been consulted by Willes, J., before the latter made the order, thought fit to give particulars of bribers in a subsequent case, viz., the *Hastings Petition* and *Stafford Petition* (20 L. T. Rep. N. S. 180), where Blackburn, J., made orders for particulars, giving the names of the persons subjected to corrupt practices, and of the persons guilty of those practices, as far as practicable, and the times and places at which the alleged treating took place. It is clear, therefore, that the form of order in *Beal v. Smith* is not conclusive. In *Anderson v. Cawley*, *The Salford Petition* case (19 L. T. Rep. N. S. 500), Willes, J., adhered to the form of order in *Beal v. Smith*. Very soon after that case, Keogh, J., after his attention had been drawn to the last-mentioned decision of Willes, J., adopted the same form (*The Londonderry Petition*, 19 L. T. Rep. N. S. 573), making an order that the petitioners should, three days before the trial, give particulars containing the names of all persons alleged to have been bribed, and also of those who were alleged to have administered bribes, and of those alleged to have been unduly influenced, &c. And another order was made in *Brett v. Robinson* (22 L. T. Rep. N. S. 487), by Bramwell, B. [Lord COLERIDGE, C.J.—There is a marked distinction between the particulars of treating and bribery.] *Beal v. Smith* was followed by Pollock, B. in the present case. [Lord COLERIDGE, C.J.—The cases cited only show that there is authority for giving particulars of bribers, and a list of acts of bribery and acts of treating, whereas the order before us goes further, and seeks information as to the times and places of treating.] If the respondent is entitled to a list of bribers, why is he not also of treaters? It is more easy to discover treating than bribery. The object of particulars is to enable the respondent to prepare his defence. [Lord COLERIDGE, C.J.—Or to ascertain what case, if any, the petitioner has.] Rather, to find out what has to be met in court. Thirdly, if entitled to the list of bribers the respondent is likewise entitled to a list of treaters, although possibly, if furnished with the places of treating, an inference may be drawn that the landlords of those places were the persons by whom the treating was accomplished. If the petitioner can give the names of bribers he can as easily give those of the persons bribed. [HONYMAN, J.—Not so. He may have seen a number of men coming out of some place with the gold in their hands, yet not know their names.] Lastly, the respondent is entitled to the names of the agents charged with conveying voters to the poll.

Field, Q.C. (with him *Lockwood*) for the petitioner. — Although no doubt the respondent has a right to particulars, yet on the other hand the petitioner should not be restricted in his proof. The election tribunals require very strict proof. There is much difference between a knowledge of bribers and a knowledge of bribees. The mode of bribery varies. A common mode is for the voter to receive a mere ticket which is after the election produced as a voucher. [KEATING, J.—The words “as far as is known” would protect you.] Yes. The petitioner will undertake to give the names so far as they are known. So, also, with the same limitation, the times and places of bribing and treating shall be given and likewise as to the conveyance of voters to the poll.

Lord COLERIDGE, C.J.—Then let the order be varied by the dates being given, and the words “as far as is known” being inserted after each question, “by whom, when, and where.”

Rule absolute accordingly.

Attorneys for petitioners, *Paterson, Snow, and Burney*.

Attorney for the respondent, *Darley*.

COURT OF EXCHEQUER.

Reported by T. W. SAUNDERS and H. LEIGH, Esqrs.,
Barristers-at-Law.

Jan. 27 and 28, 1874.

VAUGHTON AND ANOTHER v. THE LONDON AND NORTH WESTERN RAILWAY COMPANY.

Railway company—Common carriers—Loss of goods above 10l. in value—Goods not declared under sect. 1 of Carriers' Act—Felonious acts of company's servants—What sufficient evidence of in civil action—Difference in that respect in a criminal prosecution—Calling the suspected servant as witness—Carriers' Act (11 Geo. 4, & 1 Will. 4, c. 68), sect. 8.

In an action against a railway company, as carriers for hire, for the loss of goods alleged to have arisen from the felonious act of the servants of the company, it is not necessary for the plaintiff, in order to prove the felony, under sect. 8 of the Carriers' Act (11 Geo. 4 & 1 Will. 4, c. 68), to bring home the charge to any individual servant of the company in particular, or to produce such evidence of the fact as would be requisite on a criminal trial; it being sufficient for him to show it to be more probable that the felony was committed by some one or more of such servants than by anyone else; and the mere fact of the company's abstaining from calling the suspected servants as witnesses, in answer to the plaintiff's case, is sufficient to justify the case being left to the jury.

So held by the Court of Exchequer (Kelly, C.B., Pigott and Amphlett, BB.).

THIS was an action brought by the plaintiffs against the defendants as carriers for delay in the delivery of goods intrusted to them, and also (the goods not having been delivered at all) to recover the value of such goods, consisting of articles of jewellery. The defendants pleaded, *inter alia*, the Carriers' Act, and the absence of a declaration of the value of the goods being above 10l. at the time they were delivered to them to be carried; to which the plaintiffs replied, that the goods were lost by means of a felony committed by the defendants' servants.

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The pleadings in the action were shortly as follows:

The first count of the declaration charged that the plaintiffs delivered to the defendants, as being carriers of goods by railway from Birmingham to Liverpool, certain goods of the plaintiffs to be by the defendants carried from Birmingham to Liverpool aforesaid, and there delivered for the plaintiffs within a reasonable time in that behalf for reward, &c.; that the defendants received the said goods, &c.; and a reasonable time for carrying and delivering the same elapsed, yet the defendants neglected for a long and unreasonable time in that behalf to carry and deliver the said goods, whereby the plaintiffs were deprived of the use of the said goods, and the same were diminished in value. By the second count the defendants were charged with having received as carriers for hire certain goods of the plaintiffs to be by the defendants taken care of, and safely and securely carried from Birmingham to Liverpool, and there delivered for the plaintiffs within a reasonable time in that behalf for reward; and a reasonable time for carrying and delivering the same elapsed, yet the defendants did not take care of and safely and securely carry and deliver the said goods for the plaintiffs, whereby the same were lost to the plaintiffs. The third count was in trover for a wrongful conversion by the defendants to their own use of the plaintiffs' goods—that is to say, gold rings, gold locketts, gold pins, and gold seals. Claim, 100*l*.

The defendants pleaded various pleas, as follows: First (to the first and second counts), denying the delivery by the plaintiffs and the receipt by the defendants of the said goods for the purposes and on the terms alleged; secondly (further to the same counts), denying the breaches therein alleged; thirdly (to the third count), not guilty; fourthly (further to the same count), that the goods were not the plaintiffs' goods; fifthly (as to the first and second counts), that the breaches of duty in those counts alleged were, by reason of loss by the defendants of the said goods, and that the said goods were articles and property of the description mentioned in sect. 1 of 1 Will. c. 4 (the Carriers' Act), and were contained in a parcel which, with the goods therein contained, was delivered by the plaintiffs to the defendants as and being common carriers by land for hire, at a certain office or receiving house of the defendants, for the purpose of being by them, as such carriers, carried for hire in a public carriage, and the value of the said goods then exceeded the sum of 10*l*., and, at the time of the delivery of the said parcel and goods as aforesaid, there was affixed, in legible characters, in a public and conspicuous place of the said office or receiving house, being an office or receiving house of the defendants, where such parcels were then received by the defendants for the purpose of carriage, a notice, within the meaning of the said statute, whereby the defendants notified that an increased rate of charge in the said notice mentioned was required to be paid them, over and above the ordinary rate of carriage, as a compensation for the greater risk and care to be taken for the safe conveyance of articles and property of the description in the first section of the said statute mentioned, and at the time of the delivery of the said parcel and goods at the said office or receiving house of the defendants as aforesaid, the value and nature of the said goods

were not declared by the person sending or delivering the same, and neither such increased charge as aforesaid nor any agreement to pay the same was accepted by the person receiving the said parcel and goods.

The plaintiffs took and joined issue on all the said pleas, and for a second replication to the said fifth plea, they said that the loss of the said goods arose from the felonious acts of servants in the employ of the defendants, and not otherwise; and upon that second replication issue was also joined.

The cause came on for trial at the last summer assizes, 1873, at Warwick, before Honyman, J., and a special jury, on which occasion the following appeared to be the facts, which were either proved in evidence or admitted.

The plaintiffs, who were wholesale jewellers carrying on business at Birmingham, sent from thence on the 29th Jan. 1873 a box of jewellery to their traveller, a Mr. Holland, then at Liverpool, and addressed to him at "Lawrence's Hotel, Liverpool," where he was then staying. The box contained articles of jewellery, &c., which were admitted to be of above the value of £10, and to be within the operation of the Carrier's Act (11 Geo. 4, & 1 Will. 4, c. 68), but the nature and value of the contents of the box were not "declared" by the plaintiffs within the terms of sect. 1 of the Act, at the time it was handed by them to the defendants' servants at their Birmingham station, for carriage to Liverpool, although in the receipt which was given for it at that time by the defendants' servant, the package was stated to contain "jewellery." The delivering of the box by the plaintiffs to the defendants at Birmingham was not disputed by the latter, nor was there any question raised as to the nature and value of the contents, the only question at issue between the parties being whether (the box not having been delivered to the plaintiffs or to their traveller at Liverpool) its loss had been occasioned by the "*felonious acts* of any servant of the company" within the meaning of sect. 8 of the Carriers' Act above mentioned, which section is in the following words:

Provided also, and be it further enacted, that nothing in this Act shall be deemed to protect any mail contractor, stage coach proprietor, or other common carrier for hire from liability to answer for loss or injury to any goods or articles whatsoever arising from the felonious acts of any coachman, guard, bookkeeper, porter, or other servant in his or their employ. . . .

On arriving at the defendants' Lime-street Station, at Liverpool, from Birmingham, parcels, such as was the box in question, are taken to the "parcel office" at the station for delivery in Liverpool. This office is not open to or accessible by the public, but only to the servants of the company. The parcels for delivery in Liverpool are entered in a book kept for the purpose, and are then put into a covered van, at the office door, to be driven away and delivered at their several destinations in the town. The collection and delivery of these parcels from the defendants' station at Liverpool as undertaken by an agent of the company of the name of Thurston, under a contract with the defendants for that purpose, and the vans used by him in the business had his name, &c., painted upon each of them, thus, "Joseph Thurston, agent for the London and North-Western Railway Company." A man called Hindley, in the employ of Thurston, was the driver of the parcel van on the

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morning in question (30th Jan.), and he had a book in which this box, together with two other parcels, also for delivery to other persons at Lawrence's Hotel, was duly entered. It was Hindley's duty to check the parcels off by this book as they were placed in his van, and on him rested the duty and responsibility of safely delivering them. There was no part of the defendants' station open or accessible to the public nearer the spot where the parcel van was, while the parcels were being placed in it, than from six to ten yards.

On arriving with his van at Lawrence's Hotel, Hindley went into the Hotel and delivered there the other two parcels above mentioned, and permitted the housekeeper to sign his book as having received three parcels, including the box in question which she did, not adverting to the fact that only two had been delivered. The landlord, however, came in at the moment, and perceiving what Hindley had done, called his attention to it, and asked him where Mr. Holland's parcel was, to which Hindley replied, "Isn't it here?" and then went back to his van as if, apparently, to look for the parcel, and came back and said he could not find it, nor was it ever in fact delivered. The housekeeper's receipt for the box was then erased or struck through by her in Hindley's book.

On the 10th Feb. 1873, some articles of jewellery, identified as having formed a portion of the contents of the plaintiff's box, were discovered by a detective police officer to have been pledged a day or two previously at a pawnbroker's in Liverpool by a man named "Buchanan," who was not in the service of the company, and who was at once arrested on suspicion of having stolen the box. He denied the stealing, and said that he had found the articles which he had pawned lying about on a part of the defendant's station, called the "Fish Siding," which siding was open and accessible to the public, and was about 100 yards distant from the office where the parcels were put into the van. Upon going to the part of that siding pointed out by Buchanan, the police officer discovered some other broken bits of jewellery lying about, which proved to be portions of the plaintiff's property, and also some bits of wood, which were identified as being parts of the box in which the goods were packed. The officer then went to the "Parcel office," where he saw a man of the name of "Wilson," one of the clerks employed by the defendants, in and having charge of that office, and Wilson then produced to the officer a breast-pin's head, which was identified as a portion of the lost goods, and which he said he had picked up on the siding some days before, and that another man had also picked up some other bits of the jewellery. He said also that he had not mentioned anything about it, not thinking it to be of any value. The man Buchanan was subsequently discharged, the police authorities being satisfied with his statement as to finding the articles.

At the close of the plaintiffs' case, the counsel for the defendants submitted that there was no evidence to go to the jury in support of the plaintiff's second replication; there was no proof that any felony had been committed by anybody, and certainly none that it had been committed by any servant of the company. The defendants called no witnesses, and the learned judge in summing up to the jury, told them that they

must, before they could find a verdict for the plaintiffs, be satisfied that the goods were stolen by the felony, not of one of the public, but of one or more of the company's servants, or (which was the same thing here) of Thurston's servants, although the plaintiffs might not be able to fix the felony on any one particular servant, nor was it necessary that the jury should be satisfied as to which one of two or more implicated servants was the actual thief.

The jury found a verdict for the plaintiffs on the first count, with nominal damages, and on the second count with 47l. damages, and leave was reserved to the defendants to move to set aside that verdict, and to enter a verdict for the defendant on the second count, on the ground that there was no evidence which ought to have been left to the jury in support of the replication to the fifth plea.

A rule to that effect, and also for a new trial on the ground that the verdict was against the weight of evidence, was accordingly moved for and obtained by *Field*, Q.C., on the part of the defendants, in Michaelmas Term last, and now,

Digby Seymour, Q.C. and *Forbes*, for the plaintiffs, showed cause against the rule, and contended that the plaintiffs were entitled to retain the verdict which had been found in their favour, and that the jury were well warranted in finding it, because it was sufficient for the plaintiffs to adduce in evidence, as they had done in this case, circumstances which threw a suspicion of a felonious act upon the servants of the railway company, and that the burden was thereby cast upon the defendants of calling these servants into the witness box to explain, if they could do so, their conduct in the matter. For that proposition the case of *Boyce v. Chapman* (2 Bing. N. C. 222), is an authority, in which in an action against carriers, upon an issue that the plaintiff's goods were stolen by the defendants' porter, the plaintiff proved only circumstances of suspicion, which probably would not have insured a conviction on an indictment for felony; but, the defendants having omitted to call the porter as a witness, and the jury having found for the plaintiff, the court refused to grant a rule. It is quite sufficient in a case like the present, if it be shown beyond reasonable doubt that the loss of the goods in question must have resulted from a felonious act on the part of some one or other of the servants of the railway company, and it is not incumbent on the plaintiffs to fix by their evidence any one servant in particular with the felonious act, nor even to adduce such distinct and precise proof of the act as would be held needful to establish a case for the jury, if one of the servants were on his trial on an indictment for the felony. They cited also

Machin v. The London and South-Western Railway Company, 2 Ex. 418, 848; 17 L. J. 271, Ex.;

Keys v. The Belfast Railway Company (in the Irish Court of Common Pleas), 8 Ir. Com. L. Rep. 167.

Field, Q.C. and *J. Carter*, for the defendants, supported their rule.—No evidence of a felony having been committed was adduced by the plaintiffs at the trial, which should have been done to justify the case being left to the jury. [KELLY, C.B.—There would probably not have been sufficient evidence to justify a judge, had it been a criminal trial, in leaving either Hindley's or Wilson's case alone to the jury; but, taking the two cases toge-

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ther, it might be different. PIGOTT, B.—The entry in Hindley's book is strong to show that he had possession of the box. The company do not appear to have followed up the matter very closely.] The burden of proof was upon the plaintiffs to show a felony by one of the company's servants, and they have not shown it. It has been laid down, and acted upon as law in many cases, that, in order to make a carrier liable under this section, and to take him out of the protection designed for him by the statute, it is necessary that a felony should be proved to have been committed, and that suspicion merely that such is the case is not sufficient. To that effect is the case in the Common Pleas of *The Great Northern Railway Company v. Rimell* (18 C. B. 575; s. c. nom. *The Great Western Railway Company v. Rimell*, 27 L. J. 201, C. P.), an authority. It was said by Willes, J., there, that in order to make out a *prima facie* case, the plaintiff must show not only that the theory of a felony having been committed by one of the company's servants is consistent with all the facts and probable, but also that there is some one substantial credible fact which is wholly inconsistent with a contrary theory. Now, there is an entire want of that here. That case was followed shortly afterwards by another case to the same effect in the same court, of *Metcalf and another v. The London, Brighton, and South Coast Railway Company* (4 C. B., N. S., 311; 27 L. J. 333, C. P.), in which Williams (at p. 334 of 27 L. J.) said: "The plaintiffs are not entitled to recover unless they show affirmatively that the goods in question were lost by means of a felony committed by one of the company's servants." The case of *Boyce v. Chapman* (*ubi sup.*), relied on by the other side, is distinguishable, for the stolen goods had been found in the actual possession of a porter in that case; and, even if the court should not think it distinguishable, it ought not to be followed, not being reconcilable with the two later cases. As to the company's not having followed up the case with sufficient alacrity, the answer is that there was not sufficient evidence to justify them in doing so. By leaving an insufficient case in support of this replication to the jury the result will be, if the court should discharge this rule, that these two men, Hindley and Wilson, the servants implicated, will have the odium and suspicion of a criminal charge hanging over them for the rest of their lives; whereas, if they had been put in the dock on their trial for the felony, either jointly or separately, they would inevitably have been acquitted, and without the case being left to the jury. The plaintiffs here are seeking to obtain a criminal conviction by a civil procedure, and it would in effect be trying their men for a felony upon an entirely collateral inquiry; and that, it is submitted, would be quite opposed to the spirit and policy of the law, nor would it be less so to compel the defendants to put the men into the witness box. The object of the Carriers' Act was to protect the carrier, and this exception upon an exception should be read as much in his favour as possible. [PIGOTT, B., referred to the words of sect. 8, and the comments thereon of Cresswell, J., in *Rimell's case* (*ubi sup.*), where, at p. 205 of 27 L. J. C. P., that learned judge said, "a mere suspicion is not sufficient, it must be proved that the loss actually did arise by felony." KELLY, C.B.—As to the evidence bearing more hardly on the company's servants in a civil action

than in a criminal trial, the answer is that the circumstances are different, the means of defence are different, and the legal principles to be applied are different. What may be very satisfactory evidence in the one case may be very unsatisfactory evidence in the other. It was open to the company to call both Hindley and Wilson as witnesses.] If that had been done men, practically on their trial for a criminal offence would have been subject to cross examination.

KELLY, C.B.—I am not prepared to say, even if either of these men, Hindley or Wilson, had been indicted for felony in having stolen this box of jewellery, that there would have been evidence which a judge ought to have left to the jury in support of the prosecution. But, it appears to me, for reasons which I will presently mention, that a case of this nature is not to be dealt with at all on the same principle as that which governs the proceedings in a criminal prosecution. Let me take at once a supposed state of things, in which it would be perfectly manifest that one of two persons had abstracted, and, under the circumstances, it might be said, *feloniously* abstracted, a certain article, and yet the circumstances might be such that it would be impossible to say which of the two persons it was. Suppose, for instance, that a parcel had come into the possession of a railway company, and had arrived at one of its stations, to be forwarded thence the next day to some other station, and that in the meantime the company's servants had locked it up in a cupboard in the station office, of which cupboard each one of two servants of the company alone had a key, and that no other person had any key or other means of access to the cupboard in question; and suppose that, in the interim between the parcel being so locked up overnight and the cupboard being opened in the morning, in order to take out the parcel and forward it to its destination, no other individual than these two persons had been upon the spot, or within the room in which the cupboard was, and that, on the cupboard being unlocked and opened in the morning, it was discovered that the parcel was not there, it would be certain to demonstration, on proof of the above facts, that one or both of those two persons had taken away this parcel, and it would evidently be absolutely impossible to say which of the two it was. One of them might have been fast asleep in his bed during the whole time, and the other might have gotten up and taken the parcel from the cupboard. Can any one doubt that such a case would be within the intent and meaning of the statute that, where it is clear that the servant or servants of the company had stolen the parcel in question, the company should be liable? Let us just look at the section of the Act of Parliament which is applicable to this matter. The 8th section of the Carriers' Act (11 Geo. 4, & 1 Will. 4, c. 68), is the section in question, and it exempts carriers from the general protection of the Act where the loss of the articles in question arises from the felonious acts of any servant in their employ. [His Lordship here read the section, and then proceeded as follows:] The intention of that section is manifestly to protect the public from loss or injury to their goods arising from the felonious act of any servant of the carriers or company, and to make the latter liable whenever the articles in question are stolen by persons under their control. Is it possible to say that such a

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case as the present does not come within that section? We must deal with cases arising under it on very different principles from those which are applicable to a case of a person indicted for a felony. In the latter case where the prisoner cannot give evidence or be examined, if evidence were given that the particular article had come into the prisoner's possession, and had been in his possession for a time, and had then disappeared, the bare fact of possession which might, consistently with the rest of the evidence given, lead to no other inference than that the party charged had been guilty of negligence, could not justify a judge in leaving the case to the jury at all. But is not the case very different here, where the company could have called all the servants in their employ who were at all suspected of being implicated in the matter to have explained the disappearance of the box, and anything in the circumstances that might really be deceptive? Here there is much circumstantial evidence against Hindley, from his having possession of the book, the parcels mentioned in which had been checked and looked over, and his being also in the exclusive possession of the van in which they were placed. The question then arises, whether there is any difference between a civil action, in which we have to consider whether the words of this Act of Parliament have been complied with or not, and the case of the same individual (Hindley), if he had been indicted for a felony. It might be no justification for a judge leaving such a case to a jury, had Hindley been indicted for the felony, that there was circumstantial evidence that he had had possession of the parcel, and that it had disappeared at the time when it was his duty to deliver it; but in a civil action like the present, it is surely no answer to say, in argument merely, that there was no case to go to the jury, because the man might never have had actual possession of the parcel, or if he had, that it might have been stolen from his van on the way to the hotel. The reply to such an argument is at once that Hindley might have gone into the witness box, the defendants might have called on him as a witness to prove that, although true it was that the parcel had come into his possession, yet that it might have been stolen from him on the way. It is an argument in favour of the plaintiff's case, that if Hindley were innocent, or if the parcel had not been feloniously stolen by "the servant or servants of the company," he might have been, and yet was not, called as a witness to prove all that. Now we have the very high authority of Tindal, C.J., in the case of *Boyce v. Chapman* (*ubi. sup.*), that, in a case arising on this very Act of Parliament, the fact of its being in the power of the company "to call the party suspected, for the purpose of showing that the suspicion is unfounded, and proving his innocence, and their not doing so are circumstances that may well be taken into consideration, and that very fact is of itself evidence for the jury upon which, coupled with the other evidence, they may find their verdict;" and I see no reason why it should not be so. Mr. Carter, in his argument for the defendants, dwelt very ably upon the ill consequence that would ensue to a man's character from his being indirectly convicted of a felony by the verdict of a jury in a civil action, without that clear and distinct proof of guilt which is essential in a criminal prosecution. But

the answer to that is that there is nothing unreasonable in saying that, if the company rely upon the integrity of their servants, and they have to answer a *prima facie* case which has been made out tending for the moment to throw suspicion on one or more of those servants, they have the power to call the servant or servants in question as witnesses. It was a fact connected with the other facts on which the jury would be justified in finding a verdict such as they have found in the present case. But now let us see what was the evidence here. First, with regard to the case of the man Hindley, with regard to whom the case is weaker than in the case of the other man, Wilson. It is perfectly clear from the evidence of the book, which, in effect, represents the matter in writing, that the box in question had, together with other packages, been put into this van to be conveyed from the defendants' railway station to the hotel where the consignee of the box was staying; and that book was in the possession of Hindley. The fact that Hindley had taken upon himself the conduct of this van from the station to the hotel, and that he had possession of the book, which he, either alone or together with some one else, must have examined and checked with the different articles to be put into the van, would have been circumstances tending to show that at all events, the articles mentioned in the book must have been put into the van, and so must have come into Hindley's possession. Then it is said that that may well be, but that this box might have been stolen by some third person on its way to the hotel. That, however, is mere matter of conjecture, and something as to which there is no evidence. But we have the further evidence that, on arrival at the hotel, when and where it was Hindley's duty, and the responsibility was thrown upon him, to deliver the three parcels entered in the book, he delivered two only, and instead of saying, "There is a third parcel, I will go back and see what has become of it," he permitted the housekeeper to sign his book as if all three parcels, including the plaintiff's box, had been duly delivered. That would be evidence to go to the jury that there was something wrong, and that he was endeavouring to practise deception on the housekeeper, or on somebody in the hotel, which, taken together with the fact that he had his book and had checked the parcels when put into the van, may have satisfied the jury that he had got rid of the box in question in an unlawful way, and was endeavouring to cover his guilt by pretending to be delivering the whole, whereas he was delivering part only of the articles which he was bound to deliver. That is a case which, I think, if he had been put upon his trial for the felony, a judge would and ought to have left to the jury; but in a case like the present, even if the man himself had been the defendant, he would have had nothing to do but to walk into the witness-box, and account for the non-appearance of the package in question, and so justify himself before the jury; and in the case before us, where the railway company knew that it was Hindley's duty to deliver this parcel, and that there was evidence that it had come to his possession, nothing would have been easier than for them to have called him as a witness to have proved his innocence, and so to have got rid of that part of the charge in the replica-

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tion. I think, therefore, on these grounds, that there was evidence against Hindley. But with regard to the case of the other man man Wilson it does not appear to me to be open to any reasonable doubt, because he is found in possession of a part of the stolen property. I say "stolen" because some of the contents of the plaintiffs' box were found a few days afterwards to have been pawned at the shop of a pawnbroker in Liverpool. If the box had been merely mislaid, no such thing would have taken place. The man Wilson is a servant of the company, passing the greater part of his time upon their premises, and he is found in the actual possession of a portion of the articles which we must assume to have been stolen, and has given no account of them in evidence. Surely that, standing alone, would be evidence to go to a jury on the trial of the man of his having feloniously stolen the articles which he is found in possession of. I do not say that it is not evidence which might have been met and answered, and his character have been cleared from suspicion, by evidence that he might have given; and it was so very easy in this case to have given that evidence. He said that he found it on a part of the defendant's premises, and that some one else had found another portion of the contents of the box. How easy, then, to have shown by evidence that other persons at the same time, and under the same circumstances, had found portions of the contents, and had taken them innocently, as something of no apparent value, as Wilson had done. With regard to Wilson, therefore, there really was evidence which, unexplained, tended to fix upon him the charge of felony, and was amply sufficient in itself to have been left to the jury in support of it. Under these circumstances, though the evidence may be slight, yet, upon the ground that it might have been met and answered, if no felony had been committed by any of the defendants' servants, by the company calling their servants, I am, taking all these facts together, clearly of opinion that there was evidence to go to the jury in support of this replication.

PICOTT, B.—I am also of the same opinion. The question here is, was there evidence to go to the jury in support of the replication? The replication is that the box was lost by the felonious act of some one or other of the company's servants. [The learned judge here read it.] I think the true view of the construction of the 8th section of the Carriers' Act, upon which the replication is founded, is that which was taken by the Court of Common Pleas in *Metcalf's case* (*ubi sup.*), which has been cited in argument before us. There the question was whether some of the servants had committed a felony. I do not understand that any court has ever taken the view that the plaintiff is bound to point to some one particular servant. I think it is enough if the evidence points to this, that a felony of the article in question has been committed, and that it is more consistent with the facts proved, and with probability, that it was committed by the servants of the company than by any other person. That I take to be the test which was put by Willes, J., in that case, whether there is or not evidence sufficient to go to the jury, and with that rule as so laid down I entirely agree. The question then for us is, was the evidence here more consistent with the theory that a felony had been committed by a servant

of the company than that it had been committed by anybody else? It is perfectly clear that it was committed by some person. Nobody can doubt that the box was taken and broken open and the contents abstracted. Looking at the circumstances it could not have been an accidental loss of the box. What is the evidence as to the time, when, and the place from whence it is taken, both as to Wilson's possession and Hindley's conduct, as being consistent with their innocence with reference to the question when and where, and how this box could have been taken from the company's possession? It is clear that it was safe at Liverpool, at the end of the journey; that it was entered in the company's book for delivery in Liverpool; and that it was put into Hindley's book, who was the servant of Thurston, as an article for which he was accountable. Now, as to what happens upon the checking taking place, and the change of possession from the company's van to the cart of Thurston, the person who is for this purpose to be taken as a servant of the company, the evidence is left very bare indeed, and we can only judge of it from our knowledge of such things, and of the way in which business is ordinarily transacted. I understand it to be this, that when the goods are delivered at the goods' office, they are called over and entered in the book of the person who has to deliver them, and his book is evidence against him that he has these goods to account for, as having received them. That being so, this box is an article given over into the possession of Hindley, Thurston's man. It seems that it was lost after Hindley had got possession of it. It was Hindley's duty to deliver it at the hotel. He takes his cart to the hotel, and there he does that which shows that he supposes, or that he was pretending to suppose, that he had got this box, because he induced the housekeeper there to sign his book as having received the box; and the fact of its not being there is only found out by the landlord coming in and pointing out to her that there ought to be three parcels, and asking where the third was, there being only two. Thereupon Hindley says, "Is it not here," which to my mind is a clear admission of his being accountable for it. I do not dwell on that as showing that he was implicated in the felony, but that he was accountable for the delivery of the box; and when it is suggested that it may have been lost from his cart whilst he was in the hotel, the answer is that it is not consistent with the fact of some stranger having stolen it at that time, that it is found out afterwards to have been broken open upon the company's premises, about 100 yards from the spot where the cart stood to receive the parcels for delivery. No man, having stolen it from the cart at the hotel door, would have come back with it into the very jaws of the lion. These facts seem to me to go to show that the box was abstracted from the company's possession at the time when it was passing, or just as it had passed from their booking office into Hindley's, or Thurston's, cart. If so (and no evidence is called on the part of the defendants to disprove it), who could have had any opportunity of taking it at that time? It is not shown that any of the public could have gone into the parcels' office and taken it away, or could have gotten into the cart and taken it out without being seen, and it must be presumed that nobody could have done so. That seems to me to bring the felonious abstraction to a point, both of place

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and time, which is more consistent with its having been stolen by one of the company's servants than by anybody else. Those servants had the opportunity of taking it, and nobody else had that I can imagine, so far as the proof goes. Then is it not in fact shown that the loss occurred after the article was given into Hindley's charge, and before his cart started on its journey from the doors of the Lime-street station? These facts, coupled with the subsequent finding of the pieces of the box and bits of the jewellery on the company's premises, and some of the property being actually found in the possession of one of the company's servants, throw the onus upon the defendants of explaining, more fully than was done at the trial, the conduct of these several servants of theirs with reference to the whole matter. If this evidence is not sufficient to call upon the company for an answer to or explanation of these facts, then I know not how circumstantial evidence can ever show that persons are implicated in such a transaction. On the whole, I come to the conclusion that there was evidence more consistent (and that is quite enough) with the felony having been committed by the defendants' servants than by anybody else.

AMPHLETT, B.—I am entirely of the same opinion. I think this case of very great importance both to railway companies and to the public, and I am sure that the court would not be doing its duty if they frittered away the protection given by the statute to railway companies with regard to property intrusted to their care for conveyance and delivery. But what we have to consider is, whether there was or not evidence to go to the jury of a felony committed by some one or more of the servants of the company; and I think that, in considering that question, it is impossible not to consider the circumstances of some importance. The evidence is left in a somewhat vague state, but the defendants had in their possession important evidence that was not brought forward; and I think that this was a case which ought to have been left to the jury. I can only say that I agree with my Lord Chief Baron as to whether, under the statute, it is necessary to show the actual servant that committed the felony. I entirely agree with his construction that, if it is shown beyond reasonable doubt that the felony was committed by some one of them, without being able to specify distinctly which of them, the case is taken away from the protection of the statute. Then let us apply that principle to the present case. I am free to confess that I do not see, with reference to the general question, that there is any sufficient proof that the felony which was committed was necessarily committed by some one of the servants of the company; because, independently of the special case against Hindley and Wilson, there does not seem to me to be sufficient evidence to show that one of the public might not have committed the felony. But we are driven to take the case not with reference to the guilt of either of the men, but simply to the question whether there was or was not a question to be left to the jury with regard to their guilt, that is supposing the company, the defendants in this case, do not choose and have not chosen to produce any rebutting evidence at all, whether there was a case or not which the jury might consider with reference to the liability of the company. As to the facts of the case, I do not propose to go through them at all at length, but I will say a word or two with

regard to both Hindley and Wilson. With regard to Hindley, I think myself that, if he were being tried at the bar, and the only evidence against him was the facts that have been proved in the present action, a judge would be bound not even to leave the question to the jury; and the case as regards Wilson, as it struck my mind (and such things strike different minds in different ways), appears to me, on the whole of the case, to rest on a different footing. I wish particularly to guard against saying that I have any suspicion in my own mind with regard to Wilson having been guilty of felony—that is not the question. If he were put to the bar, I do not suppose he would leave the case without explanation. The question would not be whether there would or not be a sufficient case for the jury to take into their consideration, but what would be the evidence there. The evidence would be that, a felony having been committed of this box of jewellery on the 30th Jan., we must, I think, take it for granted that inquiries were immediately made with regard to the lost box, which must have been known to everyone in the office of the company. We find then that a few days afterwards, on the Thursday before the 10th Feb., Wilson, according to his own statement, found some of the stolen property, at least he found some pin heads, which appear to have been not of very great value, but of some value, and a companion of his found two more, and he says that he did not disclose the fact, or go to his employers about it until the police came and made inquiries upon the subject. I do not in the least say that Wilson might not have explained this fact. I do not say that the jury would convict even if he remained silent; but I do feel very strongly that if such a case had been made against Wilson, and he had given no further explanation about it, it would have been, as against him, a sufficient case to be left for the consideration of the jury. But, in the present case, nothing would have been easier than to have called Wilson as a witness, and, as the learned judge said at the trial, it could not be expected for a moment that the plaintiff should have called him; and I think that that was an additional reason why the case was properly left for the consideration of the jury. An observation was made by Mr. Carter with regard to the destruction of character which might arise from finding a verdict for the plaintiff in a case like this, which struck me at first to be of very great importance. But I think the answer to it is that it is for the benefit of these very parties themselves that they should be put into the witness box and be enabled to give their explanation. I have no reason to believe that their evidence would not have been satisfactory. But, if there be no explanation given, I think the jury were right to take the case into their consideration, and that the case was, therefore, properly left to them.

Attorneys for the plaintiffs, *Birton, Yeates, and Hart*, 25, Chancery-lane, W.C.

Attorney for the defendants, *R. F. Roberts*, Euston Station, N.W.

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COURT OF APPEAL IN CHANCERY.Reported by E. STEWART ROCHER and H. PEAT, Esqrs.,
Barristers-at-Law.

Wednesday, Jan. 14, 1874.

(Before the LORD CHANCELLOR (Selborne) and the
LORDS JUSTICES.)

GOODSON v. RICHARDSON.

*Highway—Owner of soil—Trespass—Mandatory injunction—Injury completed before bill filed.**Where a person lays down water pipes under a highway without the permission of the owners of the soil of the highway, the court will, at the instance of one of such owners, grant a mandatory injunction restraining the trespasser from allowing the pipes to remain there, although the work has been completed before the filing of the bill, and will not require the plaintiff in the first instance to establish his right by an action at law.*

Deere v. Guest (1 My. & Cr. 516), explained and distinguished.

This was an appeal from a decision of the Master of the Rolls.

The facts of the case were as follows :

The plaintiff, Stephen Goodson, was the owner in fee of one undivided moiety of certain lands in the parish of St. Peter the Apostle, in the Isle of Thanet, abutting for a distance of about seventy-four yards on the highway leading from Ramsgate to Broadstairs, and also of the soil of the highway adjoining his lands up to the middle thereof.

The defendant was the owner of certain lands in the same parish, and had erected divers houses thereon.

On the 9th April 1873, the plaintiff and several other landowners in the same parish, having learnt that the defendant had obtained permission from the Highway Board of the Isle of Thanet District to break up the surface of certain of the highways in their jurisdiction, including the highway adjoining the plaintiff's lands, for the purpose of laying a number of water pipes in the soil beneath the highways, for the supply of his houses, served him with a notice in the following words :

We, the undersigned, landowners of the parish of St. Peter the Apostle, Thanet, do hereby give you notice not to lay pipes through or under so much of the land belonging to us, or any or either of us, as now forms the site of any of the public highways of the said parish of St. Peter the Apostle, and forthwith to remove any pipes already laid by you through any land belonging to us or any or either of us, as aforesaid. And we further give you notice, that in case you shall act contrary to this notice, or refuse in any particular to comply therewith, we shall apply to the Court of Chancery for an injunction to restrain such your illegal proceedings.—Dated this 9th April 1873.

This notice was signed by the plaintiff and twelve other landowners, and was accompanied by a letter from the plaintiff's solicitors, stating that they had been instructed to file a bill without delay, in case he should continue his illegal proceedings, contrary to the notice.

The evidence showed that the plaintiff did not become aware of the defendant's intention till the 18th March 1873, when the defendant applied to the highway board for leave to open the road, and that he at once took legal advice on the subject.

The highway board, in answer to the defendant's application, passed a resolution on the 8th April 1873, that the permission should be given him, so far only as it lawfully could or might, but not further

or otherwise, to break up the surface of the highways for the purpose of laying the pipes; but the clerk of the board, in communicating to the defendant the resolution of the board, wrote him a letter expressly warning him that the rights of the board only extended to the surface of the highways.

This letter reached the defendant on the morning of the 9th April, and he at once set men to work, and the pipes were laid and covered up by two o'clock in the afternoon of that day.

The defendant stated that he did not receive the notice from the plaintiff till the work was completed.

The bill, which was filed on the 21st April, prayed for an injunction to restrain the defendant from laying or maintaining any mains or other pipes in or through the land or soil beneath the surface of the highway adjoining the plaintiff's lands, or from allowing any pipes which had been already laid by the defendant in or through the said land or soil to remain therein.

The Master of the Rolls granted an *interim* injunction on the 24th April, and at the hearing made the injunction perpetual.In delivering his judgment on the hearing, the Master of the Rolls said:—As I understand the law, this is an undefended case. Whether judges have, in other cases, given damages or not must depend on the particular circumstances of those cases. [His Honour then stated the facts of the case and continued:] Now, as to the law. It is said that this court will not interfere by injunction except there is serious injury to the plaintiff. I demur to that statement of the law. The real test is, whether the injury can be easily and readily compensated in damages. If it cannot, then as a general rule there is a case for an injunction. Now, what is the test of compensation in damages? Here is a case in which it is very difficult to say that the plaintiff can be seriously damaged. It is land so peculiarly situated that it is not readily available for profitable occupation. But it might be, for there might be a coal mine under it. But that does not happen to be the case. Therefore, you cannot estimate the damage, and you have exactly the case put by Lord Canworth in *The Rochdale Canal Company v. King* (2 Sim., N. S. 78), where you deprive the plaintiff of that for which the defendant is willing to pay a high price, if he cannot get it illegally; but where you cannot say that the abstraction of the property inflicts any injury or loss on the plaintiff. In that case the plaintiffs were the owners of the Rochdale Canal, the defendant was a manufacturer near the banks of the canal, and he abstracted a very small quantity of water, relatively to the bulk of water in the canal, for the purpose of working his steam-engine. The quantity abstracted was so small that it did not affect the flow of water in the canal, and inflicted no appreciable injury on the plaintiffs, but if this court interferes by restraining the defendant from doing that which, if it had been a personal chattel, would have been called stealing, and would have subjected him to criminal proceedings, but which being what in this court is called real estate, did not subject him to those proceedings—if the court had abstained from interference it would have allowed the defendant to take away the plaintiffs' property, for which he ought to pay a high price, for nothing; and, therefore, it was a case in which the court, being

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bound to protect the rights of property, which I think are not ideal, and being bound to protect the rights of property, which I cannot assent are so mythical that the court cannot understand them, said, if that is the case, this court must interfere by injunction. Now, here, we have a case in which I am satisfied that the defendant would be very willing to pay a fair rent for the easement or privilege of laying his pipes along this road. It is exactly the same case as *The Rochdale Canal Company v. King*. The taking away the small space of road at some depth below the surface may not cause any appreciable injury or damage to the plaintiff; but if he can let the right of laying pipes to the defendant or anyone else who wants to lay pipes along the road, and they get an easement rent for this privilege, the defendant, who is taking his property by force, and against his will, is in exactly the same position as he would be in if he were stealing his goods, except that it is not criminal. And I am not to interfere at all! That is the position gravely laid down by learned counsel at the bar. If we are to remain a law-abiding country, it appears to me that we shall only so remain by courts of justice respecting the rights of property and enforcing them and preventing that lawless destruction or interference with them of which we have an instance in this case. I have no hesitation in granting the injunction preventing the defendant allowing the pipes to remain on the plaintiff's land, and I shall also order him to pay the costs of the suit.

From this order the defendant appealed.

Jackson, Q.C. and Beaumont, for the appellant.—The work having been completed before the filing of the bill, this court will not grant a mandatory injunction, unless it can be proved that the damage caused to the plaintiff is very serious, and that is not pretended to be the case here. In *Hindley v. Emery* (13 L. T. Rep. N. S. 272; L. Rep. 1 Eq. 54), Wood, V.C. said: "It may be conceded that if all the mischief had already been completed before the filing of the bill, this court would not have jurisdiction to entertain the suit for injunction." And in *Durell v. Pritchard* (13 L. T. Rep. N. S. 545; L. Rep. 1 Ch. 250), Lord Justice Turner says that "this court will not interfere by way of mandatory injunction, except in cases in which extreme, or at all events very serious, damage will ensue from its interference being withheld." *Deere v. Guest* (1 My. & Cr. 516) exactly governs the present case. There the defendants had constructed a tramroad over the plaintiff's land without his permission, and merely with the assent of the occupying tenant of the land, and Lord Cottenham held that there was no equity to grant an injunction, although the leave of the tenant had been obtained by means of circumvention and fraud, and he left the plaintiff to his proper legal remedy against them as trespassers. There is really no damage done to the plaintiff by allowing these pipes to remain, and that being so, the court ought not to interfere by injunction. In *Bowes v. Lano* (22 L. T. Rep. N. S. 267; L. Rep. 9 Eq. 636), where the defendant, for the purpose of a vinery, built a garden wall to such a height that it was held to be a breach of a covenant not to erect buildings, James, V.C. refused a mandatory injunction, and gave these reasons for his refusal: "I am of opinion, having regard to all the circumstances, and considering that no substantial

annoyance has been occasioned to the plaintiff, and no substantial injury done to any right of property of his, that a declaration will be sufficient for the purpose of protecting the title, and I do not think it necessary to give the plaintiff the power of doing such an unreasonable and unneighbourly act as that of taking down this vinery, which is a great convenience to the defendant, and the taking down of which would not confer on the plaintiff himself any benefit." Those words apply exactly to the present case. It is very unreasonable and unneighbourly of the plaintiff to require these pipes to be removed, for their presence does him no injury at all.

Without calling upon

Southgate, Q.C. and Davey, who appeared in support of the order of the Master of the Rolls,

The LORD CHANCELLOR (Selborne) said: In this case the Master of the Rolls has thought it right, in the exercise of that discretion which Mr. Beaumont very properly said is a judicial and not an arbitrary discretion vested in the court, to grant an injunction to restrain the continuance of certain water pipes which the defendant has placed on the plaintiff's land. Now, it is undoubtedly true that the court, in determining whether in cases where the legal remedy exists, it will leave the parties to that legal remedy or interfere by way of injunction, has regard to the circumstances of each particular case, and amongst those circumstances is no doubt the material one, at what time a work has been executed, and what will be the relative bearing upon the particular parties of the interference of the court on the one hand, or leaving them to their legal rights and liabilities on the other. But I apprehend that the court has nowhere said that when a trespass of this kind has been committed in circumstances at all similar to the present, the mere fact of the trespass being complete at the time when the bill was filed will prevent the plaintiff from getting an injunction against the continuance of a trespass of this kind, the particular kind of trespass being this, that the plaintiff is the owner of the soil through which these pipes have been laid, and no one has a right to take for such a purpose the soil, except under contract with him with his consent. The plaintiff, at the same time, has not the right of an unlimited owner in respect of that soil, because the upper surface being dedicated to the public for the purpose of a public highway, which is under the management of local authorities, he cannot use the land or deal with it by breaking it open or obstructing the highway, or in any other manner so as to interfere with the use of it by the public upon the surface for the purpose of a highway, and, therefore, these pipes being laid below the surface, the plaintiff might not be able, without exposing himself to difficulties with the public authorities, who are the guardians of the highway, to redress the matter for himself in the easy and simple manner in which he could if the same thing had been done in an ordinary field. It is said that this objection of the plaintiff to the laying of these pipes without his consent on his land, is an unneighbourly thing, and that the right is one of substantially little or no value, and one which Parliament, if it were to deal with the question, might possibly disregard. What Parliament might do if it were to deal with the question, is, I apprehend, not a matter for our consideration now, as Parliament has not dealt with the question. Parliament is at liberty

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to take a higher view upon the balance struck between private rights and public interests than this court can do when Parliament has not interfered; and with respect to the suggested absence of value of the land in its present situation to the plaintiff, it is enough that the very fact of no interference of this kind being one which can lawfully take place without his consent and without a bargain with him, gives him, even in a pecuniary point of view, precisely the value which that power of veto for such uses creates when such uses are to any person desirable and an object sought to be attained. Besides which, I am not all prepared to accede to the proposition that it is an unneighbourly act for a man, whose motives for desiring to prevent a particular act may be collateral to his interest in the land, such, for instance, as an interest as a proprietor of waterworks, to say to his neighbour who wishes to compete with him in that business, "You are perfectly at liberty to enter into competition with me as a seller of water to the public of Ramsgate in any lawful manner, but you are not at liberty to take my land without my consent for the purpose of competing with my trade, and I shall object to your doing so." In that, I confess, I can see nothing unneighbourly whatever. Then, what are the actual circumstances of this case? The plaintiff has certainly been guilty of neither acquiescence nor delay. I cannot conceive that at any time whatsoever the plaintiff had any notice, or had any reason to suppose, that it was the purpose or intention of the defendant to deal unlawfully in any manner with the plaintiff's land. He had notice that he applied on the 18th March to the highway board for such authority as they were able to give for the use of the public highway, or interference, I should rather say, with the public highway, for the purpose of laying the water pipes, according to a plan which, extending to many other streets and places in the market, extended also to the street, the soil of which is now in question. That was an application to persons whose authority, though not sufficient, was necessary; and so far from being notice of an intention or purpose on the defendant's part to proceed without lawful authority and against the law, the very nature of the application, as far as it went, indicated an intention to keep within the law, and obtain, if he could obtain, all necessary consents. I think we must impute to both parties, whatever their actual knowledge of law may have been, so much knowledge as this, that no man's land could be interfered with without his consent, and that this particular land belonged to somebody, and in point of fact that that somebody was the plaintiff. Therefore, what passed upon the 18th March was in no way whatever notice to the plaintiff of an intention to do something at variance with his rights, and so far from anything at variance with his rights having been done afterwards, before he served his own notice of the 9th April, I am very much struck with the fact that, as far as the evidence goes, the true conclusion from it seems to me to be, that whatever was done on his land was begun and finished on that one day, and in the forenoon of that day, the 9th April. There is a studious absence in the defendant's evidence of any information to the court of the precise time at which the works on the plaintiff's lands were commenced, and I think it a just inference that they were begun on that day and finished before, I think it is said, two o'clock on

that day, having been carried through with very remarkable haste and expedition. It is certainly a remarkable thing, that on the morning of that day, and before that was done, if I am right in my inference from the evidence, a notice had been sent by the highway board to the defendant, telling him that he was not at liberty to do this without the consent of the owner, though the defendant says, and I must assume for the present purpose that he truly says, that he was not at home when that notice arrived, and did not see it till the work had been done. Whether in any other way any people acted for him in his absence I do not know, for the plaintiff had some reason to apprehend that there were circumstances to make it important to carry on the work, but it is a fact of which I cannot but take notice, that the work was hurried on, on the plaintiff's land, as I infer, with extraordinary dispatch on the morning of that day on which the plaintiff gave his own notice that a bill would be filed for an injunction, if it was attempted to be done upon the supposed consent of the highway board, who never proposed to consent except so far as they lawfully might, which fact he knew on the 24th March, because he then executed an instrument which contains these very words. It was, I say, a remarkable fact, that the work was hurried on so as to be finished on the very day the plaintiff's notice was given, and to make it a question of an hour, more or less, between the conclusion of the work and the time when the notice was delivered. In that state of things, and looking to the nature of the work that was capable of being so quickly done and done in that manner, I have no hesitation in saying that I regard this court as bound to deal with the case exactly as it would have done if the bill had been filed (not as it was a few days afterwards in consequence of a notice given an hour after this work was completed) on the morning of the day before any part of the work had been done, and going upon the particular circumstances of this case, I cannot but look upon this case as a deliberate and unlawful invasion by one man on another man's land for the purpose of creating a continuing trespass, which is in law a series of trespasses from time to time, to the gain and profit of the defendant without the consent of the owner of the land, and it appears to me as such to be a proper subject for an injunction. The cases which have been referred to are really of two classes, either cases of ancient rights, such as *Durell v. Pritchard* (13 L. T. Rep. N. S. 545; L. Rep. 1 Ch. 244), and of *Bouves v. Law* (22 L. T. Rep. N. S. 267; L. Rep. 9 Eq. 636), where a man had done something upon his own land which belonged out and out to himself, but in doing it had exposed himself to an action by the other party, either as breaking some covenant or as encroaching upon the other's right of lights and rights of that kind. The thing was finished, and in the judgment of the court it was more equitable, having regard to the consequences to the one party or the other of interference or non-interference, to leave the parties in that state of things to their legal rights and liabilities rather than to interfere; and, no doubt, in such a state of things the *quantum* of damage to the plaintiff, as compared with the *quantum* of loss to the defendant, is a material consideration. The other class of cases is that of *Deere v. Guest* (1 My. & Cr. 516), which, when rightly considered, amounts to neither more nor less than this, that there was an action of

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ejectment brought in the Court of Chancery without any equitable circumstances to induce the court of equity to assume that jurisdiction. In *Deere v. Guest*, the facts were these: The defendant had made a tramway and completed it openly, and so that everybody interested in the land either did or might have known what was taking place, three years before the bill was filed. That had been done lawfully, with the consent at the time, at all events, of the owner of the land, subject to the question of the possibility of waste, into which I will not enter. That was a case between landlord and tenant, but so far as the possession was concerned, it had been acquired lawfully by the consent of the then occupying tenant. This occupation continued for about three years afterwards, and so far as appears from the statement on the bill (for that case arose on demurrer), even when the tenancy ceased, the land was relet to a person who, upon the allegation in the bill, must be taken to have consented, so far as he could consent, to the continuance of the occupation of the tramroad by the defendant. The bill, however, contained an allegation, which Lord Cottenham considered obscure and indistinct, that when the land was so relet the plaintiff, whose position I shall presently mention, had reserved to himself the tramroad, so that his allegation was, that the right to the tramroad or to the possession of the land for the purposes of it, had been originally given by the person in occupation, that it was confirmed by the person subsequently in occupation, but who had no right to remain, because the tramroad had been excepted from the reletting, and it also appeared that the land being in mortgage, and the plaintiff's interest being that of a mortgagee only, the owner of the equity of redemption had sold this right to have the tramroad to the defendant. I should further mention that the plaintiff had not even the legal title of mortgagee, for he was only the husband of the administratrix of the mortgagee, and solely interested in the money. No doubt he was entitled to call on the persons who had the legal right to do so to protect the mortgagees, but that was the extent of his right. He had brought an action of trespass against the defendant on account of this tramroad. In point of law the defendant, having lawfully got possession three years before, was continuing in possession, and the plaintiff's title, or rather that of the trustee for him, as mortgagee, was a purely legal title on the showing of the bill, and there was no impediment to an action of ejectment or an action of trespass being actually brought. In that state of circumstances, Lord Cottenham thought, and, in my judgment, was quite right in thinking, that there was no equity whatever, as shown by the bill, to interfere with the court of law, and that the case was reduced to a simple attempt to transfer the jurisdiction in ejectment from law to equity. Had the circumstances of this case been similar, and had these pipes been laid with the consent of the tenant three years before, and used as part of the system of waterworks by the defendant during the whole of that interval, and had it been a case of legal possession liable to be displaced by ejectment, I have little doubt that I should have come to the same conclusion; but all the circumstances of the case are entirely different, and the principle upon which this ought to be dealt with must, I think, be the same as that on which the Master of the Rolls has dealt with it. Therefore, for my

part, I cannot give a voice for disturbing the judgment of the Master of the Rolls.

Lord Justice JAMES.—I am of the same opinion. The defendant in this case is admittedly a trespasser, and he has committed a trespass upon the plaintiff's land without any legal justification, or any legal excuse whatever, and he proposes to continue that trespass from day to day, keeping the pipes and allowing the water to go through the pipes for the purpose of making a profit of a trade which he proposes to set up in rivalry to a trade in which the owner of the land upon which he is so committing the trespass is interested. It is said that we ought to allow this to be done; that we ought, in fact, to dismiss the plaintiff from this court, and tell him to go out of the door of this court, and to find his way to the door of another court, in which he is to bring an action for the wrong for which there is no defence whatever, and that, allowing there has been no defence to this suit, he is to bear the costs of this suit, and bring an action in a court of law. I do not know whether more than one action would be required. And then he is to come back to this court, having succeeded in one action, or two actions, or perhaps three actions, all of which, on the facts proved in this case, would necessarily result in verdicts for him. Having succeeded in those actions, he is to come back to this court then and there, for the purpose of putting an end to that injury; he is to come back here and get a perpetual injunction, on the ground of repeated vexation and repeated actions. I do not think that there is any principle in this court which will compel us to drive the plaintiff to go through all that litigation before he is entitled to the relief in this court which he would ultimately get, having gone through it. It is said that something of the kind was done in *Deere v. Guest* (1 My & Cr. 516). In *Deere v. Guest*, beyond all question, the *ratio decidendi* (and that is always to be looked at when you are referring to an authority or a decision) of Lord Cottenham, who affirmed the decision of the Vice-Chancellor was, that the plaintiff was a person out of possession, that the defendant was a person in possession, and that the bill was in substance filed to turn the defendant out of possession and to give the possession to the plaintiff, which would be strictly and simply an ejectment bill, which is not according to the practice of this court. Here there is nothing like the ouster of possession of the plaintiff. The plaintiff has been in possession and is in possession, and the defendant has been a wrongdoer, a mere trespasser—he is a wrongdoer and trespasser, and proposes to continue so. The question is, whether, under those circumstances, the plaintiff has not a right to come here, and so to put an end to that continuous trespass which the defendant has begun and intends to continue, there being no wrong whatever that can be suggested, no damage, no inconvenience to the defendant which he has not an ultimate right to allege here. What is alleged on his behalf here is, that if this injunction is granted it will deprive him of a very valuable property, because it is essential to the value of his property that he should keep the plaintiff's property, which he has taken against his consent. If he had originally unconsciously taken that which was not his, when he became conscious, which was very soon, that it was not his, then he was taking that which was not his for the purpose of a profit to himself against the will of the real owner. That

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is taking another man's property improperly, both morally as well as legally. I am of opinion that the decision of the Master of the Rolls is quite right, and that the injunction ought to be sustained.

Lord Justice MELLISH.—I am of the same opinion. I think it is quite clear in this case that the defendant has not got into possession of any portion of real property of the plaintiff so as to make it necessary for the plaintiff to bring an action of ejectment. It is perfectly true that when a system of waterworks had been established, and the persons constructing the waterworks have made their reservoir and laid their pipes legally all along the streets which they are supplying with the water, then the law considers the pipes so far a part of the realty that they are liable to be rated as in possession of a portion of the realty, and it may be that an ejectment may be brought against them. But in this case the waterworks had not been established at all at the time this bill was filed. All that had been done was that the defendant had entered upon the plaintiff's land, had dug a trench and put the pipes at the bottom of that trench. I doubt extremely whether those pipes had become part of the realty at all. If they had they would have become the plaintiff's property. There never was any intention to annex them to the soil, so as to become part of the realty. I should be inclined to think they remained as pure chattels. However that may be, it is not necessary to decide it, because what in practice the defendant has done is, that he has committed a trespass. If that had been the only thing done, it would have been right to leave the plaintiff to his action at law to recover damages, but he was threatening to continue the trespass, threatening to complete his waterworks, and use that which was really part of the plaintiff's property as his own, and make a profit by it. Then there is this further reason why there is a remedy in this court, namely, that from the peculiar circumstance of the surface of the road being dedicated as a highway, the plaintiff has not the ordinary remedy which he would have had if the defendant had gone and dug a trench and laid his pipes across the plaintiff's field, and he would have had great difficulty in going and removing the pipes himself. Suppose that a similar trespass was committed on a man's soil while he remained in possession, and there was nothing to prevent him digging it up himself, it would be reasonable enough to allow him to remove what had been wrongly put in the soil, and to bring an action to recover damages. But in the present case it is extremely doubtful whether he could remove the pipes without rendering himself subject to be indicted by the highway board before a magistrate. In my opinion, he is entitled to be relieved from that difficulty. In some respects it is similar to the case we decided a little time ago (see *Stanford v. Hurlstone*, 30 L. T. Rep. N. S. 140; L. Rep. 9 Ch. 116), where a man had wrongly committed a trespass, and threatened to go on continuing to commit the trespass without a colour of an excuse for it. And we thought there was a proper remedy by injunction in this court.

The Lord Chancellor.—The appeal will be dismissed with costs.

Solicitors for appellants, *Paterson, Snow, and Burney*, agents for *M. and O. Daniel*, Ramsgate.

Solicitors for the respondent, *Wright and Piley*.

V.C. MALINS' COURT.

Reported by F. GOULD and JAMES E. HORNE, Esqrs.,
Barristers-at-Law.

March 13, 14, 16, 17, 18, 19, and 21, 1874.

HAYMAN v. THE GOVERNING BODY OF RUGBY SCHOOL.

Demurrer—Public Schools Act 1868, s. 13—Governing body—Power to dismiss head master.

The Public Schools Act 1868, which applies to (amongst other schools) Rugby School, by sect. 13, enacts that "the head master of every school to which this Act applies, shall be appointed by and hold his office at the pleasure of the new governing body."

The plaintiff was appointed head master of the school in Nov. 1869, by the then existing governing body.

In Dec. 1873, the new governing body (which had been duly constituted in Dec. 1871, under the powers of the Act of 1868) passed a resolution that "upon a review of the administration of the school" from the time when they came into office to the then present time, they were of opinion that the plaintiff was not "a fit and proper person to be head master, and dismissed him accordingly."

Held (on demurrer to a bill by the plaintiff praying for a declaration that, under the circumstances in the bill stated, the above resolution was invalid), that, under the above section, the new governing body had power to dismiss the plaintiff without notice, and without assigning any reason; and that, as they had exercised their power of dismissal fairly and honestly, not corruptly, nor for the purpose of effecting some collateral object, their decision was not liable to be controlled by the court.

DEMURRER for want of equity.

This was a bill filed by the Rev. Henry Hayman, D.D., the Head Master of Rugby School, against the Governing Body of the School and the Bishop of Exeter, praying for a declaration that a resolution of the governing body, dated the 19th Dec. 1873, "That upon a review of the administration of the school from the period when the governing body came into office to the present time, they are of opinion that Dr. Hayman is not a fit and proper person to hold the position of Head Master of Rugby School, and that it is essential for the interests of the school that he should cease to hold that office," and a notice of the 14th Jan., founded thereon, were respectively invalid, and ought not to be enforced; and for an injunction to restrain the governing body from dismissing the plaintiff from his office of head master, and from electing any person to succeed the plaintiff in his office, and from instituting any action at law or other proceedings for ejecting the plaintiff from the school house, lands, and buildings occupied by him by virtue of his office.

On the 20th Nov. 1869, the plaintiff was appointed Head Master of Rugby by the then trustees of the school, constituted under an Act of Parliament of 17 Geo. 3, c. 71, and entered on the duties of his office about the middle of Jan. 1870.

In Nov. 1869, the defendant, the Bishop of Exeter (then and hereinafter referred to as Dr. Temple), who had been Head Master of Rugby School since the year 1858, accepted the bishopric of Exeter, and thereupon sent in to the trustees of the school his resignation of the office of head master.

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By the above Act of 17 Geo. 3, c. 71, the school house, lands, and property then belonging to the school were vested in certain persons therein named as trustees of the school, upon the trusts and for the purposes in the Act and schedule thereto mentioned. The schedule contained the rules then in force for the government of the school, and amongst others the following rule :

That all the masters of the grammar school who shall succeed the said Stanley Burrough, the present master, the usher or ushers, and the writing masters, who shall succeed those first to be nominated, as hereinbefore mentioned, shall be chosen within three calendar months next after any vacancy shall happen, by the trustees or the major part of them present at a meeting to be held for that purpose, and be removable at the will and pleasure of the trustees, or a major part of them, present at their meeting on the first Tuesday in the month of August.

By a subsequent Act of 54 Geo. 3, c. 131, it was enacted that the annual meeting of the trustees should for the future be held on the third Tuesday in July in each year.

The bill alleged that the above rule, amended as aforesaid, was still in force.

By the Public Schools Act 1864, passed on the 29th July 1864, and which applied (amongst other colleges and schools) to Rugby School, it was enacted as follows :

Sect. 2. Every person appointed, after the passing of this Act, to any office in the governing body of any of the said colleges or schools, shall take and hold that office subject to such provisions and regulations as may be hereafter enacted respecting the same.

Sect. 3. "Governing body" shall mean any one of the several bodies referred to in the report of the said commissioners as being a governing body of any of the said colleges or schools, with the addition of the head master or other masters thereof; and any person appointed a member of the governing body of any such college or school as aforesaid, or a master thereof, shall be deemed to be appointed to an office in the governing body of the said college or school.

By the Public Schools Act 1868, which applied (amongst other colleges and schools) to Rugby School, it was enacted, that the "existing governing body" of a school shall for the purposes of the Act mean at Rugby the trustees; and that "new governing body of a school" shall, for the purposes of this Act, mean a governing body, the constitution of which has been altered in pursuance of this Act, or, if no such alteration shall have been made, the governing body which shall be in existence at the end of the time assigned by this Act for making such alteration, or a body which has been established under this Act as the new governing body of a school.

By sect. 5, power was given to the "existing governing body" to make, within the time therein mentioned, a statute or statutes for determining and establishing the constitution of the governing body in such manner as might be deemed expedient; but after the time therein mentioned, all powers of making statutes vested by that section in the governing body of a school, should pass to the special commissioners thereafter mentioned.

By sect. 6, "the new governing body" were empowered, within the time therein prescribed, to make statutes with respect "to the number, position, rank in the school, and salaries and emoluments of masters who may receive any salary or emolument out of property belonging to or held in trust for the school;" or "with respect to the disposal of the income of the property of the school," for certain purposes therein mentioned.

By sect. 12, "the new governing body" were empowered, notwithstanding anything contained in any existing Act of Parliament, and notwithstanding any custom, from time to time to make, alter, or annul such regulations as they may deem it expedient to make, alter, or annul, with respect (amongst other matters) to (sub-sect. 2) "the mode in which the boys, whether on the foundation or not, are to be boarded and lodged, and the conditions on which leave to keep a boarding house should be given," and with respect to (sub-sect. 11) "the powers committed to the head master."

Sect. 13 was as follows :

The head master of every school to which this Act applies shall be appointed by and hold his office at the pleasure of the new-governing body. All other masters shall be appointed by and hold their offices at the pleasure of the head master.

Sect. 28 was as follows :

Subject to any alterations made by this Act, or by any scheme or statute made in pursuance of this Act, all powers vested by Act of Parliament, charter, instrument of endowment, custom, or otherwise, in the existing governing body of a school to which this Act applies, in relation to such school, or the government thereof, shall continue in force and may be exercised by such governing body until a new governing body is appointed; and after the appointment of a new governing body by the new governing body in the same manner in which they might have been exercised if this Act had not passed.

Upon the resignation of Dr. Temple being delivered to the trustees, they caused advertisements to be published in the newspapers, requesting intending candidates to send in their applications, accompanied by testimonials as to their qualifications, by a day named. The plaintiff sent in to the trustees a written application for the office, together with written or printed testimonials of his character and attainments, signed by various persons and bearing various dates. Each of the said testimonials was dated, and bore the actual date on which it had been given to the plaintiff by the writer thereof, with the following exceptions, viz. : a testimonial from the late Professor Conington was not dated, and a testimonial from the Rev. Dr. Holden was dated the 11th Sept., without specifying the year.

Par. 11 of the bill was as follows :—There were several other candidates for the office besides the plaintiff, and they also sent in testimonials to the trustees, and the trustees, after considering all the testimonials, and the claims of all the candidates, came to the conclusion that the plaintiff was the fittest person to be head master of the school, and appointed him accordingly. Amongst the rival candidates were some who had been educated at or were otherwise connected with Rugby, and whose claims were favoured by Dr. Temple and by the assistant masters hereinafter named, then working under him at Rugby, and by the Rev. G. G. Bradley, D.D. (hereinafter called Dr. Bradley), who had himself formerly been an assistant master at the school, but was then Head Master of Marlborough College; and it appears from the circumstances hereinafter stated, to have been the opinion of Dr. Temple, Dr. Bradley, and the assistant masters, that the trustees were bound to select from among the candidates some candidate who had been educated at, or was otherwise intimately connected with Rugby School, or at all events, some candidate other than the plaintiff. The plaintiff was not educated at and had no connection with Rugby School, and Dr. Temple, Dr. Bradley, and the assistant masters were accordingly much piqued

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and annoyed at the choice which the trustees had made; and being much prejudiced against the plaintiff on religious and political or other grounds, they deliberately formed the scheme and design of procuring, by every means in their power, the annulment of the said appointment, or otherwise of so harassing and thwarting the plaintiff in relation to the school, and to themselves, and so disparaging him in the eyes of the public as to make his position as head master intolerable, and so, if possible, compel him to resign. A part of such scheme and design was to procure, if possible, some resolution or resolutions of the governing body censuring or reflecting on the conduct of the plaintiff, and, by publishing the same in the public newspapers, to prejudice the parents of pupils and intending pupils, and the boys themselves and the public generally, against the plaintiff, so as to make it difficult, if not impossible, for him to maintain the numbers and the discipline of the school. Immediately upon the plaintiff's appointment, Dr. Temple and Dr. Bradley, and the said assistant masters, proceeded to execute their said design, and from that time to the present have not ceased in their endeavours to carry the same into effect, and in fact the acts and proceedings hereinafter mentioned on the part of Dr. Temple, and Dr. Bradley, and of the governing body, after they became members thereof, so far as such acts and proceedings were hostile to the plaintiff, were done or procured to be done in furtherance of the same settled plan and design, viz., either to procure the dismissal of the plaintiff or to force him to resign the head mastership.

There were twenty-one assistant masters at Rugby at the time of the plaintiff's appointment, two of whom were Mr. Scott and Mr. Sidgwick. Eight of these assistant masters, one of whom was Mr. Scott, received a portion of their emoluments from the trust property of the charity, and were known as foundation masters. The others were appointed by, and held their office at the will and pleasure of the head master.

At the date of the plaintiff's election, Mr. Scott, besides being the master of a form, was one of the tutors of the schoolhouse, or head master's house. Mr. Scott had been appointed to the office of schoolhouse tutor by Dr. Temple. He had no boarding house of his own.

From the 3rd to the 6th Dec. 1869, the plaintiff was the guest of Dr. Temple at Rugby, for the purpose of deriving information as to his future duties. Shortly after this visit Dr. Temple sent to the trustees a letter, dated the 7th Dec. 1869, stating, in effect, that Dr. Hayman was, in his opinion, quite incompetent to perform some of the most important duties of the place; and submitting to the trustees that they were bound to require the plaintiff to account for the use he had made of testimonials given to him for quite other posts.

On the 20th Dec. 1869, the trustees, having fully considered the matter referred to them by Dr. Temple, and a certain memorial addressed to them by twenty of the assistant masters, complaining of the plaintiff's use of testimonials and certain other letters, unanimously agreed "that Mr. Hayman has acted with perfect good faith in the use made by him of the testimonials laid before the trustees."

This resolution conclusively settled the question as to the plaintiff's use of testimonials.

Par. 29 of the bill stated as follows:—The atti-

tude of the assistant masters, and especially of the two house tutors in the school house, continuing to be hostile to the plaintiff, he, in the month of Nov. 1870, felt it his duty to submit to the consideration of the trustees a letter of the 10th Nov. 1870. In this letter the plaintiff stated that he proposed at Christmas to give notice to Mr. Scott and the other schoolhouse tutor, that he should no longer require their services as tutors of the schoolhouse; and on the 5th Dec. 1870, the trustees passed the following resolution:

The trustees having read Dr. Hayman's letter, are of opinion that it is highly important that the relation of the house tutors to the head master should be one of the greatest confidence and cordiality; and they regret to find that this feeling does not subsist in the case of the present house tutors. They therefore fully approve of the course which Dr. Hayman intends to adopt in dismissing those gentlemen as house tutors.

Shortly after the date of the resolution, the plaintiff gave notice to Mr. Scott and the other schoolhouse tutor to vacate their posts as house tutors.

At the same time the plaintiff gave notice to Mr. Scott to vacate his post as form master. Various resolutions were passed by the trustees on this subject. At a meeting held in March 1871, they passed a resolution dispensing with his services; but at a subsequent meeting, held on the 30th March 1871, they rescinded this resolution, on the ground that they had no power to dismiss a master except at their annual general meeting.

On the 12th April 1871, certain complaints having been made of want of discipline in the schoolhouse, the trustees adopted the following resolution:

The trustees . . . consider the grievances alleged, referring to the discipline of the school house, have been sufficiently explained. They think that the under masters should never confer with the boys, not even with the sixth form, on points of school discipline, without the knowledge of the head master.

The trustees feel it now their duty, in justice to the head master, to impress upon the under masters generally the necessity, for the good of the school, of giving to the head master not only a nominal but a cordial co-operation and support.

This was the final resolution of the old trustees. It thus appeared, from the circumstances set out in the bill, that whenever disputes had arisen between the plaintiff and the assistant masters with reference to the affairs of the school, and such disputes had been referred to the old trustees as "the existing governing body," their decision had been favourable to the plaintiff and adverse to the assistant masters.

No alteration was made in the "existing governing body" of the school until the month of May 1871, when a statute was made by the special commissioners, under sect. 5 of the Public Schools Act 1868, establishing the constitution of the "new governing body." In Aug. 1871, this statute was approved by Her Majesty in Council, and in Dec. 1871 the new governing body was fully constituted.

The new governing body consisted of twelve members, of whom the Bishop of Worcester was the chairman. Five of them had previously been members of "the existing governing body." Of the rest, Dr. Temple was elected by the Senate of the University of London, and Dr. Bradley by the Hebdomadal Council of the University of Oxford.

Par. 41 of the bill was as follows:—Although Dr. Temple and Dr. Bradley have been active partisans

of the assistant masters in their differences with the plaintiff, and had, in fact, prejudiced the whole case against the plaintiff, and were determined beforehand to drive him from the school, yet they allowed themselves to be elected members of the new governing body, and thus to become judges of matters in and respecting which they and the assistant masters, whose cause they had taken up and whom they in fact represented, had a strong personal interest and bias, which made them wholly unfit to form an impartial judgment on such matters, or on any question between assistant masters and the plaintiff. Dr. Temple had been head master of the school for several years. . . . Dr. Bradley had been an assistant master of the school for many years. . . . Both Dr. Temple and Dr. Bradley were, from their personal experience and from their connection with the assistant masters, intimately acquainted with the affairs of the school, both past and present, and they were in fact looked to by their colleagues on the governing body, and trusted implicitly by them as the proper and trustworthy sources of information on all matters connected with the school. Dr. Temple abused the power and influence over his colleagues, which his long experience and ample means of knowledge gave him to further the aforesaid scheme and design of himself and the assistant masters, and made incorrect representations to his colleagues as to several matters of fact, and, more particularly, as to what were the established customs and usages of the school, and represented as part of such established customs and usages several matters which were not part thereof, but were in fact innovations introduced by Dr. Temple himself, and the acts and proceedings of the new governing body, so far as they were hostile to the plaintiff, and especially the resolutions hereinafter complained of, were in fact caused and brought about in whole or in part by such abuse of power and influence and such incorrect representations as aforesaid.

Between Dec. 1871 (when the new governing body were fully constituted) and the 19th Dec. 1873 (the date of the resolution of the new governing body removing the plaintiff from his office), three subjects of dispute arose between the plaintiff and the assistant masters.

First, Mr. Green's case.—Towards the end of the year 1871, one of the boarding masters gave notice that he would resign his boarding house, to take effect at Easter 1872, and the plaintiff thereupon offered the same to Mr. Green, who had been appointed an assistant master in Jan. 1871. Upon this, ten of the assistant masters, senior on the staff to Mr. Green, including among them Mr. Scott and Mr. Sidgwick, wrote to the plaintiff a letter, dated the 29th Jan. 1872, informing him that "since the time when boarding houses were first intrusted exclusively to assistant masters by Dr. Arnold in 1830, the principle of seniority had always been recognised in selection," and enclosing a letter, dated July 1864, sent by Dr. Temple to one of the classical assistant masters at the time of his appointment, containing the following passage:—"Houses are given in turn to all masters, classical, mathematical, &c., unless a man shows an incapacity for that sort of work. The junior masters, three besides yourself, are paid by the numbers of the school beyond 320. If the school sunk much, these masters would have to go."

Considerable correspondence took place between

the plaintiff and the governing body with reference to the appointment of Mr. Green to the vacant boarding house, and on the 28th Feb. 1872, the governing body passed the following resolution:

The appointment of Mr. Green to the boarding house vacated by Mr. Burrows having been made before the governing body has been able to frame regulations on the subject, they are not prepared to interfere with the act of the head master on the present occasion.

The bill stated that Dr. Temple and Dr. Bradley were exceedingly annoyed at the refusal of the governing body to interfere with the plaintiff's appointment of Mr. Green to Mr. Burrows' boarding house, and induced three other members of the governing body to join with them in signing a statement, which was entered on the minutes at a meeting of the 12th April 1872. This document (in effect) stated that the appointment in question was "a violation of the invariable custom of the school."

On the 12th April 1872, the chairman, at the request of the governing body, wrote to the plaintiff a letter, containing the following passage:

The governing body have therefore desired me to request you, pending the enactment of the statutes and regulations (which the Public Schools Act 1868 empowered them to make), to take no step involving a departure from the customs and usages of the school in regard to the position and emoluments of the assistant masters, or other matters affecting the discipline of the school without the previous approval of the governing body.

To which, on the 16th April 1872, the plaintiff replied, "that he had no intention of any such changes as the latter part of their letter seemed to point to."

Secondly, Mr. Scott's case.—In Jan. 1872, Mr. Scott, who had ceased to be one of the school house tutors since Easter 1871, applied to the plaintiff for leave to take pupils. This request the plaintiff refused, because, as the bill alleged, "circumstances had come to the plaintiff's knowledge which in his opinion required explanation, and without an explanation of which he could not repose that confidence in Mr. Scott which was necessary between a head master and a tutor of boys."

In July 1872, Mr. Scott wrote to the governing body complaining of the plaintiff's refusal. Some correspondence ensued between the plaintiff and the governing body on the subject, and ultimately, on the 31st July 1872, the plaintiff wrote to the governing body informing them that he was prepared to give effect to their requirement that Mr. Scott should be reinstated in his right to take pupils. Mr. Scott was reinstated accordingly.

The bill stated that on the 26th Aug. 1872, the plaintiff (who had not changed his opinion of Mr. Scott's unfitness to be a tutor of boys) drew up and communicated to him privately a statement of the circumstances which had come to his knowledge as aforesaid, and that Mr. Scott, in answer to this, gave the plaintiff no explanation of the matters about which he had inquired, but laid the communication before the governing body, for whom it was not intended, and afterwards informed the plaintiff that he had done so.

On the 23rd Oct. 1872, the governing body passed a resolution, that

That having carefully considered the communication made by Dr. Hayman to Mr. Scott in his letter and enclosures of the 26th Aug. 1872, they are of opinion that the charge against Mr. Scott is wholly without foundation, and . . . ought to be retracted without delay.

Some correspondence took place between the

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plaintiff and the governing body on the subject of the communication in question, and on the 30th Nov. 1872, the governing body passed a resolution containing the following passage:

If Dr. Hayman is not prepared to act in future in a spirit of cordial goodwill towards Mr. Scott, the governing body think it is due to the interests of the school that Dr. Hayman should lose no time in retiring from the office of head master.

All the papers which the plaintiff had sent to Mr. Scott, and the resolutions of Oct. and Nov. 1872, were shortly afterwards published in the *Times*. The bill alleged that all these publications were made in pursuance of the aforesaid scheme and design, and at the instigation or with the advice of Dr. Temple.

On the 8th Jan. 1873, the plaintiff wrote to Mr. Scott, informing him that he had withdrawn the whole of the statements which he had sent to him in August, and adding that it was his earnest desire to act in a spirit of goodwill, and he sincerely hoped to find the same reciprocated; and on the 14th Jan. the plaintiff wrote to Mr. Scott a further letter to the same effect.

On the 15th Jan. 1873, the governing body passed a resolution,

That, referring to their minute of the 30th Nov. last, they were not satisfied with Dr. Hayman's letters of the 8th and 14th Jan. inst.

Further correspondence took place between the plaintiff and the governing body, and on the 4th Feb. 1873, the plaintiff wrote to Mr. Scott "desiring to express to him fully and unreservedly his regret for having entertained suspicions with regard to his conduct, and doubts with regard to the loyalty of his co-operation in the work of the school."

Par. 88 of the bill was as follows:—The governing body, under the influence of Dr. Temple and Dr. Bradley, who were personally hostile to the plaintiff, on the ground of his having been selected by the trustees in preference to the other candidates to the office of head master, and who had determined for that reason to use every means in their power to undo that appointment, and to force the resignation or dismissal of the plaintiff, had in fact been persuaded, and had resolved beforehand, to get rid of the plaintiff, whatever he might write to Mr. Scott, and whatever explanation or statement he might make to the governing body.

On the 5th Feb. 1873, the governing body passed the following resolution:

The subject of Dr. Hayman's letter of the 4th Feb. 1873, was then considered, together with the several matters arising out of Mr. Scott's appeal, and it was resolved: That the governing body are of opinion that the letter of Dr. Hayman to Mr. Scott is satisfactory in terms, but they deeply regret that such a compliance with their minute of the 30th Nov. 1872, has been delayed until it has lost its value. The governing body are further of opinion that the position of Dr. Hayman, and that of the school, have been so seriously compromised by what has been brought under their notice since Midsummer 1872, that they feel it to be their duty, as guardians of the interests of the school, to consider the question whether Dr. Hayman should not now be recommended to retire from the head mastership.

At a meeting of the governing body, held on the 25th Feb. 1873, Dr. Temple moved, and Dr. Bradley supported, a resolution that the plaintiff should be dismissed. This motion was lost, but ultimately the following resolutions were adopted:

1. That no further proceedings be taken in the matter of Mr. Scott's appeal.
2. That the chairman be requested to write to Dr.

Hayman, and communicate to him in confidence the opinion of the governing body that it is very desirable, in his own interest and that of the school, that he should exert himself to procure, as early as possible, some means of honourable retirement by his own act from the office of head master, intimating at the same time that, failing this, and in the event of the interests of the school appearing to require a change of administration, the governing body may be obliged to put in execution the powers confided to them for that purpose.

Thirdly, Mr. Sidgwick's case.—In Sept. 1873, the plaintiff, finding that the numbers of the school had fallen off, wrote to Mr. Sidgwick, one of the classical masters, giving him notice that his services would not be required after Christmas 1873. In this letter he said, "that it seemed least invidious to select the only single man." Mr. Sidgwick was not at this time the junior classical master.

A correspondence took place between fourteen of the assistant masters and the plaintiff on the subject of this notice.

At a meeting of the governing body, held on the 29th Oct. 1873, the assistant masters, as the bill alleged, at the suggestion of Dr. Temple, laid this correspondence before the governing body, who, on the following day, sent the plaintiff a letter, through their chairman, stating "that they were of opinion that the departure shown by such notice from the customs of the school, and from the conditions under which the assistant masters had theretofore entered upon their offices, was of very grave importance to the interests of the school," and giving the plaintiff notice that they would hold a meeting for further considering the subject on the 19th Nov. 1873.

The bill denied that any custom or usage in fact existed in the school, that on any reduction in the staff of masters, those most recently appointed should be the first to retire; and that the only pretence for alleging the existence of any such custom or usage was Dr. Temple's letter of July 1864, and similar letters written by him in subsequent years on engaging assistant masters.

Par. 114 of the bill was as follows:—The governing body were well aware that the plaintiff wholly repudiated, and refused to be bound by, any engagements voluntarily entered into by Dr. Temple, which were founded on no existing statute or regulation, and which interfered with the authority vested in the head master, and they knew, therefore, that his undertaking of the 16th April 1872, was not intended to be, and was not in fact an undertaking to observe any such alleged custom. Nevertheless, they, acting under the hostile and improper influence aforesaid, accepted the unsupported and incorrect statement made to them by Dr. Temple that the said alleged scheme of retirement was one of the customs and usages of the school, and the further statement of Dr. Temple (which was wholly contrary to the fact), that the existence of such scheme of retirement had been made known to the plaintiff by Dr. Temple on the occasion of the plaintiff's said visit, and, in fact, in directing the letter of the 30th Oct. 1873, to be written to the plaintiff, and in passing the resolutions which followed the same, as hereinafter mentioned, the governing body improperly, and in derogation of the trust reposed in them, abdicated their proper functions and duties as governors and trustees of the school, and surrendered their judgment to Dr. Temple and Dr. Bradley, and allowed them, and especially Dr. Temple,

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to be at once witnesses of facts in dispute between the assistant masters and the plaintiff, and which were vital to the determination of the questions at issue, and judges of the plaintiff's conduct and other issues depending upon such disputed facts, although both Dr. Temple and Dr. Bradley had from the beginning been advocates and partisans of the plaintiff's opponents in the school, and had pledged themselves to condemn, and had in fact condemned the plaintiff and recorded an adverse judgment against him before they became members of the governing body.

Some further correspondence took place between the plaintiff and the governing body on the subject of Mr. Sidgwick's dismissal, and on the 19th Nov. 1873, they passed the following resolution:

That in the opinion of the governing body, Dr. Hayman, in giving notice of dismissal to Mr. Sidgwick, has not acted in accordance with the undertaking given by him on the 16th April 1872, to observe the usages and customs of the school . . . and require him to place his resignation in the hands of the clerk, to take effect from Easter next.

The plaintiff having declined to resign, the governing body, on the 19th Dec. 1873, passed their final resolution:

That upon a review of the administration of the school from the period when the governing body came into office to the present time, they are of opinion that Dr. Hayman is not a fit and proper person to hold the position of Head Master of Rugby School, and that it is essential for the interests of the school that he should cease to hold that office. That, in exercise of the powers vested in the governing body by the Public Schools Act 1868, Dr. Hayman be removed from his office of head master, and that such removal take effect on the 7th April next.

On the same day the clerks of the governing body sent the plaintiff a letter of that date, enclosing the above resolutions, stating that the governing body had read and fully considered a certain letter and its enclosures (sent by the plaintiff to them between Nov. 19 and Dec. 19), which, however, had failed to induce them to alter the decision which they had come to on the 19th Nov.

The Public Schools Act 1872, s. 5, is as follows:

The New Governing Body of Rugby School may, at any time before the 25th Aug. 1873, submit to the Special Commissioners, and, if approved by them, may lay a scheme before Her Majesty in Council, for carrying into effect any arrangement which may be entered into between such governing body and the trustees of the Rugby Charity, founded by Lawrence Sheriff, grocer, of London, in relation to the vesting of a portion of the property of such trustees in such new governing body for the use of Rugby School, and in relation to certain other matters therein mentioned.

Accordingly, a scheme was in July 1873 entered into between the new governing body and the old trustees, and duly approved by the Special Commissioners and laid before Her Majesty in Council, whereby the school house, with the land and buildings belonging thereto, became vested in the governing body, as trustees, for the use of the school.

On the 14th Jan. 1874, the new governing body issued a notice, requiring the plaintiff, on the 7th April, to deliver up possession of the school house and the land and buildings belonging thereto.

Par. 135 of the bill was as follows:—Under the circumstances herein appearing, the resolutions and proceedings of the governing body herein complained of were passed and adopted, not in the due exercise and execution of the powers and trusts reposed in them, nor out of a due or any

regard for the true interests and benefit of the school and the public; but out of a predetermined hostility and motives of resentment and party spirit on the part of Dr. Temple and Dr. Bradley, and the assistant masters whom they represented, and out of the exercise by Dr. Temple, by the means aforesaid, of an undue influence over the other members of the governing body, and the undue and culpable submission on the part of the other members of the governing body to such undue influence, and out of an undue bias and prejudice on the part of the governing body in favour of the assistant masters and against the plaintiff, resulting in a great measure from misrepresentations of the plaintiff's acts and motives by the defendant Dr. Temple, and an entire want of fairness and impartiality on their part in adjudicating on the charges made by Dr. Temple and the assistant masters against the plaintiff; and, in fact, out of motives which, according to the rules of equity, were improper and corrupt. Under these circumstances, the plaintiff submits that the said resolutions and proceedings are, as against the plaintiff, invalid, and ought not to be enforced.

The plaintiff submitted that the resolutions of the 19th Dec. 1873 were invalid, on the further ground, that as he had been elected head master under the provisions of the stat. 17 Geo. 3, c. 71, as modified by stat. 54 Geo. 3, c. 131, he could only be dismissed at an annual meeting of the trustees, held pursuant thereto in July.

It thus appeared, from the circumstances stated in the bill, that in the three subjects of dispute which had arisen between the plaintiff and the assistant masters with reference to the affairs of the school between Dec. 1871 and Dec. 1873, and which disputes had been referred to the new governing body, their decision had been adverse to the plaintiff and favourable to the assistant masters.

The governing body demurred to the bill for want of equity.

Cotton, Q.C., Davey, Bowen (of the Common Law Bar), and *Ilbert*, in support of the demurrer.—The object of this bill is to set aside the resolution of the governing body of the 19th Dec. 1873, on two grounds. First, that as the plaintiff was elected head master under the provisions of the Act of 17 Geo. 3, rule 2, as modified by 54 Geo. 3, c. 131, he can only be dismissed by the governing body at their annual meeting in July. But the Public Schools Act 1864, sect. 2, expressly enacts that every Head Master of Rugby to be appointed after the passing of that Act, "shall hold his office subject to such provisions and regulations as may be hereafter enacted respecting the same." And the Public Schools Act 1868, s. 13, enacts that the head master shall hold his office "at the pleasure of the governing body." This section is perfectly general in its terms, and contains no restriction as to the time or place of holding the meeting. The Public Schools Act 1864, sect. 2, therefore, completely disposes of the first ground of objection. The second and substantial ground is, that under the circumstances stated in the bill, the resolution is invalid. The new governing body were constituted under the Public Schools Act 1868, with very large powers. They were managers or administrators of the school. They were not trustees at all, as regards the administration of the school; they were only trustees in the qualified sense, that in Aug. 1873, the school house and the land belonging thereto became vested in them under

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the provisions of the Public Schools Act 1872. Therefore *Willis v. Child* (13 Beav. 116), and other cases which will be cited on the other side, in which the court interfered to control trustees, have no application to the governing body. This disposes of the allegations in the bill as to the resolution not being passed in due exercise "of the trusts reposed in them." In *Reg. v. The Governors of Darlington School* (6 Q. B. 682), the governing body had by charter the power of removing the head master "according to their sound discretion," and the Court of Exchequer Chamber held, that they might remove him in their discretion without summons or hearing, and that the court would not inquire into the soundness of the discretion exercised, unless they had acted corruptly. Par. 11 of the bill charges that Dr. Temple and Dr. Bradley had formed a scheme, prior to their election on the governing body, to force the plaintiff to resign; this allegation is not supported by any specific statement of facts. Par. 41 of the bill charges that Dr. Temple had a strong personal bias, which made him incompetent to form an impartial judgment, and made incorrect representations to his colleagues as to what were the customs of the school; but the only specific fact in support of this allegation, is the denial of the existence of the custom that on a reduction of the staff of masters, the junior masters should be the first to retire. So pars. 114 and 135 contain mere general allegations, unsupported by specific statements of fact, and such allegations are insufficient to support the bill:

Munday v. Knight, 3 Hare, 501;

Gilbert v. Lewis, 1 De G. J. & S. 49;

Grenville-Murray v. Earl of Clarendon, 21 L. T. Rep. N. S. 448; L. Rep. 9 Eq. 11.

There is no allegation of pecuniary interest or fraudulent conduct on the part of Dr. Temple or Dr. Bradley in passing the resolution of the 19th Dec. 1873, or of corrupt motive in the sense of the resolution not being passed in the administration of the school. The resolution was passed by the governing body in the administration of the school; and, therefore, the court has no jurisdiction to interfere with it. In *Dummer v. The Corporation of Chippenham* (14 Ves. 245), which will be relied upon on the other side, the resolution dismissing the head master was *ultra vires*, and, therefore, void, because passed with a view to obtain a vote at a parliamentary election. They also referred to

Fremington School, 10 Jur. 433; 11 Jur. 421.

Glaess, Q.C., Pearson, Q.C., Morgan Howard (of the Common Law Bar), and *H. A. Giffard*, for the plaintiff.—The Public Schools Act 1868, sect. 28, enacts that, subject to any alterations made thereby, "all powers then vested by Act of Parliament in the existing governing body," shall, after the appointment of a new governing body be exercised by the new governing body in the same manner as if that Act had not been passed. This section, therefore, re-enacted the provisions of the Acts of Geo. 3, as to the time at which a meeting must be held for the purpose of dismissing a head master. The resolution of Dec. 1873 was therefore void, not having been passed at a meeting held in July. Secondly, under the Public Schools Act 1872, and the scheme of July 1873, the school house and buildings belonging thereto were duly vested in the new governing body, as trustees, for the use of the school. They were, therefore, strictly trustees, and as such subject to the control of the court.

The notice of the 14th Jan. 1873, is an express admission on the part of the new governing body than the school house property was then vested in them. Dr. Temple and Dr. Bradley had such a strong personal bias and predetermined opinion against the plaintiff, as to disqualify them from being members of the new governing body. Trustees will not be permitted to act corruptly in the execution of a trust, although they have the power to dismiss the head master at their will and pleasure: (*Dummer v. The Corporation of Chippenham*, 14 Ves. 245, 252.) Here the partiality and prejudice of two of the members of the governing body amounted to corruption, and so vitiated the resolution. The decision of a bench of magistrates is vitiated by any one interested party taking part in it:

Reg. v. The Justices of Hertfordshire, 6 Q. B. 753;

Reg. v. The Justices of Suffolk, 18 Q. B. 416.

In *Doe v. Haddon* (3 Dougl. 310), the fact that one of the governing body had said "that he would spend 500*l.* rather than not turn out the defendant," was held sufficient evidence of corrupt motive to invalidate the resolution. Where there is real bias on the part of a member of the governing body in favour of or against the master, the court will interfere: (*Reg. v. Band*, L. Rep. 1 Q. B. 230.) The only ground for the resolution of the 19th Nov. was the departure from the alleged custom of the school in giving Mr. Sidgwick notice of dismissal. The letter of the 19th Dec. shows that the reason for the resolution of that date was the same as the reason for the previous resolution. Such a reason was clearly invalid, as no such custom in fact existed. Where trustees think fit to give a reason for their decision, the court will examine the validity of it:

Re Beloved Wilks' Charity, 3 M. & G. 440;

Reg. v. The Bailiffs of Ipswich, 2 Ld. Raym. 1232, 1240;

and if they have exercised their jurisdiction partially (as the governing body have done here), or assigned a reason which had no application, the court will interfere: (*Re v. The Bishop of London*, 13 East, 419, 422.) Where trustees of a charity have power to remove a head master "upon such grounds as they shall, at their discretion, deem just," they are not the only judges of the sufficiency of the grounds of removal, but are subject to the control of the court in the exercise of the trusts reposed in them: (*Willis v. Child*, 13 Beav. 123.) In that case a successful action in ejectment had been brought before judgment was delivered: (5 Ex. 894.) Trustees having a discretionary power, must exercise their discretion with honesty of intention, and with a fair consideration of the subject: (3 M. & G. 448.) As to *Munday v. Knight* and *Gilbert v. Lewis*, cited on the other side, *Chicot v. Lequeune* (2 Ves. sen. 317), shows it is not necessary to state minutely every fact in support of the allegations of the bill; it is only necessary to state sufficient facts to prevent the allegations being vague and uncertain; and this has been done here. In the *Darlington School* case (6 Q. B. 716), it was admitted on the pleadings that the governors had exercised a sound discretion. The master ought to have traversed the allegation of his removal in the exercise of a sound discretion, which might have been disproved in fact: (*Archbold's Crown Office Practice*, p. 301.) The decision in the *Darlington School* case was disapproved of by Lord Hatherley in *Dean v. Bennett* (24 L. T.

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Rep. N. S. 169; L. Rep. 6 Ch. 489). They also referred to

Rooke's case, 5 Coke, 204;

Daugars v. Rivas, 28 Beav. 243;

Attorney-General v. Magdalen College, Oxford, 10 Beav. 402;

Whiston v. The Dean of Rochester, 7 Hare, 532;

Bacon's Abridgment (Dodd's edit.), vol. 4, p. 561;

Const v. Harris, Tur. & Bus. 406.

Cotton, Q.C. in reply.—*Reg. v. The Justices of Hertfordshire* and *Reg. v. The Justices of Suffolk*, were decided on the ground that the court was not duly constituted. In *Doe v. Haddon*, the court had power to remove, "on cause to be adjudged by them," and not, as here, "at their pleasure." In *Reg. v. Band* the body whose decision was attacked, was a judicial body, which these defendants are not. The resolution of the 19th Dec. 1873, is perfectly distinct from the resolution of the 19th Nov. 1873. The resolution of Dec. 1873 was passed by the governing body in the administration of the school, without assigning any reason, except that the plaintiff "was not a fit and proper person," in their capacity of general managers of the school, and not as trustees. In *Reg. v. The Bailiffs of Ipswich*, the return to the *mandamus* was, that the officer was confirmed for life, and was not an officer *ad libitum*. *Beloved Wilkes' Charity* merely decided that where trustees have exercised their discretion honestly, the court will not examine into the accuracy of the conclusion at which they have arrived. *Rea v. The Bishop of London* (13 East, 422), and the same case at a later stage (15 East, 146), is a direct authority to show that a *mandamus* would not be granted to compel the governing body to specify their reasons for passing the resolution of Dec. 1873. In *Willis v. Childe*, the power of removal was given to trustees as part of a trust, "in exercise of the powers and trusts reposed in them." The *Fremington School case* (11 Jur. 421, 424) clearly shows that the presence of Dr. Temple and Dr. Bradley on the governing body could not vitiate the resolution of Dec. 1873. In that case the court declined to interfere with the decision of trustees, who had power to remove a head master "for just cause," although three of their number had, previous to the meeting, expressed a decided opinion of his guilt. *Chicot v. Lequeme* is inconsistent with the two later cases of *Munday v. Knight* and *Gilbert v. Lewis*. In *Dean v. Bennett* there is a mere *dictum* as to the *Darlington School case*; the decision turned mainly on the point, that proper notices for calling the meetings dismissing the minister had not been given.

The VICE-CHANCELLOR said:—From the 20th Nov. 1869, up to the present time, Dr. Hayman has been head master of the school, but he is now, under the resolution of the 19th Dec. 1873, to be removed, if that resolution is to stand, on the 7th April next. It must be observed, that the appointment was made by the then Trustees of the Rugby Charity. The duties of the trustees with regard to the head master are prescribed, and his position defined, by 17 Geo. 3, c. 71. Rule 2 states as follows: [His Honour read it as set out above.] By a subsequent Act, passed on the 17th June 1814, the time of meeting, August, having been found inconvenient, was altered to July. It is clear, therefore, that if the rights of Dr. Hayman depend upon the 17 Geo. 3 only, he was liable to be removed at the will and pleasure of the trustees; but that such will and pleasure could only be expressed at the annual meeting to be held in the month of July.

But the Public Schools Act 1868 was then in force. [His Honour read sects. 13 and 28.] It will be observed that this Act makes no provision as to the time or place at which such pleasure of the governing body is to be expressed. But it had been provided, by 27 & 28 Vict. c. 92 (in order to make those who might afterwards be appointed head masters subject to such provisions and regulations as might be hereafter enacted respecting the same), that "Every person appointed after the passing of this Act to any office in the governing body of any of the colleges or schools, shall take and hold that office subject to such provisions and regulations as may hereafter be enacted respecting the same." Then it provides that the governing body shall mean and include the head master. That, therefore, made Dr. Hayman's appointment subject to any provision which Parliament might afterwards make. The new governing body, contemplated by the Act of 1868, was duly constituted in the month of Dec. 1871. The first point relied upon on behalf of the plaintiff was, that he is not liable to be dismissed by the new governing body, but that the power must be exercised by the old trustees; and as they could only exercise it at the annual meeting in July, the resolution of the 19th Dec. 1873 was necessarily invalid. I am, however, of opinion that the plaintiff became subject to the new governing body upon their coming into existence, and that this objection to the resolution of dismissal cannot be sustained. It is, in my opinion, clear that the plaintiff, and all other masters of the great public schools to which the Act of 1868 applies, are subject to the control of the new governing body of each school, and that they hold their offices merely at the pleasure of the governing body, and are, consequently, liable to be dismissed without notice, and without any reason being assigned. The probable object of the Legislature in making such a provision was to avoid such contests as have frequently taken place in this court and the Court of Queen's Bench, as to the power of the trustees to remove their masters from public schools. Assuming this to be the true construction of the Act, it was then contended on behalf of the plaintiff that this court will control the proceedings of all such bodies as this, when it is satisfied that their powers have been exercised corruptly, unjustly, or for the purpose of effecting some collateral object, and that the circumstances of this case show that the power of the governing body has been so improperly and unjustly exercised, and its exercise was so improperly brought about, that it is the bounden duty of this court to interfere and treat the resolution for dismissal of the plaintiff as invalid, and restrain the governing body from carrying it into effect. I think that the clear result of the numerous authorities cited on both sides in the argument of the case is, that all arbitrary powers, such as the power of dismissal at pleasure, which is given to this governing body, may be exercised without assigning any reason, provided they are fairly and honestly exercised, which they must always be presumed to have been until the contrary is shown, and the burthen of showing the contrary is upon those who object to the manner in which the power has been exercised. No reasons need be given; but if they are given, this court will look into their sufficiency. Upon this subject numerous authorities were cited, and I will briefly advert to most of them.

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The first in point of date was *Reg. v. The Bailiffs of Ipswich*, which it will be remembered was a case in which the corporation dismissed Mr. Serjt. Whitaker from being their recorder. It was contended upon his behalf (but it is not necessary to go further into that), that his office was a freehold. I only read it for the purpose of the opinion expressed by that great lawyer, Lord Chief Justice Holt. In that case the Solicitor-General had opposed granting a peremptory *mandamus*, because the recorder was an officer *ad libitum* of the corporation. But that objection was contrary to the returns, whereby he appeared to have been confirmed for life; and Holt, C.J. said, that "If he had been an officer *ad libitum*, the corporation ought to have returned that and relied upon it, and it would have been a good return; but they could not take advantage of that, when they had returned a cause, if the cause were not sufficient; for it appeared that they had not gone upon their power and determined their will, but put him out for a misdemeanor." It is plain, therefore, that Lord Holt considered that if they had merely returned that he had held office at their pleasure, and that they had exercised their pleasure by dismissing him, the matter could have been no further inquired into; but as they had dismissed him for a misdemeanor, it was competent for the court to inquire into the sufficiency of the reasons that induced them to dismiss him. In *Doe v. Haddon*, one of the governing body was proved to have said that he would rather spend 500*l.* than not turn the master of the school out, and he had also threatened the constable with the loss of his office if he did not concur in his dismissal. That again was such a corrupt motive in one of the governing body as to vitiate the whole proceedings. In *Dummer v. The Corporation of Chippenham*, the master was dismissed by the governing body, who were part of the corporation there, on the alleged ground of bodily disease and infirmity of age, but the bill alleged that the resolution was really in consequence of a scheme to remove him because of his having voted at the last election in a manner opposed to the opinions of the corporation. To that bill a demurrer was put in; but Lord Eldon considered that there was such an allegation of corrupt motive there, in exercising the power, that he overruled the demurrer, and required the governing body to put in an answer. The next case in order of date of importance is the *Fremington School* case, which was so much considered by the learned Vice-Chancellor Knight Bruce. That, it will be remembered, was a case in which the governing body had a power of dismissal "for neglect or misbehaviour, or other just cause." Various charges, I think eighteen in number, were brought against the master of the school, founded principally upon gross immorality of conduct. When the matter came before the Vice-Chancellor Knight Bruce in the month of June 1846, he came to the conclusion that, inasmuch as three out of the governing body had in writing expressed their belief in his guilt before they went into the inquiry, that was such a disqualification for expressing any opinion, that he made a declaration that the resolution of dismissal was void; but he left the governing body, the trustees, at liberty to reconsider the matter. Notices were sent to all the other trustees; but the result was, that the same three trustees who had expressed their opinion of the guilt of the

master, again acted in considering the subject, and were assisted by one other trustee only: and one of the trustees, the clergyman of the parish, Mr. Tardy I think was the name, was so adverse to the master, Mr. Ward, that it might well have been considered that he was actually disqualified to sit in judgment upon him. But they having done so, and having come to the conclusion that he was guilty of the gross charges made against him, the same learned judge, reconsidering the matter after that resolution in the next year, came to the conclusion that he could not interfere, and the dismissal took effect. I only refer to one or two expressions in his judgment. He said (p. 424), "Then comes the consideration whether it was competent to these gentlemen (inasmuch as neither of their colleagues could or would sit with them) to hold a sitting for this purpose, considering all that had taken place—considering that Mr. Tardy," that is the clergyman of the parish, "one of them, had expressed an opinion of the guilt of Mr. Ward before he had heard either him upon the subject or any witness for him, and especially considering that Mr. Orde, Mr. Surtees, and Mr. Wyvill, after hearing Mr. Ward, came to a conclusion of his guilt; and who, moreover, previously, and without hearing Mr. Ward and the examination of his witnesses, had come to a conclusion of the same kind." Then he says: "Undoubtedly it placed them in a position of considerable difficulty. If Mr. Ward was unfit to remain in the school, if he was a mischievous and pernicious instructor of youth, and their colleagues would not sit with them, what were they to do? I think, therefore, that the jurisdiction, or tribunal, if I may use such a phrase, was properly constituted." Then at p. 424 he says: "Now I do not consider that the office of the court is to decide whether the electors ought or ought not to have believed or disbelieved certain evidence. It is not for this court to be satisfied—it is for the electors to be satisfied; and if upon legitimate materials which might possibly have satisfied a reasonable man desirous of doing justice, they come to a certain conclusion; in point of fact, my opinion remains, that it is not the office of the court to interfere with it." Then, for the third time, he expressed his regret that he was obliged to come to the conclusion to leave the matter to be carried into effect according to the resolution of the governing body. I shall mention next a very important case, *The Darlington School* case. That is a case in which the governing body had a power to remove the master "according to their sound discretion." It was held by the Court of Queen's Bench, and by the Court of Exchequer Chamber, affirming their judgment, that by the terms of the charter the governors might in their discretion remove the master without summons or hearing, and although no charge against him had been exhibited to them. The judgment of the Court of Queen's Bench was delivered by Lord Denman. Lord Denman there says. "They," that is the governing body, "are bound to remove any master whom, according to their sound discretion, they think unfit and improper for the office; and as their discretion may possibly be well exercised for defects of various kinds not amounting to misconduct, so there may be misconduct incapable of proof by witnesses, but fully known to the governors themselves, on which they could not abstain from exercising their power of removing the

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master without the abandonment of their duty." Then he further says, "But they might be reasonably satisfied of the truth of the charges without possessing any means of proving them by evidence; and even if they had no charge before them they might still, in the exercise of their discretion, remove him for reasonable cause. The prosecutor," the prosecutor of course here was the schoolmaster, "has denied the charges and the trial; but he does not deny the exercise of discretion, which might have been disproved in fact, as by showing that malicious feelings against the master were indulged by the governors, or that they had some interest to serve in promoting another to his place. The allegation of removal in the exercise of discretion, is an independent allegation, which the prosecutor does not deny, though it is accompanied with reasons which, on the trial, he disproved. But the power of the governors so to remove justifies their so doing, and it is not to be restricted by any opinion which we may form of the reasons for which they may have been induced to exert it." That came, on appeal, before the Court of Exchequer Chamber and the judgment of that tribunal was delivered by Lord Chief Justice Tindal, and I will refer to one or two passages of his judgment also. He says—"Looking to the terms of the letters patent of Queen Elizabeth, we think the office in question is, in its original creation, determinable at the sound discretion of the governors, whenever such discretion is expressed; and that it is in all its legal qualities and consequences, not a freehold, but an office *ad libitum* only. The governors would be guilty of misconduct, might perhaps render themselves liable to a criminal prosecution, if they exercised their discretion of removal in an oppressive manner or from any corrupt or indirect motive; but we see nothing that is to restrain them from exercising such discretionary power whenever they honestly think it proper so to do." Then he says—"And there seems nothing unreasonable in the founder's giving such authority to the governors. For there may be many causes which render a man altogether unfit to continue to be a schoolmaster, which cannot be made the subject of a charge before a jury, or otherwise capable of actual proof. A general want of reputation in the neighbourhood, the very suspicion that he has been guilty of the offences stated against him in the return, the common belief of the truth of such charges amongst the neighbours, might ruin the well-being of the school if the master continued in it, although the charge itself might be untrue, and at all events the proof of the facts themselves insufficient before a jury. Many other grounds of removal fully sufficient in the exercise of a sound discretion might be suggested." Then in the case of *Willis v. Childs*, before Lord Langdale, there was a power to remove upon such grounds as the trustees shall in their discretion in a due exercise and execution of the powers and trusts, reposed in them, deem just. Having that power, charges were made against the master. It was necessary to have two meetings, and meetings were convened, but the result was, that no sufficient investigation took place. This is a specially important case, because in the very same transaction the trustees, having treated the master as their tenant at will, had given him notice to quit the school house, and had brought an action of ejectment against him, which action was successful and had been decided before

this judgment was given. When the matter came before this court Lord Langdale said, "the plaintiff alleges that the power of the trustees has been corruptly exercised, or at least that there has been an undue exercise of their discretion. A great many affidavits have been filed; they contain much inconsistent evidence, and it seems to me that some at least of the trustees manifest an eager desire to remove the plaintiff. If upon a fair investigation of the facts, and after just means of explanation and defence had been afforded, it had appeared that the employment of the plaintiff had become prejudicial to the school, the trustees would have been fully justified in removing him. Upon the merits I find it very difficult to form any conclusive opinion upon the truth or falsehood of many of the allegations which are stated; but after reading the affidavits I observe that some differences having arisen between the master and the usher, the trustees, not troubling themselves to promote any means of conciliation or adjustment, seem to have been disposed to impute the principal fault to the plaintiff; and instead of instituting an inquiry in his presence which might have afforded him the means of explanation and defence, they without his knowledge commenced proceedings against him by referring the matter to the school committee to consider the case. The committee proceeded to investigate the case in his absence, and without his knowledge, and reported against him. The report was not communicated to him; but the trustees met, and, as they say, considered the report, and, in his absence and without hearing him, they confirmed the report and resolved to remove him, and stated the grounds and reasons for his removal." That resolution Lord Langdale restrained the trustees from acting upon, and, as far as appears by the report, the plaintiff remained in his office. To this class of cases also belongs the case of *Dean v. Bennett*. I need not go further into that case than to state that it was the case of a Protestant dissenting congregation, who had the summary power of dismissing their minister at two meetings. A meeting was called, and charges made against the minister, which were not investigated; a second meeting was called to confirm the resolution passed at the first meeting, the proceedings at the first meeting being unknown to those who voted at the second. Lord Hatherley, under those circumstances, considered that, though there was a summary power which might have been exercised without assigning any reason, inasmuch as it was apparent their proceedings had been unjust, he must restrain the trustees from acting upon it. It was in that case that he expressed, not disapprobation, but some doubt, as to the *Darlington School* case to which I have already referred. The case of *Beloved Wilkes' Charity* was a case in which trustees had a power of selecting a boy from four particular parishes to be educated at the expense of the charity as a clergyman of the Church of England. In default of their finding a fit candidate within those four parishes, they were at liberty to go to any other parish; they had gone out of the four parishes, and had selected a candidate; and a farmer, an inhabitant of one of the parishes, being dissatisfied, filed a bill to restrain them from carrying out the charity in favour of the boy, who did not belong to one of the four favoured parishes. Lord Truro, in a very remarkable judgment—and I only refer to this part of it—says: "The duty of supervision on the part of this

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court will thus be confined to the question of the honesty, integrity, and fairness with which the deliberation has been conducted, and will not be extended to the accuracy of the conclusion arrived at except in particular cases. If, however, as stated by Lord Ellenborough, in *Res v. The Archbishop of Canterbury*, trustees think fit to state a reason, and the reason is one which does not justify their conclusion, then the court may say that they have acted by mistake and in error, and that it will correct their decision, but if, without entering into details they simply state, as in many cases it would be most prudent and judicious for them to do, that they have met and considered and come to a conclusion, the court has then no means of saying that they have failed in their duty, or to consider the accuracy of their conclusion." *Res v. The Bishop of London* was a case in which no minister could preach without the sanction of the diocesan. In that case, the Bishop of London having refused his sanction to a particular candidate, an application was made to the Court of Queen's Bench for a *mandamus* to compel him to license. I read it only for an expression of Lord Ellenborough's. The Act said, "that no person should be allowed to preach, unless he be first approved and thereunto licensed by the archbishop or bishop. Suppose he should return *non idoneus* generally; can we compel him to state all the particulars from whence he draws his conclusion? Is there any instance of a *mandamus* to the ordinary to admit a candidate to holy orders or to specify the reason why he refused? If indeed, it had appeared that the bishop had exercised his jurisdiction partially or erroneously; if he had assigned a reason for his refusal to license which had no application, and was manifestly bad, the court would interfere; but the difficulty that I feel is, that the bishop, as it now appears, stands only upon his objection to the fitness of this party, of which the statute meant that the bishop should be the judge." That came afterwards again before the court; and it is reported in the 15th East; it was an application against the bishop and the Archbishop of Canterbury, and it is only necessary to say that Lord Ellenborough again, in delivering a more elaborate judgment of the court, says (p. 146), "But, in the instance of the lecturer, the term approbation in the statute 13 & 14 Car. 2, is quite another thing. What scales have we to weigh the conscience of the bishop? And how are we to know whether he properly or improperly disapproves? May he not properly disapprove of the candidate for a lecturer's licence on account of many matters which cannot be conveniently stated to a court of justice? May he not disapprove for matters within his own personal observation and knowledge; for the habits of life and conversation of the person, which might be known to him from residing in the same university or society with him; from his conduct in life, down perhaps to the very time when the bishop is called upon to signify his approbation? Is he to exclude his own knowledge, the most material of any? Does the law say upon what proof he is to act, or that he is to have witnesses upon oath to the facts by which his judgment is to be guided. What authority has he to compel the attendance of witnesses before him? The word of the statute is 'approve,' and he must exercise that approbation according to his conscience, upon such means of information

as he can obtain, and everything that can properly minister to his conscientious approbation, or disapprobation, and fairly and reasonably induce his conclusion on such a subject, though it might not be evidence that would be formally admitted in a court of law, may, I am of opinion, be fitly taken into his consideration." I need hardly say that pecuniary interest in the governing body would be conclusive. That was decided in *Reg. v. The Justices of Hertfordshire*, where one of the justices, who decided the question, had a very insignificant pecuniary interest, I think, amounting only to 8l. or 9l.; but that was considered by Lord Campbell in the Court of Queen's Bench as fatal to his exercising any judgment, and the finding, to which he was a party, was quashed. The same thing will be found in *Reg. v. The Justices of Suffolk*: but although pecuniary interest will disqualify, circumstances which may be calculated to produce bias will not do so. Therefore in the case of *Reg. v. Rand*, where two of the justices were trustees of a property, which would be affected by the decision (it was a rating question), as they were only trustees, having no pecuniary interest, it was decided that, though that might produce bias, it was not a disqualification; and Mr. Justice Blackburn, in giving the judgment of the court, said, "Wherever there is a real likelihood that the judge would, from kindred or any other cause, have a bias in favour of one of the parties, it would be very wrong in him to act; and we are not to be understood to say that where there is a real bias of this sort the court would not interfere; but in the present case there is no ground for doubting that the justices acted perfectly *bonâ fide*; and the only question is, whether, in strict law, under such circumstances, the certificate of such justices is void, as it would be if they had a pecuniary interest; and we think that *Reg. v. Dean of Rochester* is an authority that circumstances from which a suspicion of favour may arise, do not produce the same effect as a pecuniary interest, and as the decision in that case was on demurrer to a plea, and might have been taken into error, the authority is one on which we ought to act." Therefore there was a bias there, but no interest. Upon these authorities then, and upon every principle, it is clear that if the governing body was properly constituted, and if they fairly and honestly exercised the power of dismissing the plaintiff, their decision is not liable to be controlled by this court. But the contention on the part of the plaintiff is, that looking at the events which occurred on his appointment to the head mastership in 1869, and the subsequent transactions, the governing body was not so constituted as to be capable of coming to a just and impartial decision, and that its decision was in fact unjust and partial. The objection of the plaintiff to the decision of the governing body is founded on the fact of the Bishop of Exeter and Dr. Bradley having been two members of the body. No objection is or could be taken to the other distinguished members of the body, and the decision is impugned solely on the ground that it was produced by the undue and improper influence of the Bishop and Dr. Bradley. [His Honour, after reading and commenting on Dr. Temple's letter of 7th Dec. 1869, Dr. Hayman's letter of 10th Nov. 1870, and the resolutions of the old trustees, continued:] It is, I think, to be

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regretted considering all that passed upon the appointment of Dr. Hayman, that the Bishop of Exeter and Dr. Bradley should have allowed themselves to be put on the governing body, while Dr. Hayman continued to be head-master. At the same time I am far from saying that I am bound to consider that two such men, when put in the responsible position of governors of this school, with quasi-judicial duties to perform, were incapable of throwing off the opinions which they had entertained two years before. [His Honour, after describing and commenting on the three subjects of dispute, which had arisen between the plaintiff and the assistant masters, after the appointment of the new governing body, and the resolutions of the new governing body in reference thereto, continued:] The real question is, whether this resolution is valid; and it must be so if it is the result of the fair and honest opinion of the governing body. Subject to the question of the construction of this Act, which I have already disposed of, it is admitted by the plaintiff's counsel that no objection can be taken to any of the governing body, except the Bishop of Exeter and Dr. Bradley. Can I attribute any improper motive to them? Their character and position renders that all but impossible. If they took the course they did upon an honest conviction that it was right, and that it was not for the good of the school that Dr. Hayman should remain there, can I say that, as members of the governing body, they were not entitled to act upon that conviction? A man's scholarship may be perfect, his character admirable, and yet for want of the power to control subordinates and govern boys, he may be wholly unfit for a schoolmaster. I am not attributing—I do not attribute—this unfitness to Dr. Hayman. On the contrary, I believe that he would have succeeded in the management of the school, if he had had a fair chance, but that he had not. Still the governing body are entitled to act upon their own opinions, uncontrolled by this court, if their opinions are fairly and honestly entertained. And I am unable judicially to come to the conclusion that they were not. It is to my mind plain, that a state of things existed at Rugby in December last, which made it imperative for the governing body to do something, or the school must have gone to destruction. Whether it was proper to remove the assistant-masters, or the head-master, was for them, and not for this court, to determine. To them the Legislature has left the decision of such questions, and so it must be left by this court, unless I can see that the decision has been arrived at for some improper, corrupt, or collateral object. I am unable to see that any such object has actuated the able and distinguished body of men who were parties to the resolution of 19th Dec. last. If it had not been for the unfortunate part taken by Dr. Temple and Dr. Bradley in 1869, I am satisfied that the decision would not have been questioned by Dr. Hayman in this or any other court. Therefore, apart from the question of the serious charges contained in this bill, I should, on principle, come to the conclusion that I am not authorised judicially to interfere with the decision of the governing body. [His Honour, after reading paragraphs 11, 41, 88, 114 and 135, continued:] The allegation of personal interest on the part of the Bishop of Exeter and Dr. Bradley, is so unsustainable, that I must disregard it. Bias they may have had. As to the allegation

that such a body of men as these, twelve in number, were overwhelmed and swayed by the Bishop of Exeter and Dr. Bradley, it is impossible to suppose that such a body of men were incapable of expressing a judgment of their own. Therefore I must treat this allegation as mere allegation of the pleader. The allegations in paragraph 135 can hardly be regarded as allegations of fraudulent conduct. They amount only to strong charges of opinion of unfitness: and the cases of *Munday v. Knight*, *Gilbert v. Lewis* and other cases of the same class, show that general charges, such as of fraud, when not sustained by particular circumstances stated in the bill, will not do; any more than a general charge that property is held on trust will do, as was decided in the case of *Grenville-Murray v. Lord Clarendon*. There the allegation in the bill was, that property in the hands of the Foreign Secretary was held in trust for the plaintiff. Although there was a demurrer, the demurrer was held not to amount to an admission of the trust, merely because the bill alleged it but without stating facts to show the existence of the relation of trustee and *cestui que trust* between the parties. Upon the whole, therefore, I am sorry to be obliged to come to the conclusion that the bill does not show a case for the interference of the court. The demurrer will therefore be allowed, but without costs.

At the close of the judgment it was arranged that the demurrer of the Bishop of Exeter, which had been filed, but not set down, should be treated as set down, and allowed without costs.

Solicitors: *Bower and Cotton; Iliffe, Russell, and Iliffe.*

Friday, April 17, 1874.

PERRING v. TRAIL.

Charitable bequest—9 Geo. 2, c. 26—Private Act—Power to hold lands acquired by will.

The W. Hospital was, by a private Act of Parliament, empowered by will or otherwise to acquire and hold lands of any sort and any kind of personal estate. P. devised his real and personal estate to trustees for sale, and to pay thereout among other legacies 100l. to the W. Hospital. The pure personal estate was insufficient to pay the legacies in full.

Held, that the power given by the special Act to the hospital to acquire involved a power to the testator to devise or bequeath lands or other personal estate to the hospital, and that the legacy must be paid in full.

JOHN PERRING, who was at the time of his death possessed of freehold and leasehold property and other personal estate, by his will, dated the 28th Aug. 1863, gave all his real and personal estates, except estates vested in him as mortgagee or trustee, to William Perring and Jas. A. Edwards, upon trust for sale, and to stand possessed of the proceeds after payment of his debts and funeral and testamentary expenses, upon trust to pay various charitable and other legacies, among which was the following: "To the treasurer for the time being of the Westminster Hospital the sum of 100l." The testator died on the 16th May 1867, and in October 1868, a suit was instituted for the administration of his estate.

The testator's pure personal estate having proved insufficient to pay the legacies in full, the question

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arose whether the Westminster Hospital was entitled to have the legacy of 100*l.* made up out of the impure personal estate. The Westminster Hospital was incorporated by the Act of 6 Will. 4, c. 20, which enacted:

That the President, the Vice-Presidents, the Treasurers, and Governors for the time being of the said hospital or public infirmary shall be, and they are hereby, declared to be one body politic and corporate for the purposes of the said institution or hospital, by the name and style of "The President, Vice-Presidents, Treasurers, and Governors of the Westminster Hospital," and by that name and style shall have perpetual succession and a common seal . . . and by the same name shall be able and capable, without incurring the penalties or forfeitures of the Statutes of Mortmain, to hold and retain for the purposes of the said hospital, the said hospital or building in and near the Broad Sanctuary aforesaid, and the piece of ground there whereon the same stands, and the said piece or pieces of land or ground in James-street aforesaid, and by will, gift, purchase, or otherwise, to obtain, acquire, hold, and retain, for the purposes of the said hospital, any manors, messuages, lands, tenements, and hereditaments, of any kind, name, quality, or sort, either in fee or for terms of life or years, or otherwise howsoever, so as such manors, messuages, lands, tenements, and hereditaments, exclusive of the said hospital at or near the Broad Sanctuary aforesaid, and the piece or parcel of ground whereon the same stands . . . do not in the whole exceed the clear yearly value of twenty thousand pounds . . . and also by will, gift, purchase, or otherwise, to obtain, acquire, hold, and retain, for the purposes of the said hospital, any kind of personal estate and any moneys and property of what nature or kind soever, including money secured on mortgage or charged upon any manors, messuages, lands, tenements, or hereditaments.

Glasse, Q.C. and W. W. Karlake, for the plaintiff, contended that the Westminster Hospital was not entitled to have the bequest made up out of the impure personal estate and cited.

Nethersole v. School for the Indigent Blind, L. Rep.

11 Eq. 1; 28 L. T. Rep. N. S. 728;

Chester v. Chester, L. Rep. 12 Eq. 444;

Robinson v. Governors of the London Hospital, 10 Ha. 19 in which last case there was express power in the Act enabling persons to devise lands to the hospital.

Phear, for the Westminster Hospital.—The Act which gives the hospital power to acquire real estate must imply a power to persons to give it. In *Nethersole v. School for the Indigent Blind*, there was a power in the Act for the school to hold land, but no express power to take by devise.

Hull, W. J. Owen, and Cates for other parties.

The VICE-CHANCELLOR was of opinion that the power being given to the hospital by their special Act to acquire by will lands of any kind, it would be rendering the Act nugatory to hold that there was no corresponding power to persons to give by will to the hospital that property which they were so empowered to take and hold. How otherwise could they acquire lands by will? It was to be regretted that the Act had not, as in the case of *Robinson v. the Governors of the London Hospital*, given express power to persons to devise lands to the Hospital, but he was of opinion that the right of the Hospital to take lands by devise involved a power for persons to give them by will. There would therefore be a declaration that the Westminster Hospital was entitled to be paid the legacy in full.

Solicitor for the plaintiff, J. H. Jeanneret.

Solicitors for the Hospital, Trollope and Winckworth.

Solicitors for other parties, H. Cockle; Sismey; Fladgate and Co.

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COURT OF QUEEN'S BENCH.

Reported by J. SHORR and M. W. McKELLAR, Esqrs.,
Barriers-at-Law.

Wednesday, Nov. 12, 1873, and Feb. 16, 1874.

REG. v. GREEN.

Previously to 1847 the rectory and parish of D. comprised the townships of D. (the same name as the parish), M., W., and B., the parish church being situated in the township of D. The township of M. contained a chapel and graveyard in which the usual services were performed by a curate appointed by the rector, and had its own vestry and two separate churchwardens, who, by custom, were both chosen by the inhabitants. The inhabitants of M. never intervened at the vestry holden at the parish church, which was attended by the inhabitants of the other three townships, and at which two churchwardens were appointed in the ordinary way, who were called churchwardens for the parish of D. The churchwardens of the parish of D. never performed any duties within M., nor the churchwardens of M. within D., and separate church rates were made.

In 1847 an Act of Parliament (10 Vict. c. 3) was passed dividing the parish of D. into three distinct and separate parishes, D. and W. constituting one, M. a second, and B. the third. Section 5 of the Act enacted "That when the division of the said rectory of D. into several parishes and rectories shall have taken effect, either wholly or in part, under this Act, two fit and proper persons shall be chosen churchwardens for each such parish, when such division shall have taken effect, at the same time and in the same manner as churchwardens are now chosen and appointed for the said parish of D., the rector of each of the said new rectories exercising the same rights and powers in the appointment of such churchwardens, or one of them, as the rector of the said rectory of D. now exercises."

Held (per Blackburn and Archibald, JJ., dissentiente Quain, J.) that the effect of this enactment was to deprive the inhabitants of M. of the right formerly enjoyed by them of electing both churchwardens.

Per Quain, J. (dissentiente), that this enactment did not expressly or by necessary implication abolish the old custom of electing churchwardens which prevailed in M. before the passing of the Act.

In this case a writ of mandamus issued, commanding the defendant to convene a meeting in vestry of the inhabitants, ratepayers of the rectory and parish of March, in the county of Cambridge, for the purpose of electing two fit and proper persons to be churchwardens for the rectory and parish. To this writ a return was made, and, by agreement of parties and order of a judge, it was determined to state the facts without pleadings in the following

SPECIAL CASE.

1. The rectory and parish of Doddington, otherwise Dornington, in the county of Cambridge, until the death, in Nov. 1868, of the Rev. Algernon Peyton, the then incumbent, comprised the township of Doddington, which in the Act of 1847 is called Doddington, otherwise Dornington, the township, hamlet, or chapelry of March, and the hamlets of Wimblington and Benwick.

2. The entire area of the rectory and parish was about 36,987 acres, or upwards of 57 square

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miles; and the population inhabiting that area, according to the census of 1851, and that of 1871, was 9708 and 9190 respectively distributed as follows:—

	EXTENT		POPULATION	
	acres		1851	1871
Doddington Township	7159	1454	1870	
March	19141	6341	5654	
Wimblington	7590	1158	1308	
Benwick	3097	850	857	

In 1847 a private Act of Parliament was obtained at the instance of the then patrons of the rectory (10 Vict. c. 3) intituled "An Act to divide the Parish and Rectory of Doddington, otherwise Dornington, into three separate and distinct Parishes and Rectories, and to endow the same out of the revenues of that Rectory, and to make provision for the further division of such Rectories and Parishes, and for other purposes connected therewith." A copy of the said Act accompanied and formed part of the case.

4. By sect. 1 it is provided that immediately after the incumbency of the Rev. Algernon Peyton shall cease, the said parish and rectory of Doddington, otherwise Dornington, shall be divided into and form three separate and distinct parishes and rectories as hereinafter next mentioned—that is to say, the township of Doddington and the hamlet of Wimblington—shall form and be one separate and distinct parish and rectory for all ecclesiastical purposes, and shall be called by the name of the parish and rectory of Doddington. The township, chapelry, or hamlet of March shall be and form a separate and distinct parish and rectory for all ecclesiastical purposes, and shall be called by the name of the parish and rectory of March; and the hamlet of Benwick shall be and form a separate and distinct parish and rectory for all ecclesiastical purposes, and shall be called by the name of the parish and rectory of Benwick.

5. The 4th section in substance provides that when such division of the said Rectory of Doddington, otherwise Dornington, shall have taken effect, each of the said three parishes shall for ever thereafter for all ecclesiastical purposes be a separate and distinct parish of itself, and shall be a distinct rectory, and that the rector for the time being of each such rectory shall perform all the parochial functions of a minister in the same manner and with the same powers, privileges, rights, and immunities as the present Rector of Doddington, otherwise Dornington, is now by law empowered to do, and may be entitled to exercise respectively within the said Rectory of Doddington, otherwise Dornington, and shall also appoint parish clerks, sextons, and other officers, and shall have all such other powers in each such parish and rectory as the Rector of Doddington, otherwise Dornington, is now entitled to exercise in the rectory of or parish of Doddington, otherwise Dornington, aforesaid.

6. By section 5 it is provided that two fit and proper persons shall be chosen churchwardens for each such parish when such division shall have taken effect, at the same time and in the same manner as churchwardens are now chosen and appointed for the said parish of Doddington, otherwise Dornington, the rector of each of the said new rectories exercising the same rights and powers in the appointment of such churchwardens or one of them as the rector of the said rectory of Doddington, otherwise Dornington, now exercises.

7. By section 6 it is provided that this Act shall not be construed to affect any churchwarden, or his rights or duties, who may be in office at the time such formation of the said separate parishes may take place; and the present churchwardens of Doddington, otherwise Dornington, shall continue in office and perform all the necessary acts and duties as churchwardens relating to the three separate and distinct parishes and churches as aforesaid, after such division shall have taken effect until the next usual period of appointing churchwardens.

8. By sect. 8, it is provided that the clerk and sexton of each of the said separate rectories and parishes respectively, shall be entitled to receive the like fees within each such parish and rectory as the clerk and sexton respectively of the church at Doddington, otherwise Dornington, are now entitled to receive. And by sect. 13, that when the division of the said parish of Doddington, otherwise Dornington, into separate and distinct parishes shall have taken effect, the said church and churchyard or burial ground at Doddington, otherwise Dornington, shall be the parish church and burial ground for all the inhabitants of the said new parish of Doddington, otherwise Dornington; and the said chapel at March and burial ground shall, on the formation of the separate and distinct parish and rectory of March taking effect, be the parish church and burial ground for all the inhabitants of the said parish of March; and the then existing chapel or new church of Benwick, and any ground which is now or may hereafter be appropriated as a burial ground thereto shall, on the formation of the separate and distinct parish and rectory of Benwick taking effect, be the parish church and burial ground for the inhabitants of the said parish of Benwick, and each of the said churches of Doddington, otherwise Dornington, March, and Benwick, when they shall become separate and distinct rectories and parishes as aforesaid, and every additional church which may be hereafter erected in such parishes respectively under this Act, shall be maintained at the sole costs and charges of the inhabitants of the respective parishes in which such churches respectively may be situate; and all sums of money requisite for that purpose shall be provided by rates to be made, raised, and levied within such respective parishes, and shall be applied in the repair and maintenance of such churches respectively; and such inhabitants shall meet in vestry in all respects as inhabitants of the parish are entitled to do, and each such vestry shall have the powers of a parish vestry.

9. By sect. 15 it is provided that it shall be lawful for any of the inhabitants within the said two separate parishes of March and Benwick as aforesaid, after the formation thereof under this Act or either of them shall have taken effect, to be buried in the churchyard at Doddington, otherwise Dornington, aforesaid, without any other fees being payable in respect of such burials than would have been payable in respect of burials of inhabitants of Doddington if the Act had not been passed; but such privileges shall cease as to the inhabitants of each such parish at the expiration of twenty years next after such division aforesaid shall have taken effect under the Act.

10. By sect. 19 provision is made for the future sub-division of the said three new parishes, or

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either of them, into fresh, separate, and distinct parishes and rectories.

11. By sect. 22 it is enacted that on the formation of each new separate and distinct parish and rectory for each such additional church, two fit and proper persons should be chosen churchwardens for each such parish at the same time, and in the same manner as churchwardens might then be chosen and appointed for the parish out of which such new parish might have been taken; the rector of such new parish exercising the same rights and powers in the appointment of such churchwardens, or one of them, as the rector of the parish out of which such new parish should have been taken might be then entitled to exercise.

12. Sect. 28 recites that the parish clerk of the church of Doddington, otherwise Dornington, is entitled to receive certain fees as such parish clerk, for and in respect of the occasional marriages of the inhabitants of Doddington, otherwise Dornington, in the present parish church thereof, which marriages of some of such inhabitants will be discontinued from and after the division of the said rectory, under the powers of the Act; and the said parish clerk of Doddington, otherwise Dornington, will thereby sustain a certain loss of fees, and enacts that in lieu of such fees, and as a compensation for the loss of the same, the present parish clerk of Doddington, otherwise Dornington, in case he shall continue such parish clerk when the division of such parish into distinct and separate parishes under this Act shall have taken effect, shall, so long as he shall continue such parish clerk, be entitled to and be paid a moiety of any fees which may be due to and received by the parish clerks of the churches of March and Benwick aforesaid, or of the additional church or churches which may be erected as aforesaid for the solemnization of any marriages in the said last-mentioned churches.

13. By sect. 42 it is provided that nothing in the Act contained shall affect or alter the application of any charitable devises, bequests, or gifts now applicable to the maintenance, repair, or restoration of the said church at Doddington, otherwise Dornington, and the said chapel of March, or either of them, but the same devises, bequests, and gifts respectively shall remain applicable to the respective purposes to which they are now lawfully applicable, notwithstanding the division of the said Rectory of Doddington, otherwise Dornington, and the conversion of the said chapel of March into a parish church intended to be effected by the Act.

14. By sect. 44 it is provided that nothing in this Act contained shall make any alteration in the division of the said parish of Doddington, otherwise Dornington, into townships or divisions, for the maintenance of the poor, or in any civil purpose whatsoever relating to the present parish of Doddington, otherwise Dornington.

15. By sect. 45 it is provided that the provisions of the several Acts recited in the preamble to an Act passed in the eighth and ninth years of the reign of her present Majesty, entitled, "An Act for the further Amendment of the Church Building Acts," being the Church Building Acts, and of that Act may be used for the purpose of carrying this Act into execution so far as the same are applicable to, and not inconsistent with, or repugnant to, the provisions of this Act.

16. At the date of the said Act there were (as

stated in the said Act) in the said parish of Doddington, otherwise Dornington, the consecrated parish church (which was situate within the township of Doddington) and the consecrated chapel at March (which was situate within the township of March) possessing a spire with a peal of bells and a chapel then out of repair at Benwick. Each of the two former had a graveyard, and at each of the two former all the offices of the church were performed. Persons resident within the township of March were married or buried in the chapel or in the graveyard at March, and persons resident within the rest of the parish and rectory of Doddington were married or buried in the church or in the churchyard at Doddington, though it occasionally happened that inhabitants of March were married or buried in Doddington, and inhabitants of Wimblington buried at March, divine service, and christenings, and churchings only were performed at the chapel at Benwick.

17. The rector resided at Doddington, four miles from March, and served the chapel at March by a curate, who was nominated by the rector of Doddington, and licensed by the Bishop of Ely to that duty.

18. In the vestry books and other documents the hamlet or township of March is occasionally called the parish of March, and the inhabitants described as parishioners of the hamlet of March. In the same documents the chapel of March is occasionally called the church of March.

19. In the 18th year of King Henry VIII. a license or indulgence, dated the 3rd Nov. 1526, was granted by Cardinal Wolsey relating to the chapel of St. Wendred, in the village hamlet of March, in the parish of Doddington and diocese of Ely [a translated copy of which was set out in the appendix to the case.]

20. In reference to sect. 28 of the Act of 1847 the parish clerk of March was appointed by the Rector of Doddington, otherwise Dornington, for the time being. (The sexton of March was appointed separately at a vestry of the parishioners of the hamlet of March without any interference on the part of the rector in the choice or appointment of such sexton.) The clerk and sexton of March respectively alone received fees for marriages and burials and other services performed within the township and in the chapel of March. Neither the parish clerk nor sexton of March ever paid a moiety or any other proportion which they might receive for the solemnisation of any marriages, burials, churchings, or otherwise to the parish clerk or sexton of the township of Doddington. The parish clerk of Doddington did not sustain any loss in regard to fees by reason of the separation of the township of March from the rest of the rectory of Doddington, otherwise Dornington, under the Act referred to, inasmuch as he never was entitled to any fees or share of fees in respect of marriages solemnised within the said township of March. Banns of marriage were published in the church of March with respect to the marriages of persons residing within the township or hamlet, and not in Doddington.

21. In reference to sect. 6 of the Act the churchwardens of Doddington performed no duties in or affecting March.

22. The chapel at Benwick was served either by the rector or his curate at Doddington, and in latter years a separate curate was appointed for Benwick.

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23. The rectory and parish of Doddington, otherwise Dornington, was not a parish properly speaking, in civil matters. Each of the townships or hamlets of Doddington, March, Wimblington, and Benwick stood alone, each making its own poor rate and highway rate, and having its own overseers of the poor and surveyors of highways. The ratepayers of March held their own vestry at March, and the ratepayers of the other townships or hamlets their own vestry at Doddington as occasion required. The rector of Doddington officiated whenever he thought proper at the Chapel of March. March had separate churchwardens and a church rate confined to March. The church rates were ordinarily headed as for the hamlet of March and as made by the inhabitants of the hamlet of March for the necessary repairs of the church or chapel in the said hamlet. The inhabitants of Doddington never interfered in these vestries but in like manner they held their own vestries at the church at Doddington without any intervention on the part of the inhabitants of the township of March.

24. Separate churchwardens were appointed at the latter vestries by the name of the churchwardens for the parish of Doddington. The churchwardens so appointed exercised no functions within the hamlet of March. There is only one instance on record of a church rate being made by the vestry held at Doddington Church, viz., in 1736, when it was made for Doddington and Wimblington only. There were lands called "Town lands," vested in the churchwardens of Doddington, the revenues of which were applied to the repairs of Doddington Church. The chapel of Benwick was formerly supported by voluntary contributions, and latterly it had not been supported at all, and fell down.

25. The common law mode of electing churchwardens has always prevailed, in the election of churchwardens for the parish of Doddington, viz., a joint appointment where there was no difference, and in case of difference, the appointment of one churchwarden by the rector and the election of the other by the parishioners.

26. At the vestries holden at March the custom was for the inhabitants of March to choose two churchwardens for that hamlet. This custom was the subject of litigation in 1782, and a trial was had at the assizes for the county of Cambridge in that year which resulted in a verdict establishing the custom. The churchwardens of March were always sworn in at the same time and place as the churchwardens of Doddington, and acted *ex officio* as overseers of the poor for March.

27. In 1856 an Act was passed to amend the said Act of 1847, and it is agreed that either party may refer to a Queen's Printer's copy thereof should it become material to do so.

28. On the death of the Rev. Algernon Peyton in 1868, the defendant was presented to the rectory of March.

29. A vestry for the parish of March was duly held on the 19th April 1870, the defendant being in the chair. It is unnecessary to detail the circumstances which led to the present proceedings, as it is agreed by the parties that,

30. The question for the opinion of the court is whether the parishioners of the said parish of March have a right to elect both churchwardens. If the opinion of the court shall be in the affirmative, judgment shall be entered by the Crown,

with costs, and a peremptory writ of *mandamus* may issue. If the opinion of the court shall be in the negative, judgment shall be entered for the defendant, with costs, the court to have power to draw inferences of the fact.

Nov. 12, 1873.—*Bulwer*, Q.C. (with him *F. M. White*) for the prosecutor.

Prideaux, Q.C. (with him *McIntyre*, Q.C.) for the defendant.

The following authorities were referred to :

Reg. v. Marsh, 5 A. & EL 468 ;
Reg. v. North Riding of Yorkshire, 6 A. & EL 863 ;
Anon., 2 Rolfe's Rep. 265 ;
Lute v. Harris, 1 Lee's Reps. 146 ;
Craven v. Sanderson, 7 A. & EL 880 ;
Stead v. Heaton, 4 T. R. 669.

Our. adv. vult.

Feb. 16, 1874.—The court differing in opinion, the following judgments were now delivered :

QUAIN, J.—This is a special case in a proceeding by *mandamus*, stated for the purpose of obtaining the opinion of the court on the question whether the inhabitants of the rectory or parish of March, in the county of Cambridge, have the right to elect both the churchwardens for that parish. It appears from the case that the parish of March is a new rectory or parish created under an Act of Parliament which was passed in the year 1847 for the purpose of dividing the parish of Doddington into three separate and distinct parishes, and endowing the same out of the revenues of the old parish. By the 5th section of that Act it is enacted that "two fit and proper persons shall be chosen churchwardens for each such parish when such division shall have taken effect, at the same time and in the same manner as churchwardens are now chosen and appointed for the said parish of Doddington, the rector of each of the said new rectories exercising the same rights and powers in the appointment of such churchwardens or one of them as the rector of the said rectory of Doddington now exercises." It appears, therefore, in the first place, that it was not the intention of the Act to alter in the new parishes the mode of choosing churchwardens from the manner in which they were chosen in the old parish; they were to be elected as they were elected before. Nor was it the intention to confer on the rectors of the new parishes any powers in the appointment of churchwardens in those parishes which the rector of the old parish did not possess. If the choice or election of churchwardens in the old parish was regulated by any custom or usage, that custom or usage is preserved, and is to be applied to the new parishes respectively in the same manner that it was applied to the old parish. It therefore becomes necessary to inquire in what manner churchwardens were chosen and appointed for the old parish of Doddington. It is stated in the case that the parish of Doddington before the Act of 1847 comprised the township of Doddington, the township or hamlet of March, and the hamlets of Wimblington and Benwick. The township of March was the largest division, and comprised more than half the parish. The parish church was situate in the township of Doddington; but there was a chapel in March, where all the usual services of the church were performed by a curate appointed by the rector of Doddington. The rector also appointed the parish clerk of March; but in all other respects the township of March enjoyed all the rights and privileges of a separate parish. The

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hamlet or township of March held its own vestry and had separate churchwardens who acted *ex officio* as overseers of the poor for March, and a church-rate confined to March. The custom was for the inhabitants to choose two churchwardens for that hamlet. Paragraph 26 of the case states that this custom was the subject of litigation in the year 1782, which resulted in a verdict establishing the custom. The inhabitants of the township of Doddington (or it may be of Doddington, Wimblington, and Benwick combined), held their own vestries at Doddington church without any intervention on the part of the inhabitants of March. At those vestries separate churchwardens were appointed by the rector and inhabitants jointly when there was no difference, and in case of difference the rector appointed one and the inhabitants the other. These churchwardens were called "churchwardens for the parish of Doddington," but they exercised no functions whatever within the hamlet of March. It seems to me not clear from the case (paragraph 23), whether separate churchwardens were elected for the hamlets of Wimblington and Benwick, but this point does not affect the argument. It is well established that the mode of electing churchwardens is regulated by custom, and in the absence of special custom, they are elected by the rector and inhabitants jointly, or in case of difference, the rector appoints one and the inhabitants the other. The custom varies very much in different places. According to the prevailing custom both churchwardens may be elected by the inhabitants at large, or by a select vestry, or separate churchwardens may be elected by different parts of a parish, or there may be a custom for the outgoing churchwardens to nominate their successors. In the parish of Berkeley, mentioned in *Rees v. Marsh* (5 A. & El. 468), there were four districts called tithings, which each nominated a separate churchwarden, who, after his appointment, uniformly acted for and within his own district only. The parish church was in the tithing of Berkeley, and there was a chapel of ease in the tithing of Ham. Each of the tithings had separate poor rates and separate overseers. The question arose in that case whether a churchwarden elected by one of the tithings was a churchwarden of the parish of Berkeley, and it was held he was. In delivering the judgment of the court, Lord Denman says: "Generally speaking the churchwarden is peculiarly and emphatically a parish officer. The nomination may be (not unusually) by a portion of, or even by a person in, the parish; but the office is not thereby affected. He is still of and for the parish. We think that this may be considered as a somewhat unusual case of separate appointment and separate acting without affecting the proper and legal character of churchwardens." In the more recent case of *Bremner v. Hull* (L. Rep. 1 C. P. 748), there is another instance of the different townships of a parish electing separate churchwardens; and in one of the townships the mode of electing was different from the rest; but all the churchwardens when so elected were churchwardens for the parish. It seems to me, therefore, that we are bound to hold, following the case of *Rees v. Marsh* (*ubi sup.*), that the churchwardens elected by the rector and the inhabitants of the township of Doddington, and the churchwardens elected by the inhabitants of the township of March, together constitute the

four churchwardens for the parish of Doddington, or at least represent that whole parish as churchwardens. The difficulty then arises, how are those different modes of election to be applied to the new parishes in accordance with sect. 5? I think that, considering it was not the intention of the Act to alter the mode of electing churchwardens in the new parishes from that which prevailed in the old, and that the new parish of March is continuous with the old hamlet or township of March, and that there are no words in the Act which either expressly or by necessary implication abolish the old custom of electing churchwardens which prevailed in March before the passing of the Act, the only way of carrying out the intention of the Act is by construing the 5th section as enacting that the churchwardens of the new parishes shall be elected in the same manner as they were elected in the corresponding divisions or districts of the old parish before the separation. The latter part of sect. 5 seems to point to the same conclusion by enacting that the rector of each of the said new parishes shall exercise the same rights and powers in the appointment of such churchwardens as the Rector of Doddington now exercises. Now the Rector of Doddington did not exercise any rights or powers in appointing or electing the churchwardens elected in the old hamlet of March, and I think that the Act does not, and did not intend to, confer on the new Rector of March any greater powers than the old rector had or exercised in the old hamlet. Sect. 22, relating to the appointment of churchwardens in any new or additional parish to be framed under the Act, seems to me also to show that the intention of the Act is that the new churchwardens were to be elected in the same manner as they had been theretofore elected for the district "out of which such new parish may have been taken." Lastly, a strong argument in favour of this construction of the Act was based on the language of sect. 6. What is the meaning of the expression, "the present churchwardens of Doddington," as used in that section? The object of the section is that the churchwardens in office at the time when the division took effect should remain in office to the end of their year, notwithstanding the division. Now if the expression "the present churchwardens of Doddington" applies only to the two churchwardens appointed by the rector and township of Doddington, then the churchwardens for March might be superseded in the middle of their year of office, for the section expressly enacts that the present churchwardens of Doddington shall continue in office and perform all the necessary acts and duties as churchwardens relating to the three separate and distinct parishes (therefore including March) after the division shall have taken effect to the end of their year. This appears to me directly at variance with the intention of the section, which manifestly is that all things as regards the churchwardens and the church rate should remain *in statu quo*, notwithstanding the division of the old parish, until the end of the year. But if the expression "the present churchwardens of Doddington" includes, as I think it does, all the churchwardens, those appointed by the township of March as well as those appointed by the rector and the township of Doddington, that construction of the section gives full effect to what appears to me to be the object and intention of the Act of Parliament. It is a well known rule of construction that affirmative words in statutes

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do not take away a former custom (Co. Litt. 115a; Com. Dig. Parliament B. 24.) In the *Mayor of Leicester v. Burgess* (5 B. & Ad. 246) it was held that the Licensing Act for permitting and regulating the general sale of beer, although it in words enabled all persons in England to sell beer subject to the conditions imposed by that Act, did not supersede the custom of a borough that no person should carry on the trade of an alehouse keeper therein, who was not a burgess. In the present case there was an ancient custom for the inhabitants of the township or hamlet of March to elect both churchwardens. The statute of 1847 was passed solely for the purpose of converting the former hamlet into a separate parish. I think that such an ancient custom cannot be abolished by any (if I may use the expression) side wind or by an ambiguous or incidental expression; and I think, therefore, that in the absence of any express words in the statute (and I find none), abolishing the ancient custom of electing churchwardens, the old custom must be considered to exist in the new parish as it did in the old hamlet. For these reasons I think that the parishioners of the parish of March have the sole right to elect both churchwardens.

The judgment of Blackburn and Archibald, JJ., was delivered by BLACKBURN, J.—The question in this case depends entirely on the construction to be put on the 5th section of the statute, 10 Vict. c. 3. I think that we are bound to give effect to the intention of the Legislature, which we are to collect from the words used, as they should be understood with reference to the facts respecting which that language is used. It appears that the rectory and parish of Doddington was a very extensive one, comprising four townships, Doddington, March, Wimblington, and Benwick. The parish church was situated in Doddington township. March is called in the Act the township, chapelry, or hamlet of March, and in it was a consecrated chapel with a separate graveyard, in which service was performed either by the rector in person or by a curate, whom he appointed. The facts are stated in the 23rd, 24th, 25th, and 26th paragraphs of the case. Those which I think material are, that a vestry was holden at the parish church, at which the inhabitants of March never intervened, but at which, as I understand the statement in the case, the inhabitants of all the rest of the parish did attend. At this vestry two churchwardens were appointed in the common method, who were sworn in and bore the name of the churchwardens for the parish of Doddington. The inhabitants of March held their own vestry at March, and there two officers were chosen for the hamlet of March. It is not distinctly stated by what name they were called. They were chosen by the inhabitants of March, the rector having no voice in their appointment. This, though not the ordinary mode of appointing ecclesiastical officers, is perfectly good by custom. The churchwardens of the parish of Doddington never performed any duties within March. The two officers chosen by the inhabitants of March did not perform any duties in any part of the parish not included in March. Separate church rates were made which it is stated were ordinarily headed "for the hamlet of March," and I infer, though it is not distinctly stated, that the officers were called churchwardens for the hamlet of March. Certainly

they were not called churchwardens for the parish of Doddington. Such being the state of things the Legislature enacted that in future there should, for ecclesiastical purposes be three distinct parishes, each being a distinct rectory—one coextensive with the township of Doddington and township of Wimblington, to be called the parish and rectory of Doddington; another coextensive with the township, chapelry, or hamlet of March to be called the parish and rectory of March; and a third coextensive with the hamlet of Benwick, to be called the parish and rectory of Benwick. The Legislature then, in sect. 5, proceeded to provide for the election of churchwardens in each of these three new parishes. It seems to me that there are several schemes, either of which might reasonably have been adopted. The Legislature might have provided that in each of the three new parishes the churchwardens should be chosen according to the mode which prevails of common right where there is no custom. Or they might have said that the churchwardens in the new parish of March were to be chosen according to the custom which prevailed in the election of the churchwardens for that hamlet, and the churchwardens for the other two new parishes, according to the custom, if any, which prevailed in the election of the churchwardens for the old parish of Doddington. But instead of adopting either of those schemes, and expressing it clearly, the Legislature have used the language which has been already read by my brother Quain. It is worth noticing that the existence of the churchwardens for the hamlet of March is not mentioned in the Act. Perhaps, when passing the Bill the custom in the election of the churchwardens for the hamlet was overlooked, and it was not distinctly known what the custom as to the election of the churchwardens for the parish was. But whatever may have been their motive in using such language we must construe it. And I regret to say that this language is so far from clear that there is a difference in our opinions as to its meaning. I think it means that the churchwardens for all the three new parishes were to be elected in one way, that being the way in which the churchwardens for the old parish were elected. I cannot agree with my brother Quain in thinking that the churchwardens for the hamlet of March were in any sense of the words churchwardens for the parish of Doddington. In the case of *Rex v. Marsh* (5 A. & El. 468), it appeared that the parish of Berkley was divided into four tithings. Berkley town, Alkington, and two others, each of which maintained its own poor. The parish of Stanley St. Leonards adjoined the parish of Berkley, and there was a dispute whether the appellant's lands were situated in the township of Alkington, and so in the parish of Berkeley, or in the parish of Stanley St. Leonards. The Inclosure Commissioners, acting under the 41 Geo. 3, c. 109, had determined that the lands were in the parish of Stanley St. Leonards, but in order to make their determination valid it was, by the 3rd section, necessary that a notice should be left at the abode "of one of the churchwardens or overseers of the poor of the respective parishes." There was no overseer of the poor for the parish of Berkley. The peculiar custom of the parish of Berkley was that the inhabitants of each tithing separately elected an officer. All four officers were sworn in as churchwardens of

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the parish, but by custom each performed all ordinary acts within his own tithing, without any intervention by the other churchwardens. And the question for the court was whether the churchwarden elected by the inhabitants of Berkeley town, and so sworn in and admitted as churchwarden for the parish of Berkeley, was a proper person on whom to serve the notice relating to the boundary of a portion of the parish of Berkeley not in the tithing of Berkeley town. The court decided that he was. That would be an authority for saying that, within the meaning of 41 Geo. 3, c. 109, the churchwardens elected by the inhabitants of Doddington (exclusive of March), and sworn in as churchwardens for the parish of Doddington were churchwardens for the whole parish, but I cannot see that it is anyway established that the churchwardens elected by the inhabitants of a hamlet, and sworn in and acting for that hamlet, are to be in any sense considered as churchwardens for the parish. But I think it is not necessary to determine whether the churchwardens for the parish of Doddington were really churchwardens for the whole parish or not, for they were so called; and having attained that name by prescription, they would properly use it even in strict pleadings: (see *Head v. Henton*, 4 T. R. 699). And I think that *prima facie* at least, the Legislature in using this name mean the officers designated by that name. And I am the more inclined to this construction, because it would have been easy to say that the churchwardens for March rectory should be elected according to the custom prevailing in the election of the churchwardens for March chapelry if that was the intention of the Legislature, whilst in order to put the meaning on sect. 5 that is contended for, it is necessary to interpolate words and read instead of "in the same manner as churchwardens are now appointed for the said parish of Doddington," "are now appointed to act for the portions of the said rectory of Doddington, of which the said new rectories respectively are composed," or some similar words, for which I think we have no warrant. I do not think that the 6th section raises any difficulty. The earlier part of the section is quite sufficient to make good all acts, if any, done by the churchwardens for the hamlet in the interval between the creation of the new parish of March and the election of the new churchwardens for that parish. And the omission of any mention of these churchwardens for the hamlet in the latter part of the section tends to strengthen my conjecture that the existence of these officers was for the moment overlooked. Nor can I see that the 22nd section affects the question in any way. I have, therefore, come to the conclusion that the question ought to be answered in the negative, and judgment entered for the defendant accordingly. In this judgment my brother Archibald agrees. The judgment will, therefore, be entered for the defendant.

Judgment for the defendant.

Attorneys for prosecutor, *Merediths, Roberts, and Mills.*

COURT OF COMMON PLEAS.

Reported by *ETHERINGTON SMITH* and *J. M. LELY*, Esqrs.,
Barristers-at-Law.

April 16 and 18, 1874.

HAMMOND v. THE VESTRY OF THE PARISH OF ST. PANCRAZ.

Metropolitan Management Act 1855 (18 & 19 Vict. c. 120), ss. 68, 69, 72, 82, 125—Duty of vestry as to cleaning of sewers—Damage caused by unknown sewer—Construction of statutes imposing duty upon public body.

A vestry constituted under the Metropolitan Management Act 1855 are bound only to use reasonable care to keep the sewers by that Act vested in them properly cleared, cleansed, and emptied, and are not bound so to keep such sewers in all events.

By sect. 69 of the Metropolitan Management Act 1855 the defendants were bound from time to time to repair and maintain a certain sewer, which by being blocked up caused damage to the plaintiff's health and premises. By sect. 72 the defendants "shall cause" the said sewer "to be constructed, covered, and kept so as not to be injurious to health, and to be properly cleared, cleansed, and emptied." By sect. 82 the defendants may inspect any drain within their parish, and by sect. 125 may appoint scavengers for the "cleansing out and emptying" of such drains.

The jury found that the sewer which caused the damage and the obstruction thereto were alike unknown to the defendants, and that the sewer might have become known to them by the exercise of reasonable care, but that the obstruction might not.

Held that the defendants were not liable except in the absence of reasonable care, and that the findings of the jury negatived the absence of reasonable care, and a rule to enter a verdict for the defendants made absolute.

Per Brett, J.—Where a statute imposes a duty on a public body in any but clear and unambiguous terms, such a duty is not absolute, but only a duty to use reasonable care.

DECLARATION that a certain sewer and barrel drain were vested in the defendants, and the plaintiff was possessed of premises near thereto, and the defendants did not keep the said sewer and barrel drain properly cleansed, whereby these became choked up and overflowed with foul water and other filth, which flowed into and over the premises of the plaintiff, whereby the said premises were much injured, together with certain plant, &c., then being in and near the said premises, and the plaintiff lost the use and enjoyment of the same, and whereby the plaintiff suffered much damage through loss of trade, and whereby the plaintiff was much injured in his health, and incurred expense for medicines, &c.

Pleas first, not guilty by Statute 25 & 26 Vict. c. 102, s. 106(a); and secondly, not possessed. Issue thereon.

The cause came on to be tried before Bovill, C.J., and a special jury at the Middlesex Sittings, after Trinity Term 1873, when the following facts appeared in evidence: The plaintiff was a licensed victualler, carrying on business at the Elephant

(a) By 25 & 26 Vict. c. 102, s. 106, one month's notice is to be given before commencing an action against a vestry. Notice of action was given and admitted, so that the defence became one of "not guilty" only.

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and Castle, No. 1, King's-road, St. Pancras. The defendants were the Vestry of the Parish of St. Pancras, having the sewers of the parish vested in them as such vestry by the 18 & 19 Vict. c. 120 (The Metropolitan Management Act 1855), s. 68(a).

The Elephant and Castle is situate on the west side of King's-road, St. Pancras, just opposite the Vestry Hall. Adjoining it are two cottages of which the plaintiff was lessee and which were occupied by his tenants. The Elephant and Castle was entirely drained by means of a brick drain running through the yard at the back of the premises, and communicating with and draining the two cottages also. This brick drain, after passing through the plaintiff's premises, joins an 18in. barrel drain running under a building on the adjoining premises which are a timber yard. The outlet of this barrel drain is in the King's-road main sewer, and the barrel drain conveyed the plaintiff's sewage into the main sewer of the defendants, so long as both the brick and the barrel were in proper working order. The cellar of the plaintiff having been discovered to be flooded with water and filth which he was unable to remove, the foreman of the flushers of the vestry was communicated with, and after considerable time spent in searching for the manifest impediment to the proper working of the drains, it was found that the brick drain was blocked up at its junction with the barrel drain by hard solid matter, upon the removal of which the brick drain began again to carry off the sewage of the plaintiff's house. The nuisance was conse-

quently abated, but not before the plaintiff's health and premises had suffered considerable damage. Interrogatories administered to the chief surveyor of the defendants had disclosed that the flusher of the vestry "found the cause of the flooding of the plaintiff's premises to be the stoppage of a brick drain of the plaintiff's, and not of a contiguous sewer at its junction with the said brick drain; that the barrel drain was found to be a common sewer, although it was not known to be such before that time; that both the brick drain and the barrel drain were buried out of sight, and until the stoppage, the defendants had no means of ascertaining their existence; and that the defendants had not at any previous time cleansed, flushed, or in any way interfered with either of the drains.

In answer to five several questions put to them by the learned judge, who had ruled that both the brick and the barrel drain were sewers within the meaning of the Act, the jury found: (1) that the brick drain, and not the barrel drain, was stopped up, and so occasioned the damage; (2) that the vestry did not know of the existence of the brick drain; (3) that the existence of the brick drain might have been known by the exercise of reasonable care and inquiry; (4) that the obstruction was not known before the mischief occurred; and (5) that it could not have been known by reasonable care that the obstruction existed.

A verdict then passed for the plaintiff with 50*l.* damages. A rule was afterwards obtained, pursuant to leave reserved at the trial, to set aside this verdict and enter a verdict for the defendants, or a nonsuit on the ground that on the evidence given at the trial, and on the finding of the jury, no liability attached to the defendants. The rule was also to arrest judgment on the ground that no cause of action was stated in the declaration, and that no negligence was therein alleged.

Powell, Q.C. for the plaintiff, now showed cause.—The sewer which caused the damage complained of is one of the sewers vested in the defendants by 18 & 19 Vict. c. 120, s. 68. By sect. 69 they are to repair all sewers vested in them, by sect. 72 they are to cause such sewers to be kept properly cleansed and emptied, and by sect. 125 they may appoint scavengers for the "cleansing and emptying out of sewers and drains." The effect of these sections is to impose an absolute liability upon the defendants. [DENMAN, J. (after reading all the questions put to the jury, and the answers thereto)—All that the jury find is that they might have known of the brick drain. BRETT, J.

—That is equivalent to a finding that they did know, if the statute imposes an absolute duty. Is it contended that the mere fact of the drains being out of order makes the vestry liable? It is so contended. The vestry are charged with a trust, and they have taken no trouble to execute it properly. It became a part of their duty to ascertain the state of the drainage. [BRETT, J.—When you say duty, do you not mean a duty to take reasonable care? DENMAN, J.—Under which sections does an absolute duty arise? Under sects. 69 and 72. [BRETT, J.—The vestry are not paid.] But they are not personally liable; they would be reimbursed out of the rates. They have neglected a statutory duty. In *Meek v. Whitechapel Board of Works* (1 F & F. 144), a case under this very statute, an action was brought for not keeping a sewer cleansed, and Wilde, B., said, that a defence of con-

(a) By 18 & 19 Vict. c. 120, s. 68, "All sewers vested in the Metropolitan Commissioners of Sewers which are situate" in the parish of St. Pancras, "with the walls, grates, works and things thereunto appertaining, and the materials thereof with all rights of way and passage used and enjoyed by such Commissioners over or to such sewers, works and things, and all other rights concerning or incident to such sewers, works or things, shall become vested in the vestry" of that parish. For the rights of way, &c., of the Metropolitan Commissioners of Sewers see 11 & 12 Vict. c. 112, ss. 17, 48, 49, and 50. It will be seen from the arguments and judgments that the material sections of the Metropolitan Management Act 1855 (in addition to s. 68) were ss. 69, 72, 82 & 125.

By sect. 69. "The vestry . . . shall from time to time repair and maintain the sewers under the Act vested in them; . . . and shall cause to be made, repaired, and maintained such sewers and works, or such diversions or alterations of sewers and works, as may be necessary for effectually draining their parish . . ."

By sect. 72. "Every vestry shall cause the sewers vested in them to be constructed, covered and kept so as not to be a nuisance or injurious to health, and to be properly cleared, cleansed, and emptied, and for the purpose of clearing, cleansing, and emptying the same, they may construct the place either above or under ground, such reservoirs, sluices, engines, and other works as may be necessary.

By sect. 82. "It shall be lawful for any such vestry or for their surveyor or inspector, or such other person as they may appoint, to inspect any drain within the parish of such vestry, and for that purpose, at all reasonable times in the day time, after twenty-four hours' notice in writing has been given to the occupier of the premises to which such drain is attached, or left upon the premises, or in case of emergency without notice, to enter, by themselves or their surveyor or inspector and workmen, upon any premises, and cause the ground to be opened in any place they think fit, doing as little damage as may be."

By sect. 125. "It shall be lawful for every vestry, and they are hereby required to employ and appoint a sufficient number of persons, or to contract with any company or persons, . . . for the cleansing out and emptying of sewers and drains, in or under houses or places within their parish . . ."

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tributory negligence would be of no avail, and looking to the provisions of the Act, could hardly be sustained. "The Board had powers," he said, "to enforce the removal of any refuse however caused; and the very breach of duty charged was not acting on those powers." [BRETT, J.—Have you no cases before the court itself?] *Wilson v. Mayor and Corporation of Halifax* (L. Rep. 3 Ex. 114; 17 L. T. Rep. N. S. 660) will be cited on the other side, but that case is distinguishable, arising as it did under sect. 68 of 11 & 12 Vict., c. 63, which gave a discretionary power to the defendants in that case, whereas here the words of sect. 72, are "shall cause." [DENMAN, J.—Whether a sewer be injurious to health is a matter of opinion. In *Wilson's* case, Kelly, C.B., said, "Should a case arise in which the question shall be whether sect. 68 of the Public Health Act 1848 imposes upon the local authority the liability to be sued for damages, we should pause before we could hold that, in addition to the well-established remedy by indictment every individual would have a right of action." BRETT, J., referred to *Whitehouse v. Birmingham Canal Co.* (27 L. J. 25, Ex.; 30 L. T. Rep. 105, 150.)] *Whitehouse's* case is distinguishable; the defendants there were doing the work imposed upon them; the defendants here did nothing. [DENMAN, J.—Is it not implied that with such secret things as drains, there must be notice of the existence before a liability can arise? BRETT, J.—The declaration is launched upon the basis of an absolute duty. The case of *Meek v. Whitechapel Board of Works* (*ubi sup.*), seems to support your view, but *Brown v. Sargent* (1 F. & F. 112), may perhaps point the other way.]

Sir H. James, Q.C. (*Beasley* with him), for the defendants, supported the rule.—The burden of proof is upon the plaintiff, who is bound by the findings of the jury, who have distinguished between the brick and the barrel drain. Of the brick drain the defendants never had any notice, as it did not appear upon the plan handed to them when they took the sewers over from the Metropolitan Commissioners of Sewers. [BRETT, J.—Did not the third finding of the jury mean this—that by looking at the plan, the vestry would have seen that the plaintiff's house was either without a drain, or was drained by a drain which ran into the barrel drain?] The defendants would have seen trespassers if they had searched the plaintiff's premises for drains. Where they know of a drain they may inspect it under s. 82, but that is very different from searching for one which they do not know of. If they had gone to the premises and made enquiry, the plaintiff might have refused either to answer, or to allow inspection. It is admitted that no human foresight could have discovered the obstruction, and as for the word "maintain" in s. 69, that can never mean that the vestry are to ensure the removal of all obstructions. [BRETT, J.—Supposing that the plaintiff had known of the obstruction, was he bound to give notice of it to the defendants?] It is conceived so, at least if he knew that the defendants could not know of it. [DENMAN, J.—It is a strong point for the defendants that the legislature could not have intended the smelling every day at a man's drains. BRETT, J.—If you read "shall keep" in s. 72, as "shall use care to keep" do you not alter the meaning of words?] In Com. Dig. (Action *sur case* B.) it is said that an action on the

case does not lie where a man has not sufficient notice of his duty. There is no *mens rea* here; an indictment would not have lain. Sect. 82 presupposes a knowledge of the existence of a drain. [BRETT, J.—That section is against you; could not the defendants have gone on the premises of the plaintiff under that section?] It is conceived not. They could only have gone there for the purpose of inspecting a known drain. They also cited

Readhead v. Midland Railway Company, L. Rep. 4 Q. B. 379; 38 L. J. 169, Q. B.; 20 L. T. Rep. N. S. 628;

Mersey Docks Trustees v. Gibbs, 35 L. J. 126, Ex.; L. Rep. 1 E. & I. App. 93; 14 L. T. Rep. N. S. 677; *Sutton v. Clarke*, 6 Taunt. 29.

and distinguishing

Brown v. Sargent (*ubi sup.*);

Meek v. Whitechapel Board of Works (*ubi sup.*);

and

Whitehouse v. Fellowes, 30 L. J. 305, C. P.; 4 L. T. Rep. N. S. 177; 12 C. B., N. S., 765.

on the ground that in all these latter cases the defendants had been guilty of negligence, contended that to impose upon the vestry the duty to keep the sewers clear in all events would be like imposing upon a blind man the duty to read and write.

Cur. adv. vult.

BRETT, J.—This was an action against a vestry brought by the plaintiff to recover damages for an injury sustained by him by reason of water flowing into his cellar from a certain drain, and the plaintiff sought to maintain his action upon the authority of s. 72 of the Metropolitan Management Act 1855 (18 & 19 Vict. c. 120), by which section the vestry "shall cause the sewers vested in them to be properly cleared, cleansed, and emptied." It was contended for the plaintiff that this section imposed an absolute duty to keep the sewers clear, cleansed, and emptied, and that by reason of the sewers not having been so kept, water overflowed into his cellar causing damage for which the defendants are to be held responsible. It was contended for the defendants that the section does not impose upon them an absolute duty to keep the sewers clear, cleansed, and emptied in all events, but only a duty to use reasonable care and skill to keep them clear, cleansed, and emptied, so that if defendants have done all which reasonable men should have done, they are not to be held liable. At the trial a verdict passed for the plaintiff, but leave was reserved to the defendants to move to set this verdict aside and enter a verdict for them, if upon the facts and findings of the jury the court should be of opinion that the verdict should be so entered. A motion was made accordingly, and also in arrest of judgment on the ground that the declaration disclosed no cause of action. Now, the findings of the jury were that the vestry did not know of the existence of the brick drain which caused the damage, that the existence of it might have been known by the exercise of reasonable care, that the vestry did not know of the obstruction which caused the damage, and could not have known of it by the exercise of reasonable care. I think that the fact of the existence of the brick drain not being known to the defendants cannot absolve them, because the jury have found that they might have known of the existence of that drain by the exercise of reasonable care. The case must stand as if they had actually known of the existence of the brick drain. I think also that

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upon the facts and findings it must be taken that the brick drain was a sewer, for the reason that it drained more than one house; and further, that the injury complained of was occasioned by this sewer not having been kept clear. Now if s. 72 throws an absolute duty on the defendants, i.e., the obligation of a guarantee that the sewers shall be kept clear, cleansed, and emptied, it follows that if injury occurs by reason of their not having been so kept, the defendants are liable in law for the consequences of that injury. The question therefore for the court to decide is simply this, what is the meaning of s. 72 of the Metropolitan Management Act, 1855? The answer to this question will decide both points, both the nonsuit and the arrest of judgment. For as the declaration charges no negligence, no liability attaches at all, unless it attaches under the Act. Now upon a careful review of the words of this section, I am of opinion that they are capable of either meaning, that is that they may be construed as imposing an absolute duty, or they may be construed as imposing a duty to manage with reasonable care and skill. In such a case what is the proper rule of interpretation? Now the defendants are a public body, and I think that the duty imposed upon with regard to this matter was not the absolute duty, but merely the duty to use all reasonable care to ascertain whether there was an obstruction or not. We must take it that there was in point of fact an obstruction. The finding of the jury assumes this, otherwise it would be inconsistent. But the jury have also found not only that this obstruction was not known to the defendants, but also that it could not have been known to them. Now I think that it is contrary to all ideas of natural justice that the Legislature should impose upon persons in the position of the defendants an absolute duty to avoid an injury which they by no skill on their part could have avoided. It may have been so intended by the Legislature; but if it was, the intention should have been expressed in the clearest possible terms. In construing all statutes regard must be had to their subject matter. Where the conduct of individuals is complained of no legal liability attaches unless those individuals have been wanting in proper conduct. I think, therefore, that the duty imposed upon these defendants was a duty to keep the sewers clear when by the exercise of reasonable care and skill they might have kept them clear, and that the defendants are not liable unless they can be proved not to have exercised such reasonable care and skill. The want of skill is negatived by the jury, and consequently this rule ought to be made absolute on both points. There is no doubt one authority of very great weight which is at any rate seemingly in conflict with our present decision—I mean the ruling of Lord Penzance in *Meek v. Whitechapel Board of Works* (*ubi sup.*). I have some doubt whether that ruling is not after all consistent with our decision. I have some doubt whether Lord Penzance did not mean to leave a question of negligence to the jury in that case. (a) If that be so, there is no inconsistency. But if that be not so, I can only say, with all respect for the

most clear-headed of judges in my memory, that I must decline to follow his ruling, by which this court is not bound.

DENMAN, J.—I am of the same opinion. So far as I can see, our decision is not inconsistent with the ruling of Lord Penzance in *Meek v. Whitechapel Board of Works* (*ubi sup.*). Looking at the very sketchy character of the report of that case, it might be found that the question of negligence was in effect left to and considered by the jury. However that may be, this case turns upon upon the construction of sect. 72 of the Metropolitan Management Act 1855. At first sight, indeed, the words of sect. 72 seem positive, and it might plausibly be contended that upon an injury happening through those words not being complied with, an action would lie *ipso facto*. But on looking more closely at the section itself, I find the words “and for the purpose of clearing, cleansing, and emptying the same” (the sewers) “they” (the vestry) “may construct and place either above or underground such reservoirs and other works as may be necessary.” I think that these words contemplate works causing much expense and delay, and that the use of these words shows that the section does not impose an absolute liability such as that contended for on the part of the plaintiff, but is rather one of the many enabling clauses clothing the vestry with the powers which it was intended to clothe it with for the public benefit. Now, I find in the evidence, although we did not go into the evidence, that one probable cause of the injury complained of was the existence of rats. It is quite possible that damage so caused might go on a long time in the drain itself without showing itself on the outside. The jury have found that the obstruction, however caused, could not have been known to the defendants. There is therefore an ample finding of no negligence. These being the circumstances, was there an absolute liability? I apprehend not. I am of opinion that section 72 is merely one of many enabling clauses, and that this rule must be made absolute.

Rule absolute.

Attorney for the plaintiff, J. L. Matthews.

Attorneys for the defendant, Cunliffe and Beaumont.

April 17 and 18, 1874.

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Election petition—Ballot Act 1872, rules 29, 36, 37, 38, 40, 41, 42—Application to inspect marked register, rejected ballot papers, and counterfoils—Sealing up of marked register with counterfoils—Order to produce marked register for inspection—What is insufficient case for inspection of rejected ballot papers and counterfoils—Meaning of “required for the purposes of a petition” in rule 40.

By rule 29 of the Ballot Act 1872, the presiding officer of each polling station is to “make up into separate packets (*inter alia*) the marked copies of the register of voters, and the counterfoils of the ballot papers.” By rule 41 “no person shall, except by order of any tribunal having cognizance of petitions, open the sealed packet of counterfoils after the same has been once sealed up.” By rule 42 all documents forwarded by a returning officer in pursuance of the Act to the Clerk of the Crown in Chancery, other than ballot papers and counter-

(a) The question left to the jury in *Meek's* case was this:—“Was the overflow caused by the neglect of the defendants in not causing the sewers to be kept cleansed, or by a storm so sudden that no reasonable care could provide against it?”

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foils, shall be open to public inspection, and by rule 38, "marked copies of registers" are named among the documents to be forwarded by the returning officer to the Clerk of the Crown in Chancery. The returning officer for the borough of Petersfield had included the marked register in one package with the documents forwarded by him under rule 38, and the Clerk of the Crown in Chancery declined to open the said package in order to allow the inspection of the marked register on behalf of an election petitioner;

Ordered, per Brett, Grove, and Denman, JJ., that the Clerk of the Crown be at liberty to open "the sealed packet alleged to contain the marked register," and to permit the petitioner and respondent or their agents to inspect and copy it, upon condition that inspection be not allowed of any other papers.

Per Brett, J.—The meaning of rule 29 is that the marked register and the counterfoils should be sealed up separately.

By rule 40 no person may inspect rejected ballot papers in the custody of the Clerk of the Crown in Chancery, except upon an order to be granted by a Superior Court "on being satisfied by evidence" that the inspection is "required for the purpose of a petition."

The affidavit of the attorney for the petitioner stated that an inspection of the rejected ballot papers and counterfoils was in his belief necessary for the due conduct of the petitioner's case, and would probably save expense by ascertaining accurately who had voted, but did not state the names of any person as to whom the information was desired. The number of the names on the register was 896.

Held per Grove and Denman, JJ., that inspection of rejected ballot papers and counterfoils ought not to be granted without a strong case, and that the petitioner had not made out such a case.

Per Denman, J.—"Required" in rule 40 means reasonably requisite, not merely asked for.

Per Brett, J.—Inspection under the Ballot Act ought to be granted on the same principles as it is granted in ordinary litigation, regard being had to the maintenance of secrecy, and the petitioner ought to be allowed to inspect the backs of the rejected ballot papers, and the counterfoils corresponding thereto, upon condition that those documents should not leave the hands of the clerk of the Crown in Chancery.

THIS was a rule obtained on Wednesday, the 15th April, being the first day of Easter Term, calling upon the respondent in the Petersfield election petition to show cause peremptorily, on the Friday then next, why a writ of *mandamus* should not issue to the Clerk of the Crown in Chancery, directing him to exhibit to the petitioner or his attorney the marked register of voters at the Petersfield borough election, the counterfoils of the ballot papers, and the rejected ballot papers, subject to such conditions as the court might think expedient. It will be seen from the argument, and from the form of the order eventually made, that the question became one not of *mandamus*, but of an order for inspection of documents under the Ballot Act 1872, rules 40, 41, 42.

The petition stated that the Petersfield election was held on 30th Jan. 1874, when the Hon. S. H. Jolliffe and W. Nicholson, Esq., were candidates, and that the poll having been taken on the 3rd Feb. Mr. Jolliffe was returned; that the

said return was void on the grounds of bribery, treating, undue influence, and corrupt practices by Mr. Jolliffe or his agents; and further, that many persons had voted and were reckoned upon the poll for Mr. Jolliffe, whose votes were void and ought to be struck off the poll, on the grounds of corrupt practices, legal incapacities to vote, personation, and having been improperly placed upon the register; and finally, that Mr. Jolliffe "obtained an apparent and a colourable majority over the said W. Nicholson, whereas in truth and in fact the said W. Nicholson had a majority of legal votes of the electors of the said borough, who voted at the said election, and who were at the time thereof duly qualified by law to vote, and was duly elected as a member to serve in Parliament for the said borough of Petersfield, and ought to have been returned as such member."

The prayer of the petition was, "that it may be determined that the said S. H. Jolliffe was not duly elected or returned, and that his election and return were wholly null and void, and that the said W. Nicholson had a majority of legal votes over the said S. H. Jolliffe, and was duly elected at such election, and ought to have been returned."

From the affidavit of the attorney for the petitioner it appeared that on the 17th March 1874 a summons was served on the respondent, calling upon him "to show cause why the petitioner, his attorney, or agent, should not be at liberty to inspect the ballot papers and counterfoils in the custody of the Clerk of the Crown in Chancery, relating to the last election for Petersfield, pursuant to rules 40 & 41 of the Ballot Act 1872; (a) that the

(a) In addition to rules 40 and 41, rules 29, 38, 37, 38, and 42, will be found referred to in the arguments and judgments. The material parts of these rules now follow in their order:—

Rule 29. The presiding officer of each station . . . shall . . . make up into separate packets sealed with his own seal and the seals of such agents of the candidates as desire to affix their seals:—

- (1) Each ballot box in use at his station unopened, but with the key attached; and
- (2) The unused and spoilt ballot papers placed together; and
- (3) The tendered ballot papers; and
- (4) The marked copies of the register of voters, and the counterfoils of the ballot papers; and
- (5) The tendered votes list, and the list of votes marked by the presiding officer, and a statement of the number of the voters whose votes are so marked by the presiding officer under the heads "physical incapacity," "Jews," and "unable to read," and the declarations of inability to read; and shall deliver such packet to the returning officer.

Rule 36. The returning officer shall indorse "rejected" on any ballot paper which he may reject as invalid, and shall add to the indorsement "rejection objected to" if an objection be in fact made by any agent to his decision. The returning officer shall report to the Clerk of the Crown in Chancery the number of ballot papers rejected and not counted by him under the several heads of:—

- (1) Want of official mark;
- (2) Voting for more candidates than entitled to;
- (3) Writing or mark by which voter could be identified;
- (4) Unmarked or void for uncertainty;

and shall on request allow any agents of the candidates, before such report is sent, to copy it.

Rule 37. Upon the completion of the counting, the returning officer shall seal up in separate packets the counted and rejected ballot papers. He shall not open the sealed packet of tendered ballot papers or marked copy of the register of voters and counterfoils, but shall proceed, in the presence of the agents of the candidates, to verify the ballot paper account given by each presiding

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said application was heard by Cockburn, C.J., and Grove, J., sitting together at chambers (a) on the 9th April, and was opposed by the respondent, both the petitioner and the respondent being represented by counsel; that in support of the said application an affidavit of the deponent was read, in which, after stating the material allegations of the petition, the said attorney of the petitioner deposed that, "in his judgment and belief it was requisite for the purposes of the said petition, and for enabling him duly to prepare the case of the petitioner" that the deponent "as his attorney or agent, should be allowed to inspect, and should inspect the rejected ballot papers, the counted ballot papers, and the counterfoils of ballot papers, in the custody of the Clerk of the Crown in Chancery." The affidavit then proceeded as follows:—

4. My reason for desiring an inspection of the ballot

officer, by comparing it with the number of ballot papers recorded by him as aforesaid, and the unused and spoilt ballot papers in his possession and the tendered votes list, and shall reseal each sealed packet after examination. The returning officer shall report to the Clerk of the Crown in Chancery the result of such verification, and shall, on request, allow any agents of the candidates, before such report is sent, to copy it.

Rule 38. Lastly, the returning officer shall forward to the Clerk of the Crown in Chancery . . . all the packets of ballot papers in his possession, together with the said reports, the ballot paper accounts, tendered votes lists, lists of votes marked by the presiding officer, statements relating thereto, declarations of inability to read, and packets of counterfoils, and marked copies of registers sent by each presiding officer, indorsing on each packet a description of its contents. . . .

Rule 40. No person shall be allowed to inspect any rejected ballot papers in the custody of the Clerk of the Crown in Chancery, except under the order of the House of Commons, or under the order of one Her Majesty's Superior Courts, to be granted by such court on being satisfied by evidence on oath that the inspection or production of such ballot papers is required for the purpose of instituting or maintaining a prosecution for an offence in relation to ballot papers, or for the purpose of a petition questioning an election or return; and any such order for the inspection or production of ballot papers may be made subject to such conditions as to persons, time, place, and mode of inspection or production as the house or court making the same may think expedient, and shall be obeyed by the Clerk of the Crown in Chancery. Any power given to a court by this rule may be exercised by any judge of such court at chambers.

Rule 41. No person shall, except by order of the House of Commons or any tribunal having cognisance of petitions complaining of undue returns or undue elections, open the sealed packet of counterfoils after the same has been once sealed up, or be allowed to inspect any counted ballot papers in the custody of the Clerk of the Crown in Chancery; such order may be made subject to such conditions as to persons, time, place, and mode of opening or inspection as the house or tribunal making the order may think expedient; provided that on making and carrying into effect any such order, care shall be taken that the mode in which any particular elector has voted shall not be discovered until he has been proved to have voted, and his vote has been declared by a competent court to be invalid.

Rule 42. All documents forwarded by a returning officer in pursuance of this Act to the Clerk of the Crown in Chancery, other than ballot papers and counterfoils, shall be open to public inspection at such time and under such regulations as may be prescribed by the Clerk of the Crown in Chancery, with the consent of the Speaker of the House of Commons; and the Clerk of the Crown shall supply copies of or extracts from the said documents to any persons demanding the same, on payment of such fees and subject to such regulations as may be sanctioned by the Treasury.

(a) The application was made to Cockburn, C. J., in the first instance, who had specially requested the assistance of Grove, J., as then being one of the election judges.

papers and counterfoils, as stated in the argument on the hearing of the said application, was that I might know with certainty the names of the persons who voted. The borough of Petersfield comprises upwards of six parishes and extends over a large district.

The number of names on the register is 896. Many voters from distant parts of the borough were personally unknown to the agents of the defeated candidate who attended at the taking of the poll, and the record kept by them is consequently untrustworthy and imperfect. In these circumstances I do not know accurately who were the persons who voted. Without precise information on this point, it is likely that I shall incur expense in getting up evidence and bringing witnesses to the trial with reference to the qualifications of persons on the register who did not in fact vote; and as the number of objections of which the petitioner has given notice and on which he intends to rely is large, and each separate objection will in almost all cases have to be supported by evidence relating to itself alone, the expense thus uselessly incurred may be very considerable. In some instances a number of witnesses will be required to support a particular objection. At the hearing of the said application I, through counsel, stated that the production of the counterfoils would be sufficient for my purpose, though they would not enable me to discover the names of the persons who actually voted, but merely the names of those who applied for ballot papers.

5. The Lord Chief Justice and Mr. Justice Grove held that no case had been made out for the production of the ballot papers or counterfoils, because the information sought would be afforded by the marked copy of the register.

[The deponent then referred to rules 38 and 42 of the Ballot Act, which will be found set out in the note.](a)

6. It was alleged by counsel for the petitioner and conceded on behalf of the respondent, that in fact access could not be had to the marked copy of the register, inasmuch as the Clerk of the Crown in Chancery maintained that he was not entitled to open the package which contained the marked register as well as the ballot papers and counterfoils, and therefore declined to produce it, but the judges held that though this might be a ground for applying to the court for a *mandamus*, it could not affect the present application, and they made no order on the summons.

7. On the day before swearing this my affidavit, I made personal application at the office of the Clerk of the Crown in Chancery for inspection of the marked register, but its production was refused on the ground that the Returning Officer for Petersfield had included in one package all the documents which, under rule 38 of schedule 1 to the Ballot Act he is bound to forward to the Clerk of the Crown, and that the Clerk of the Crown considered he had no right to open this package. I was further told that in this matter the Returning Officer for Petersfield had acted in accordance with what had been the invariable practice of returning officers since the Ballot Act, and has been considered at the office of the Clerk of the Crown to be the correct practice.

8. As I cannot in the circumstances obtain access to the marked register, it is in my judgment requisite for the reasons hereinbefore set forth that I should be allowed an inspection of the counterfoils; and I say that though the production of the marked register or of the counterfoils would be sufficient for my present purpose, it would not, as I am advised and believe, be sufficient for the purposes of the trial, at which it will be necessary to prove that a particular person actually voted before evidence can be given to invalidate his vote. . . .

W. G. Harrison (Couch with him) for the respondent, now showed cause.—This court has no power to issue a *mandamus* which can only issue from the Queen's Bench. [The court suggested that they could do by rule all that the Queen's Bench could do by *mandamus*, the Court of Common Pleas having exclusive cognisance of election petitions, and the objection was not further argued.] From the numbering of the five paragraphs of rule 29, it follows that there

(a) See rules 29 and 37.

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must be five separate packets, each one containing just the precise documents specified in each paragraph, no more and no less. This is done by the presiding officer. The returning officer acts under rule 37, which confirms the view that there must be five packets only, and that the marked register and the counterfoils must be put up together. [GROVE, J.—Rule 42 says that the marked register shall be open to public inspection, but another rule(a) says it is to be sealed up with the counterfoils and not opened. Then rule 41 says that no person is to open the packet of counterfoils when it has once been sealed up, and in this case it has been already sealed up with the marked register.] That is so; the difficulty is that one part of the Act says that the marked register is to be open to public inspection, and another part, by directing it to be sealed up with the counterfoils, prevents any such inspection. But however that may be, this is not a *bonâ fide* application. What could be the object of seeing the ballot papers and counterfoils except to see how people voted? [GROVE, J.—Practically the petitioner would get all he wanted by an inspection of the marked register. BRETT, J.—Has the Clerk of the Crown in Chancery the power to open the sealed packet containing the marked register? It would seem that he has, upon the true construction of rule 41. [GROVE, J.—That would give him power to open the counterfoils, but taking out the marked register is a different thing.] Rule 29 then assumes the power. [BRETT, J.—Rule 29 does not apply to the Clerk of the Crown at all. GROVE, J.—Does paragraph 4 of rule 29 mean that the marked register and the counterfoils are to be sealed up in one and the same packet? BRETT, J.—I do not see why we should not order the packet which contains both to be opened, and the marked register taken out and shown without showing the counterfoils.] There is no substantial reason for the application. The petitioner has all the materials for supporting his petition in his own hands. The reasons given in paragraph 4 of his affidavit are quite insufficient. He has provided himself with a record of witnesses, and all he wants is to have means of checking it. [GROVE, J.—I thought at chambers and Cockburn, C. J. thought too, that the petitioner ought to have the marked register produced; but we doubted whether we had power to order the production of it. BRETT, J.—In every action, a court facilitates any desired inspection as far as it can. The Ballot Act was not intended to throw difficulties in the way of *bonâ fide* litigants. The only thing to be kept secret is how a man voted; that secrecy preserved, I think the court ought to proceed on the ordinary principle of facilitating *bonâ fide* litigation. DENMAN, J.—Do not the words “tribunal having cognisance” in rule 41 mean the judge trying the petition? BRETT, J.—I should say not, from the use of the expression “any tribunal;” that phraseology generally contemplates more than one.] The argument in favour of facilitating this, upon the same principle as ordinary litigation, would apply to all ballot papers, and in the case of a small borough it would become easy to discover how a man had voted. [BRETT, J.—I take it that the rejected ballot papers and the marked register together would show what people voted. The point of the petitioner is that he has witnesses to invalidate certain votes. Before those witnesses can be of any use, he must prove that these votes were actually given.

GROVE, J.—The whole tendency of the Ballot Act is secret voting: are we to assist a person because he is a petitioner to do that which may possibly infringe it, or are we to wait till he has made out a case for our assistance? The agent of the petitioner has already seen these rejected ballot papers, and had the opportunity of objecting to the rejection of them under rule 36. [BRETT, J.—That last is a good point.]

Griffiths for the petitioner (*Lumley Smith* with him).—This is a case of scrutiny, and the object of the petitioner is merely to see whether he is right in selecting certain votes to object to. All that would appear from a counterfoil would be two numbers, say, 60, 24. (He exhibited the facsimile of a counterfoil). [DENMAN, J.—All that means is that number 60 on the register came up 24th man and voted.] Yes; this is the best evidence of the vote having been given, and would never disclose how it had been given. We are obliged to give notice of objection of the voters objected to, and of the grounds of objection. Suppose we say that A., B., and C. were bribed, and it turns out that they did not vote, all the expenses of procuring evidence as to the bribery would be thrown away. [GROVE, J.—Must we not look at this in the way that one looks at all things not mathematical; take a common sense view of it, and say that an average of 2 per cent. of bad votes may be expected? BRETT, J.—Are you content to see the marked register, the back of the rejected ballot papers, and the counterfoils corresponding? We are content. [GROVE, J.—Then the powers under rules 40 and 41 will have to be exercised in favour of any *bonâ fide* petitioner whatsoever. If this had been the intention of the Legislature, would it not have been expressed in so many words? DENMAN, J.—The powers of the court are guarded by conditions.]

Harrison, in reply, was heard as to the counterfoils only.—If the counterfoils are opened at all, how can they be prevented being seen? [BRETT, J.—We could make an order that only the Clerk of the Crown should open them, and that not in the presence of the agents.] That would be giving enormous power to the Clerk of the Crown in Chancery. [BRETT, J.—He is liable to imprisonment if he discloses anything: see sect. 4 of the Ballot Act.(a)] That section does not apply to him. [BRETT, J.—Are we to act on the supposition that the Clerk of the Crown in Chancery will betray his duty? Certainly not; but even the possibility should be guarded against. [DENMAN, J. here referred to rule 43.(b) GROVE, J.—If this petitioner has the order in the terms he asks, I do not see how any petitioner is to be refused a similar order in future. BRETT, J.—All that the Ballot Act had in view was to preserve secrecy.] It is submitted that the Legislature intended to guard against any possibility of infringing secrecy.

BRETT, J.—In this case the application first made has been in result limited, and we are asked

(a) By sect. 4 of the Ballot Act every officer in attendance at a polling station, or at counting of votes, shall aid in maintaining secrecy, and “every person who acts in contravention” of the section is liable to six months’ imprisonment.

(b) By rule 43 the production by the Clerk of the Crown in Chancery of any document relating to a specified election is conclusive evidence that such document relates to the specified election.

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to make an order for the opening of a sealed packet said to contain counterfoils and the marked register of voters, and a sealed packet containing rejected ballot papers, the petitioner being content to see the backs only of the rejected ballot papers, and willing to accede to the condition that those ballot papers should not leave the hands of the Clerk of the Crown in Chancery at all. And he does not ask to see all the counterfoils, but only the counterfoils corresponding to the rejected ballot papers. In my opinion the petitioner is entitled to have that order, so limited, to its full effect. Independently of the Ballot Act, the inspection of documents ought to be granted in the case of an election, upon the same principle as that which is universally applied in ordinary cases of discovery. In ordinary cases, while what are called "fishing" applications are refused, the rule is that either party may obtain inspection of such documents as will be useful to him in the conduct of his cause, and that too before trial, in order that he may know beforehand how to conduct it. Before the Ballot Act all needful information was fully open, it was known who voted, how the votes were given, and what votes were rejected. But the Ballot Act has rendered all this information unattainable, its object being to ensure a strict secrecy in voting. In ensuring this object, the Act has incidentally thrown great difficulties in the way of parties litigating. It is, however, for the public interest that bribery should be detected, and not only petitioners but constituencies are highly interested that that candidate, who is legally elected, should be returned. Every facility in aid of this object should be given, consistent with the rules of law and the proper construction of the Ballot Act; and inspection should be allowed of all documents of which inspection is sought, so long as the secrecy of the ballot is not invaded. Now as to the marked register, it is admitted that that ought to be shown both to the public and to the parties. According to my view of rule 29, the numbers preceding each paragraph denote mere divisions of subjects, and do not mean that the documents named in each paragraph should be included in one packet. I think that according to that rule the marked register should have been sealed up in one packet and the counterfoils in another. It has turned out, however, that the marked register and the counterfoils have got sealed up in one and the same packet. But by rule 41 we may make an order to open "the sealed packet of counterfoils;" and I think that we ought to make such an order, so that the marked register may be taken out of that sealed packet. As to the rest of the proposed order, I am of opinion that, as we have power by rule 40 to make an order allowing inspection of rejected ballot papers, an order to that effect ought to be made, but subject to the following condition. If the order were to go so far as to allow the face of a rejected ballot paper to be shown, this would be allowing it to be shown how a man had voted: it would be contrary to the Act, and could not be made. The order therefore should be made subject to the condition that the back only of the rejected ballot papers should be shown; the Clerk of the Crown in Chancery not giving the papers out of his hands, and the packet not being opened in the presence of the candidates. But inasmuch as this, without the counterfoils corresponding to the rejected ballot papers, would not show

who had voted, I think that these counterfoils should be inspected also. This does not show how a man voted: it merely shows of a man whether he voted or not, so that the petitioner may consider whether it be worth while to test his vote. Unless by the exercise of the most perverse ingenuity, no opportunity would be given to see how a man had voted; so that the real object of the Ballot Act would not be thwarted. For these reasons, subject to the conditions which I have named, I think that the order ought to be made on the Clerk of the Crown in Chancery to allow inspection of the rejected ballot papers and counterfoils. As to the objection that the order might be made by the judge trying the petition, I think that this court is a "tribunal having cognisance of petitions" within the meaning of rule 41, and can make the order now. For the judge to make it afterwards at the trial would be too late. I think that justice requires that this information should be given.

GROVE, J.—I regret to say that I differ from my brother Brett in my judgment as to a portion of this case; I agree, but not without doubt, as to another portion. As to the marked register, it is made in terms open to public inspection by rule 42. [The learned judge read rule 42.] Now, whether by accident or design, the marked register has been included in the same paragraph of rule 29 with the counterfoils. There are five paragraphs consecutively numbered, and it will be noticed that the first four paragraphs end with the word "and." The marked register is mentioned in the fourth paragraph. Now if it had been mentioned in the fifth we should have had a clear separation of the documents open to public inspection from those not so open, and it will be noticed that the fifth paragraph contains a large number of documents, so that a separation of this kind may have been the object of the arrangement of the paragraphs. However that may be, it is plain from rule 42 that the marked register is open to public inspection. But now that it has found its way by mistake into the same sealed packet which contains the counterfoils, can the court order that packet to be opened? At chambers I thought not, *quâ* petition. But I am now on the whole of the opinion that this court may make such an order. After the direction in rule 42 as to "all documents," we have the direction in rule 43 as to "any document." Rule 43 contemplates the production of any document ordered in such manner as may be directed by such order or by a rule of court having power to make such order. Rule 40, relating to ballot papers, gives the power to a Superior Court and to a judge at chambers also. Rule 41 gives the power to a "tribunal having cognisance of petitions" only. The statute contemplates a power in the court which a judge in chambers has not. I am of opinion that an order for the inspection of the marked register may and ought to be made. With reference to the other two branches of the order asked for, I think that no case has been made out for an order to inspect either the rejected ballot papers or the counterfoils corresponding to them. The order is not asked for as to particular ballot papers, but as to all. The question I think comes to this, Is this court as a matter of course to make such an order on the mere production of an affidavit that the petitioner would like to have it? If it had been intended by the Legislature that the court should have this

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power, the Act might have made provision accordingly and made it in two lines. Instead of two lines we have three long rules, the last of which contains provisions for taking copies. Let us consider the scope of the Act on this matter, and the sequence of the rules. We have under the heading, "Counting the votes" provisions for the presence of the agents at the counting: we have rule 36 with its provisions for an objection by the agent to the rejection of a ballot paper, its four grounds, separately numbered, of rejection, and its final direction that the returning officer shall on request allow any agent to copy his report to the Clerk of the Crown in Chancery. Then comes rule 37, which directs that "upon the completion of the counting, the returning officer shall seal up in separate packets the counted and rejected ballot papers." Before rule 37 takes effect the agent of the candidates may inspect the ballot papers. After the rule takes effect, the ballot papers are to be sealed up in a packet which is to be opened only under special provisions. It may be that the Legislature did not intend the Clerk of the Crown in Chancery to see the rejected ballot papers at all. However, the whole scope of the rules is to be looked at, and I think that before rule 40 can be brought into operation, a substantial case must be made out. [The learned judge then read rule 40.] Now are all the formidable proceedings detailed in this rule to take place on the application of every petitioner? Surely not. To hold this would be to hold that this court is a mere mouthpiece, and the result would be that in every case of scrutiny the petitioner would be allowed to see all the ballot papers as a matter of course. It is true that we are only asked for an order allowing the petitioner to see the backs of the ballot papers, but it would be difficult to see the backs without seeing the faces too. However, it does not stop here. We next come to rule 42, which is very explicit. [The learned judge read rule 42.] This rule may apply either to an election judge or to a Superior Court, but it shows an elaborate care on the part of the Legislature in framing it. Then we have rule 42, as to documents open to public inspection. Now I think that a large portion of these elaborate rules would be wholly unnecessary if any petitioner could see the ballot papers as a matter of course. I do not say that the court has no power to order the inspection of them, but I think that a strong case should be made out before such an order ought to be made; and I think that the present petitioner has not made out any such strong case, nor indeed anything like a case. I would concur, perhaps, in granting another application, but I see no ground why I should grant the present one. The petitioner might have claimed, for instance, to inspect a particular number of ballot papers, or he might have said of certain particular persons that he did not know whether they voted or not. I am not now deciding whether this would be sufficient; what I say is, that I think it would be different from the present case, in which there is no allegation that any voter did or did not vote, nor even as to the belief of the petitioner on the point. I am of opinion that it was the intention of the Act absolutely to prohibit any step towards the invasion of secrecy, except under safeguards, to be imposed by a Superior Court, and that there is nothing to satisfy us that the step asked for may be taken in the present instance. I may add that the hardship

of the petitioner in not being able to see the counterfoils and the rejected ballot papers is very small. The petitioner knows that some voters are objected to, say one hundred in number. By looking at the marked register he can see who tried to vote. These would be only a small fraction. All the hardship is that he may get evidence as to the very few persons who tried to but did not vote—a hardship of the very smallest nature; and when we consider that the judge at the trial may look at the ballot papers, it becomes infinitesimal.

DENMAN, J.—This rule was originally obtained for a *mandamus*, but in the course of the argument it was turned into an application for inspection, and it was sought to inspect three classes of documents. Now as to the marked register, I agree that this court has power to order the production of it, and that the petitioner has made out a right to have that power exercised in his favour. But as to the rejected ballot papers and the counterfoils relating thereto, I have come, after considerable doubt, to the conclusion that an order to inspect them ought not to be granted in the present case. I think that the question turns upon the meaning to be given to rule 40. [The learned judge read rule 40.] In my view the meaning of the words "on being satisfied that inspection is required" is, that the court must be satisfied that inspection is reasonably requisite and *bonâ fide* wanted. Upon the affidavit before us, I see no evidence of inspection being reasonably requisite. The application to inspect the ballot papers and counterfoils seems to have been a mere afterthought, occurring because an inspection of the marked register could not be at first obtained. It appears that Cockburn, C. J. and Grove, J. at chambers doubted whether they had power to order inspection of the marked register. As we grant inspection of the marked register, this ground for an application to inspect the ballot papers and counterfoils no longer exists. It is in effect the setting up of a new case. I cannot think that mere statements such as appear in the affidavit before us are sufficient to support that case. We have the power to order the inspection of these rejected ballot papers and counterfoils, but I am of opinion that we ought not to exercise it in favour of the petitioner.

The following is the form of the order made:—

"That the Clerk of the Crown in Chancery be at liberty to open the sealed packet which is alleged to contain the marked register of voters of the Petersfield borough election, and permit the petitioner and respondent respectively or their agents to inspect such marked register, and take copies if required upon payment for the same. And that the said Clerk of the Crown in Chancery do not permit any other papers than the said marked register to be inspected."

Attorney for the petitioner, *F. L. Soames*.

Attorneys for the respondent, *Rogerson and Ford*.

Monday, April 20, 1874.

HURDLE AND ANOTHER (pets.) v. WARING (resp.).

Election petition—Time within which it may be presented—31 & 32 Vict. c. 125, s. 6—35 & 36 Vict. c. 33, s. 7 and 44th rule in the first schedule—When is return made to the Clerk of the Crown—Date from which the twenty-one days begin to run.

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The Parliamentary Elections Act 1868 enacts that a petition shall be presented within twenty-one days after the return has been made to the Clerk of the Crown in Chancery; and the 44th rule in the first schedule to the Ballot Act says, that the return of a member shall be made by a certificate under the hand of the returning officer endorsed on the writ, and that such certificate shall have effect and be dealt with in like manner as the return under the existing law, and further gives permission to the returning officer to deliver the writ with such certificate endorsed to the postmaster to be forwarded by the first post to the Clerk of the Crown.

Section 2 of the Ballot Act directs the returning officer to count the votes and forthwith declare to be elected the candidates or candidate to whom the majority of votes have been given and return their names to the Clerk of the Crown in Chancery.

The poll at P. was declared on the morning of the 4th Feb., and the returning officer sent off the certificate by a post which reached London at 6 p.m. At 8 p.m. in the same evening it was delivered by special messenger at the office of the Clerk of the Crown, and received in his absence and in that of the office clerks, by a woman who was servant to the housekeeper, and who was authorised to take in letters and parcels, and if necessary give a receipt for them. This being a registered letter she gave a receipt. The certificate was first seen by the Clerk of the Crown when the office opened the next morning the 5th Feb., and the requisite entries in the books were then made. On the question being raised whether the return was made to the Clerk of the Crown, for the purpose of calculating the days within which a petition might be presented, on the 4th or on the 5th:

Held that it was made on the 5th;

Held that the return was not made to the Clerk of the Crown until he had some opportunity of acting upon it; and that it is not complete until it has reached the authority specified in the Act in such a shape that he or his deputy can act upon it:

Held also, that the receipt of the certificate by a servant who had authority to receive it, but to do nothing else, was not constructively the receipt of the Clerk of the Crown so as to constitute it a return made to him.

This was a rule calling on the petitioners against the return of Mr. Charles Waring as member for the Borough of Poole to show cause why the petition should not be ordered to be taken off the file, on the ground that it was not presented in time.

The facts which appeared when the rule was moved for by McIntyre, Q.C. were shortly as follows:

The election took place on the 3rd Feb., and the returning officer counted up the votes, and declared the result on the morning of the 4th. He then delivered to the postmaster at Poole the return and the various sealed packets specified in the Ballot Act, for the purpose of their being forwarded to the Clerk of the Crown in Chancery by the mid-day post. The documents were duly forwarded, registered, and reached London about 6 p.m. on the evening of the 4th. They were sent out from the General Post office by special messenger, and arrived at the office of the Clerk of the Crown about 8 p.m. The Clerk of the Crown was not there, but there was a woman called Kate Phipps, a servant of the housekeeper, who took in the

parcel, and gave the messenger a receipt. The following morning the parcel was received by the Clerk of the Crown or his office clerks, and the usual entry was then made in the books of the return. The petition against the return was presented on the 2nd March, and the question for the decision of the court was whether that was within twenty-one days after the return had been made to the Clerk to the Crown, as required by the 6th section of 31 & 32 Vict. c. 125, or not. If the return were held to be made on the 4th Feb. then the petition was too late, but if on the 5th then it was in time.

Giffard, Q.C. and W. G. Harrison showed cause.—The facts in our affidavits show that the ordinary office hours in the office of the Clerk of the Crown are from 10 a.m. to 2 p.m. Three clerks and one messenger are employed there, and a return book is kept in which the entries are made by the clerks and by no other persons. There is another return book which is copied from this one and is made for the use of Parliament and is signed by the Clerk of the Crown. It appears that Ellen Lovegrove was the housekeeper, and that she was not in the service of the Clerk of the Crown nor paid by nor employed by him, but by the Lord Great Chamberlain; and that her duties were to light the fires, and clean the offices. Kate Phipps was the servant of Ellen Lovegrove, and performed the same duties. The return from Poole came into the hands of the clerks on the 5th Feb., and though it might have come to the office on the preceding evening and been taken in, yet Kate Phipps had no authority to receive it, and the practice always was to date the return as when it came into the hands of the clerks. The entry in the return book which was made as above stated by the Clerk of the Crown for the information of Parliament was in these words—"The 5th Feb. Town of Poole—Charles Waring;" and this book generally lies on the Speaker's table, and is referred to in swearing in members. This is the certificate on which the respondent would act, and it is dated the 5th, so he cannot be said to be in default for having accepted it. In the original book at the office the entry is the 4th Feb., but then that has been scratched through and the 5th inserted, and the copy signed by the Clerk of the Crown has the 5th only. But can it be seriously said that the return was made on the 4th? Under the old system no one but an authorised clerk could have received the indenture. Here Kate Phipps being servant to a servant who herself was not employed by the Clerk of the Crown, and had no duties connected with the business of the office, took in the parcel from the Post office messenger, and gave a receipt. But that was only an acknowledgment for the satisfaction of the Post office that the parcel had reached the building to which it was addressed, and was no proof of the contents, or that it was made known to the Clerk of the Crown or his duly authorised officials on the date appearing on the receipt. Kate Phipps was in effect only an animated letter box, and her act purely ministerial in receiving the parcel and putting it on the office table. [BRETT, J.—You must take it that she was authorised to receive it, and keep it till the morning.] Certainly; but this cannot constitute a delivery to the Clerk of the Crown, who was not there till the next morning; that did not make her a deputy recorder at the moment of receiving the parcel. Then consider what the return is. It is the certificate

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endorsed on the writ itself, and rule 44 says that "such certificate shall have effect and be dealt with in like manner as the return under the existing law." Now upon these words I contend that the rule did not mean to interfere with the existing practice, except so far as to simplify it for the returning officer and the Clerk of the Crown, and admit of the return being sent by post. The return was formerly made by indenture, and executed by the returning officer at the place of election, and then sent up to the office of the Clerk of the Crown. The old law with regard to filing petitions will not help us here, because the petitioner was to question the return within "fourteen days next after any new return shall be brought in." This clearly means brought in to Parliament, and there is just this analogy to be urged that time began to run from the report to Parliament, and here according to our contention it is from the entry by the Clerk of the Crown in the book from which Parliament receive their information of the returns. So generally the analogy of the old practice is that there is a certificate instead of an indenture, but it must reach an authorised person; and it is a strong argument in favour of this necessity, that the elected member cannot sit till the return is made to the Clerk of the Crown; for on his report alone he is admitted. Then the object of the return being to enable the Clerk of the Crown to make his entry, and for the elected member to take his seat upon the entry, when can the return be said to be made? Surely not till the certificate can be dealt with by the Clerk of the Crown. For otherwise it must be contended on the other side that the return is made by sending off the papers; but I submit that in the true view of the proceedings there is a chain, in which the sender has to do something and the recipient something, and it is not complete when only the sender has done all he can. The minute directions as to the mode of transmission which the returning officer may adopt are only for his protection.

McIntyre, Q.C., Chandos Leigh, and C. S. C. Bowen in the support of the rule.—The version of the facts upon our affidavits says that during the elections the office of the Clerk of the Crown was often open till 6 p.m., and that either he himself or some of the clerks attended up to that hour, and that all returns received were entered as received on that day. That the housekeeper or other attendant was authorised to take in parcels and letters which should arrive after the office, was closed for public business, and so Kate Phipps was authorised to receive this return. [BRETT, J. You must deal with the meaning of the Acts of Parliament, not with the practice as it may have prevailed at the office of the Clerk of the Crown.] I show that the return did come to a person at the office of the Clerk of the Crown authorised by him to receive it. [Lord COLERIDGE, C.J.—The words are "return made:" does not that mean made so that it can be acted on?] The time at which he acts upon the return is immaterial for the purposes of determining when the return was made. [BRETT, J.—The 2nd section is important, for it says "return their names to the Clerk of the Crown," and the 44th rule only explains how this is to be done, and does not relieve the returning officer from any of the necessity laid upon him in sect. 2.] The returning officer is directed to take a receipt from the postmaster when he sends off the papers by post. This surely looks as if the

postmaster became agent not for the sender but for the recipient, and supports the argument that the return is made when the certificate is posted. [DENMAN, J.—If this had been meant it would have been so easy to have added some such words as "and such delivery shall be equivalent to a return to the Clerk of the Crown."] At any rate I say that if in due course of post the certificate would arrive on the 4th, it ought, whether it did or not really do so, to date on the 4th. This should *prima facie* be its date until disproved. But here it in fact did arrive on the 4th. Then as to the suggested definition of "return made" in sect. 6, subsect 2 of the Corrupt Practices Act, that it is not made until the officer has the opportunity of doing something, this would be directly at variance with rule 44. That says that a certificate is to take the place of the return, and that such certificate shall have effect and be dealt with in like manner as the return under the existing law; that is, the certificate when made shall be so dealt with. But clearly, dealing with it when made has nothing to do with the making of it: Under the old law the duty of the returning officer was to take the return, and when taken his duty was discharged: the making therefore is the sending, and accordingly the rule proceeds to give him the option of sending by post, and he is authorised to give it to the postmaster. The only possible question therefore can be, when is the transit determined, because as soon as it is determined, beyond all doubt the return is made. It must be admitted that the physical transit is complete when the certificate reaches the office of the Clerk of the Crown and is there received. Was then Kate Phipps authorised to determine the transit? Clearly upon the affidavits she was; for, apart from all questions of authority to deal with the contents of the parcel, she was expressly empowered to take in all letters and parcels, and stayed in the office for that purpose. When she gave a receipt to the messenger, the transit was determined, for she acted in accordance with the authority given her.

Lord COLERIDGE, C.J.—In this case an application has been made to take off the file a petition, which has been presented against Mr Charles Waring, the sitting member for the Borough of Poole, on the ground that it was not presented within twenty-one days after the return had been made to the Clerk of the Crown in Chancery in England. The facts, as laid before us, show that the election at Poole took place on the 3rd Feb., that the polling was on that day, and that on the 4th the number of votes was counted by the returning officer and the declaration of the result made. He then on the same day sent up by post, in a registered letter, the certificate of the return, directed to the Clerk of the Crown, and sent it at such an hour as would bring it to London about 6 p.m. the same evening. It did in fact arrive, and in consequence of being registered was sent by a special messenger from the Post office, and reached the office of the Clerk of the Crown about 8 p.m. He was not there, nor was there any person in the office: the only person on the premises was Kate Phipps, a woman in the employment of the housekeeper, who was herself appointed and paid by the Lord Great Chamberlain. Under these circumstances the fact being that the registered letter reached the office of the Clerk of the Crown at 8 p.m., and was not endorsed or dealt with in any way, nor indeed could be till the next

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day, we have to decide whether a petition which was presented within twenty-one days after the 5th Feb. was in time, as having been presented within twenty-one days after the return had been made to the Clerk of the Crown. We have to construe two sections of different Acts of Parliament, and to see if the 44th rule in the first schedule to the Ballot Act throws any light on the expressions in the Acts. The 2nd subsection of the 6th section of 31 & 32 Vict. c. 125 enacts, "The petition shall be presented within twenty-one days after the return has been made to the Clerk of the Crown in Chancery in England," and the latter part of the 2nd section of 35 & 36 Vict. c. 33 has these words: "At the close of the poll the returning officer shall open the ballot boxes, and ascertain the result of the poll by counting the votes given to each candidate, and shall forthwith declare to be elected the candidates to whom the majority of votes have been given, and return their names to the Clerk of the Crown in Chancery." The words in these two sections are for all substantial purposes the same; and the only question is what they mean. An ingenious argument has been addressed to us on rule 44, to the effect that the return must be considered to be complete when the physical process of transmission through the instrumentality of the Post office is over. Mr. Bowen was pressed to admit as a necessary consequence that the return is complete when the certificate is signed, or when it is handed to the Post office for transmission, but was unwilling to adopt that, arguing that all that is meant by making the return is transmission. I am of opinion that this argument cannot prevail. The true construction is that "return to be made" means that the officer is to make it in such sense as that the Clerk of the Crown can act upon it. Now what is it which the Clerk of the Crown has to do? He has to copy into a book the names returned to him, and he has to furnish a copy of this book to the House of Commons, and on that book (or on the single return as the case may be) the member is allowed to take his seat. Now when there is a new Parliament the members are not at first sworn in, but they go to the House of Lords, and then come back and elect a speaker; and what is the only authority for members on such an occasion, acting in so important a matter? Why this return made by the Clerk of the Crown to the House of Commons and this alone: and he cannot return the names of members except by means of this return so directed to be made to him. As therefore this return to the Clerk of the Crown is to be followed by such important matters, I think that it is not complete till it has reached the authority in such a shape that he or his deputy can act upon it. It may be said that in so construing the words I am importing considerations of what is to be done after the return is made; but I may reply that the argument that the "return made" is delivery to the Post office, is addressed to us on consideration of the duty of the transmitter rather than of the meaning to be elicited from the words themselves. "Return" being a complicated and not a simple matter, and the meaning not being necessarily apparent on the first instance, we must say what we think it means. There may be difficulties both ways, however it be interpreted, but the rule of good sense is to construe the words as I have done, and to hold that "return made" is not made until the Clerk of the

Crown has an opportunity of acting upon it. I may, however, point out that there is nothing unreasonable or unjust in this, because if the return is to be complete when the Clerk of the Crown has the opportunity of acting, and if he does his duty in acting at once, a point of time is fixed from which the time may run, and elected members and intending petitioners may both know when it begins, as it will be from the endorsement on the writ. This, though not strictly a legal consideration, yet may, as I have already given my opinion, on the proper construction of the words in the sections, be adduced to show that the interpretation does not produce inequality or injustice.

BRETT, J.—The first statute to be considered is 31 & 32 Vict. c. 125, passed in 1868, and the subsect. of sect. 6 is, "The petition shall be presented within twenty-one days after the return has been made to the Clerk of the Crown in Chancery in England," and this clearly points to the Parliamentary practice which existed before the statute came into operation, a practice which had no reference to the presentation of petitions. How was the return then made? It was done by the returning officer executing an indenture witnessed by several persons; and this was executed at the place where the election had taken place and the declaration made. It was never thought under that practice that the execution of the indenture was a return. The indenture was then sent off, usually by messenger, for the returning officer was responsible for its being received at the office of the Clerk of the Crown. What was done with it when received shows why it was sent; it was that the Clerk of the Crown might act on it. He entered it in a book and made a report of it; and it was most important that this should be done, because the return was the only voucher on which members entered the House, as may be seen from the practice laid down in Sir Erskine May's book. It could not then be said that the return was made until the Clerk of the Crown had had an opportunity of acting on it, and this he could only have when it came to his hands or those of some duly authorised deputy. That being the meaning of the expression in the Act of 1868, what, we must ask, is the meaning of the same phrase in the Ballot Act? Surely, where it occurs in the 2nd section, not having any reference to petitions, but being merely descriptive of the course of proceeding, it must mean the same thing. Then does rule 44 in the schedule to the Ballot Act modify this interpretation? The first part says: "The return of a member or members elected to serve in Parliament for any county or borough, shall be made by a certificate of the names of such member or members, under the hand of the returning officer, endorsed on the writ of election." These words are, indeed, capable of the construction that the return is made by making the certificate; but if this be so it must mean that the return is made when the certificate is signed. But this cannot be so, for the whole meaning of the clause, as I read it, is to substitute a certificate for the indenture, and I have already said that the execution of the indenture was not equivalent to making the return. The rule then goes on: "And such certificate shall have effect and be dealt with in like manner as the return under the existing law." Just, therefore, as the execution of the indenture was not the "return," so the signing the certificate is not the

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"return." It then goes on to point out one particular mode of sending the writ to the Clerk of the Crown, viz., by delivering it to the postmaster, and taking a receipt for it from him. If the returning officer avails himself of this provision, and does forward the writ and certificate endorsed on it in this way, his doing so absolves him from any responsibility, but does not make it a "return." It must come into the hands of the Clerk of the Crown, and the provision in the rule as to the mode of transmission does not interfere with that necessary part of the return. If that be so, was this certificate made to the Clerk of the Crown on the 4th Feb.? It was handed to a person who could receive it, but could do nothing else,—could not act upon it. A test is one which I put in the course of the argument: Suppose a member so elected had come to the office that night, and found only a housekeeper there, and not the Clerk of the Crown or his authorised deputy, could he have taken his seat that night by persuading the housekeeper to take the certificate to the Clerk of the House of Commons? could the latter have received that as a return upon which he could have acted and admitted the member? But then it is said, if so, elected members are at the mercy of the Clerk of the Crown; and if he neglects his duties they may suffer. Well, so it is to a certain extent. He may delay a member's taking his seat, or he may prolong the period of his liability to be petitioned against; but what then? If he does so, and cause injury, he will be liable to an action, and we cannot consider these possibilities, but have to interpret what the Legislature has said, and what is the meaning of the sections and rules, without regard to imaginary consequences.

DENMAN, J.—I am of the same opinion. By the Corrupt Practices Act 1868, a petition has to be presented within twenty-one days after the return has been made. I do not go the whole length of my Lord in saying that the words "return made" are ambiguous words. I think we are bound to read the words as affirmatively meaning, effectively made to the Clerk of the Crown, or some one authorised by him. That being my interpretation of the earlier statute, does anything in the 1872 Act repeal or alter those words? The general rule with regard to Acts of Parliament is, that no Act is repealed by implication unless the words in the later statute are wholly inconsistent with it. But here there is nothing in the Ballot Act inconsistent with this provision; and, therefore, I think that the words remain in full force and effect, and must receive the same interpretation as before; and so it follows that the return was not made until made so that the Clerk of the Crown could take notice of it. In my opinion, the delivery to Kate Phipps did not make it such a return to the Clerk of the Crown.

Rule discharged without costs.

Attorney for petitioners, C. C. Ellis.

Attorneys for respondent, Waterhouse and Winterbotham.

CROWN CASES RESERVED.

Reported by JOHN THOMPSON, Esq., Barrister-at-Law.

Saturday, April 25, 1874.

(Before Lord COLERIDGE, C. J., BLACKBURN, J., LUSH, J., FIGOTT, B., and CLEASBY, B.)

REG. v. THOMAS COOPER.

Misdemeanor—Misappropriation of money by an attorney—24 & 25 Vict. c. 96, ss. 95, 96.

W. deposited title-deeds with D. as security for a loan; and requiring a further loan, the defendant, an attorney, obtained for W. a sum of money from T., and delivered to her a mortgage deed as security. There were no directions in writing to the defendant to apply the money to any purpose, and he was entrusted with the mortgage deed, with authority to hand it over to T., on receipt of the mortgage money, which was to be paid to D. and W., less costs of preparing the deed. The defendant fraudulently converted a substantial part of the money to his own use.

Held, that as there was no direction in writing, and the mortgage-deed was duly delivered to T., the defendant was not guilty of a misdemeanour within 24 & 25 Vict. c. 76. s. 75.

Held, also, that he was not guilty of the misdemeanor, in sect. 76, of converting property entrusted to him for safe custody.

CASE reserved for the opinion of this Court by Grove, J.

The defendant, an attorney, was indicted under the 24 & 25 Vict. c. 96, for having converted to his own use certain money intrusted to him or received by him as the proceeds of a deed intrusted to him for a special purpose.

The indictment contained two counts framed respectively under the 75th and 76th sections, as follows:

First count. The jurors for our Sovereign Lady the Queen, upon their oath present, that Thomas Cooper, on the 25th March, in the year of our Lord 1867, then being an attorney and being intrusted with certain property, to wit, the sum of one hundred and forty pounds, of John Whittaker for safe custody, did then and there unlawfully and with intent to defraud, convert, and appropriate a certain part of the said property of the said John Whittaker, to wit the sum of eighty pounds, to and for the use and benefit of himself the said Thomas Cooper, against the form of the statute, &c.

Second count. And the jurors aforesaid, upon their oath aforesaid, do further present that the said Thomas Cooper, on the day and year aforesaid, was entrusted by the said John Whittaker with a certain valuable security, to wit, a deed of mortgage of certain property of the said John Whittaker, to secure the repayment of a sum of one hundred and forty pounds then lately before agreed to be lent and advanced to the said John Whittaker by one Martha Taylor, such valuable security being intrusted to the said Thomas Cooper, as the attorney and agent of the said John Whittaker for the special purpose and with the intent and object that the said Thomas Cooper should receive from the said Martha Taylor, the said sum of one hundred and forty pounds for and on behalf of the said John Whittaker, and having so received such sum, should thereout pay the sum of fifty pounds then due and owing from the said John Whittaker, to one Nathaniel John Dewsbury,

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and should pay the remainder of such sum of one hundred and forty pounds to and for the use of the said John Whittaker, and the jurors aforesaid upon their oath aforesaid do further present that the said Thomas Cooper having on the day and year aforesaid, received from the said Martha Taylor, the said sum of one hundred and forty pounds, on the deed and valuable security above mentioned unlawfully, fraudulently, in violation of good faith, and contrary to the purpose, intent, and object with which such valuable security had been so intrusted to him as aforesaid, did convert to his own use and benefit a certain part of the proceeds thereof, to wit the sum of eighty pounds, against the form of the statute, &c.

The facts so far as they are material to the questions submitted to the Court were these:

A Mr. John Whittaker had before 1867 obtained a loan of 50*l.* from a Mr. Dewsbury on a deposit of title-deeds to some leasehold property. In consequence of Whittaker's wish for a further loan, the defendant in 1867 obtained 140*l.* from a Miss Taylor, and prepared and handed to her brother-in-law, who acted for her, a mortgage-deed, securing the 140*l.* Out of the money which defendant was to receive he was to pay off Dewsbury and pay the balance to Whittaker. He did not pay Dewsbury, and he only paid Whittaker 60*l.*, on which Whittaker paid him interest, while he, defendant, without Whittaker's knowledge paid the mortgagees' interest on the 140*l.*, Whittaker, being also ignorant, at all events for some years, that defendant had obtained so much as 140*l.* Allowing 10*l.* for the preparation of the mortgage-deed, which defendant's brother and former partner said was a fair sum, the defendant would have 70*l.* of Whittaker's in his possession, less the difference of interest which he paid without authority.

Defendant's counsel contended that there was another 30*l.* paid to Whittaker which would reduce the sum to 40*l.*, but the evidence preponderated greatly against this.

A good many letters were put in to show the defendant's conduct in the matter, but with these the Court need not be troubled.

After reading to them the material parts of the evidence, I told the jury that if they were satisfied without reasonable doubt, that the defendant received the 140*l.* from Whittaker, and in violation of good faith, and fraudulently converted to his own use a substantial part of the money which they considered he should have paid to Whittaker, and to Dewsbury for him, they should find him guilty; otherwise not.

The jury found a verdict of guilty.

It must be taken by the court: 1st, that there were no directions in writing to the defendant to apply the money or any part of the proceeds of the deed to any purpose; 2nd, that defendant was entrusted with the mortgage deed with authority to hand it over to the mortgagee or her agent on receipt of the mortgage-money which was to be paid to Dewsbury and Whittaker, less costs of preparing deed; 3rd, that defendant received 140*l.* for Whittaker's use, and in violation of good faith and contrary to the purpose for which such deed and money were entrusted to him, converted a substantial part of the money to his own use.

I respited the judgment and allowed the defendant to go out on bail (to be fixed by magistrates) to appear for judgment if required.

The question for the Court is—does the offence committed by the defendant come within either or both the sections above named, viz., the 75th and 76th sections.

If within both or either of them, the conviction to be affirmed, if not within either a verdict of not guilty to be entered.

13th April, 1874. (Signed) W. R. GROVE.

Bowen, Q.C. (*E. J. Dunn* with him) for the prisoner.—The conviction cannot be sustained. The case is not within the language of either section of the statute. [He was then stopped by the court.]

Torr, Q.C., in support of the conviction.—The first count of the indictment is framed upon the 76th section of the 24 & 25 Vict. c. 76, which enacts that "whosoever, being a banker, merchant, broker, attorney, or agent, and being entrusted with the property of any other person for safe custody, shall, with intent to defraud, sell, negotiate, transfer, pledge, or in any manner convert or appropriate the same or any part thereof to or for his own use or benefit, &c., shall be guilty of a misdemeanor." Here the defendant got the money from Miss Taylor to hold safely until he had fulfilled her injunctions to pay off Dewsbury, and pay the balance to Whittaker. [BLACKBURN, J.—The defendant did not fraudulently dispose of the mortgage security. Lord COLERIDGE, C.J.—And it cannot be said that the money was entrusted to him for safe custody.] The second count is framed upon the 75th section, which enacts that "whosoever having been entrusted as a banker, merchant, broker, attorney, or other agent with any money or security for the payment of money with any direction in writing to apply, pay, or deliver such money or security or any part thereof, or the proceeds or any part of the proceeds of such security for any purpose or to any person specified in such direction, shall in violation of good faith, and contrary to the terms of such direction, convert to his own use or benefit, or the use, &c., such money, security, or proceeds, or any part thereof respectively; and whosoever, having been entrusted as banker, merchant, broker, attorney, or other agent, with any chattel or valuable security, or any power of attorney for the sale or transfer of any share or interest in any public stock or fund, &c., for safe custody or for any special purpose, without any authority to sell, negotiate, transfer, or pledge, shall in violation of good faith, and contrary to the object or purpose for which such chattel, security, or power of attorney shall have been intrusted to him to sell, negotiate, transfer, pledge, or in any manner convert to his own use or benefit, &c., such chattel or security, or the proceeds of the same, or any part thereof, or the share or interest in the stock or fund to which such power of attorney shall relate, or any part thereof, shall be guilty of a misdemeanor." The defendant is brought within that provision by the facts, for he was intrusted with the mortgage deed to hand it over to Miss Taylor on receipt of the mortgage money which was to be paid to Dewsbury and Whittaker. [Lord COLERIDGE, C. J.—He was not intrusted with the proceeds of an improperly pledged mortgage deed.] The case falls within the second part of the enactment in sect. 75. [PIGOTT B.—No. The foundation of the offence is that the defendant must have without authority improperly transferred or pledged a chattel or security intrusted to him for

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safe custody or some special purpose. If he had been indicted under sect. 3 for converting to his own use property bailed to him, I am inclined to think he might have been convicted. BLACKBURN J.—This money was not the proceeds of a chattel converted contrary to good faith.]

LORD COLERIDGE, C.J.—I am of opinion that the conviction should be quashed. The indictment is framed under two sections of the 24 & 25 Vict. c. 96, and consists of two counts, the first framed upon the 76th section, and the second upon the 75th section. The first count upon the 76th section is out of the question, because the defendant has not improperly dealt with any property entrusted to him for safe custody within the meaning of that section. Then the second count is framed upon the 75th section, which seems to consist of two parts: the first part relates to the case of a banker, merchant, broker, attorney, or other agent entrusted with any money or security for the payment of money with any direction in writing to apply, pay, or deliver such money or security, or any part thereof, for any purpose or to any person specified in such direction who shall in violation of good faith and contrary to the terms of such direction, convert the same to his own use or benefit. Now this case is not within that part of the section, for here there is no direction in writing to apply, pay, or deliver the money and security. Then is this case within the second part of the section? This is, "Whosoever having been intrusted as banker, merchant, broker, attorney, or other agent with any chattel or valuable security or any power of attorney for the sale or transfer of any share or interest in any public stock or fund for safe custody, or for any special purpose, without any authority to sell, negotiate, transfer or pledge, shall in violation of good faith and contrary to the object or purpose for which such chattel, security, or power of attorney shall have been intrusted, sell, negotiate, &c., or in any manner convert to his own use or benefit, such chattel or security or the proceeds of the same, &c." Now these are the facts: the defendant, as attorney for Whitaker, had obtained from Miss Taylor a sum of money advanced by her on mortgage with which to pay off Dewsbury's prior advance, and to pay over the balance to Whitaker. The mortgage deed was Miss Taylor's, and the moneys in a certain sense the moneys of Dewsbury and Whitaker. The mortgage deed was properly drawn and delivered to Miss Taylor, but the defendant misappropriated part of the monies advanced by Miss Taylor on the mortgage. But those monies were not the proceeds of the mortgage improperly converted within the meaning of this enactment, which means shall convert either a security or money intrusted to him for safe custody or for any special purpose. The defendant therefore is not brought within the words of the enactment, and the conviction must be quashed.

The rest of the Court concurring.

Conviction quashed.

Attorney for the Prosecutor, *Nordm*, Liverpool.

Attorney for the Defendant, *Sherratt*, Kildsgrove.

HOUSE OF LORDS.

Reported by C. E. MALDEN, Esq., Barrister-at-Law.

April 16 and 17, 1874.

(Before the LORD CHANCELLOR (Cairns), Lord CHELMSFORD, and Lord SELBORNE.)

MACBETH AND OTHERS v. ASHLEY AND OTHERS.

ON APPEAL FROM THE FIRST DIVISION OF THE COURT OF SESSION IN SCOTLAND.

Licensing Acts (Scotland)—16 & 17 Vict. c. 67, s. 11—25 & 26 Vict. c. 35, s. 2—"Particular locality within any county, district, or burgh"—Hours of closing.

The Act 25 & 26 Vict. c. 35, fixes the hours for opening and closing licensed houses in Scotland at eight in the morning and eleven at night; and by sect. 2, gives power to the licensing magistrates, at their discretion, to vary those hours "in any particular locality within any county, district, or burgh requiring other hours for opening or closing."

The magistrates of B. defined by metes and bounds a certain part of their burgh, which in fact included all the licensed houses therein, and passed a resolution to the effect that the particular locality so defined required that the licensed houses in it should be closed at ten at night, and inserted that hour in the certificates which they granted:

Held, that the resolution was ultra vires, and an evasion of the statute, for the Act gave them a discretion to select a portion of the whole district, and it was contrary both to the spirit and letter to apply an exceptional rule to what was virtually the whole burgh.

THIS was an appeal from a decision of the first division of the Court of Session in Scotland (the Lord President Inglis, Lord Deas, and Lord Jerviswoode; Lord Ardmillan dissenting), delivered on the 20th June 1873, in favour of the respondents, reversing the decision of the Lord Ordinary (Lord Gifford) in favour of the appellants.

The appellants were the magistrates of the burgh of Rothesay; the respondents were the four principal hotelkeepers in that town; and the question raised in the action was, whether the appellants, in resolving at their meeting for granting and renewing publicans' certificates, held on the 15th April 1872, "that in the particular locality within the burgh, situated within the following limits (specifying them), other hours are required for closing inns and hotels and public-houses than those specified in the forms of certificate in schedule A annexed to the Act (25 & 26 Vict. c. 35), applicable thereto," and in granting certain certificates, in the terms of this resolution, had gone beyond the powers conferred upon them by the Public-houses Acts.

The Acts which regulate public-houses and the granting of publicans' certificates in Scotland, are the Acts 9 Geo. 4, c. 58, 16 & 17 Vict. c. 67, and 25 & 26 Vict. c. 35.

The only provision as to the hours for keeping open public-houses, in 9 Geo. 4, c. 58, is contained in the form of certificate, which provides that the hotel, inn, or public-house shall not be kept open during the hours of service on Sundays, nor "at unseasonable hours" on other days.

Sect. 11 of 16 & 17 Vict. c. 67, provides, "that in localities requiring other hours for opening and closing public-houses, inns, and hotels, than those

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contained in the said schedule, it shall be lawful for such justices or magistrates to insert in the said schedule such other hours, not being earlier than six o'clock or later than eight o'clock in the morning for opening, or earlier than nine o'clock or later than eleven o'clock in the evening for closing the same, as they shall think fit."

The forms of certificates contained in the schedule to this Act provide, "that the holder shall not keep open house, or permit or suffer any drinking on any part of the premises belonging thereto, or sell or give out therefrom any liquors before eight o'clock in the morning, or after eleven o'clock at night."

The later Act (25 & 26 Vict. c. 35) substitutes new forms of certificate for those provided by the Act last quoted; but, as regards the hours of opening and closing, the provisions are identical.

Sect. 2 provides: "That in any particular locality within any county, or district, or burgh, requiring other hours for opening and closing inns, &c., than those specified in the forms of certificates in the said schedule applicable thereto, it shall be lawful for such justices or magistrates respectively to insert in such certificates such other hours, not being earlier than six o'clock or later than eight o'clock in the morning for opening, or earlier than nine o'clock or later than eleven o'clock in the evening for closing the same, as they shall think fit."

Under the provisions of sect. 36 of the last quoted Act, the two previous statutes, so far as not repealed are incorporated with and form part of it.

Rothsay is the chief town of the island of Bute, in the Firth of Clyde. It has a population of about 7800, which is much increased during the summer months by the arrival of visitors. There were thirty-one licensed publicans in the burgh, and the appellants, by their resolutions of the 15th April 1872, above mentioned, defined certain limits within the boundaries of the burgh, which embraced about two-thirds of the whole burgh, and included all the licensed inns, hotels, and public-houses, and left unaffected only parts of the burgh, either not built upon at all or occupied only by outlying villas. Thus the whole burgh, for licensing purposes, was affected by the resolution, which substituted ten o'clock at night for eleven o'clock as the hour for closing all licensed houses, and this hour was inserted in all the certificates for the year which began on the 15th May 1872.

The grocers of the town were not affected by the resolution; and the respondents, feeling themselves aggrieved thereby, commenced the proceedings, which resulted in this appeal.

The *Lord Advocate* (Gordon, Q.C.), the *Solicitor-General* (Holker, Q.C.), and *W. A. O. Paterson* (of the Scottish Bar), appeared for the appellants.

At the conclusion of their argument,

Southgate, Q.C., *Kay*, Q.C., and *R. V. Campbell* (of the Scottish Bar), who were counsel for the respondents, were not called upon.

The LORD CHANCELLOR.—My Lords, the question, and the only question to be determined in this case is, whether an order made by the magistrates of the burgh of Rothsay, was within the powers conferred upon them by the Act of Parliament under which they were proceeding, for if the order was within these powers it was not for the Court of Session, and it is not for your Lordships, to examine into the discretion exercised by the magis-

trates. The exercise of that discretion is entirely for them and for them alone. My Lords, the question in the view which I should submit of it to your Lordships turns really upon one Act of Parliament, the 25 & 26 Vict. c. 35. It is true that before that Act, another Act, that of the 16 & 17 Vict. had been passed upon this subject, but if your Lordships will turn to the Act of the 16 & 17 Vict. you will observe that the form in which that enactment is couched is this, it gives in a schedule one form of certificate of licence to be granted to an hotel or public-house, and in that form there occurs the condition, that the house is not to be opened before eight o'clock in the morning, or to be kept open later than eleven o'clock at night; and then the 11th section of the Act provides, after declaring that the magistrates may grant a licence in the form to which I have referred, that "in localities requiring other hours for opening and closing public-houses, &c., than those contained in the schedule, it shall be lawful for the justices or magistrates to insert in the schedule such other hours, not being earlier than six or later than eight o'clock in the morning for opening, or earlier than nine o'clock or later than eleven o'clock in the evening for closing the same." The proviso, therefore, is a power given to alter or modify the particular form of licence which is contained in the schedule to that Act. But when your Lordships turn to the Act of the 25 & 26 Vict., upon which I shall have immediately to comment, you will find that the form of certificate given by the earlier Act is entirely swept away and another form substituted for it. Therefore, the proviso in the earlier Act which was to operate upon the form of certificate given in that Act, of necessity comes to an end when the certificate given by the earlier Act is removed out of the way. Therefore, my Lords, without stopping to consider whether there are or are not actual repealing words in the later statute, and without stopping to consider what may have been the meaning of the proviso in the earlier statute, it appears to me sufficient to say that the certificate given in the earlier statute, being now at an end, and being a certificate which cannot be granted, the earlier statute itself is no longer to be considered. My Lords, I then turn to the later statute, but before considering the words of it I will remind your Lordships of what has been done by the magistrates of Rothsay in this case. They have made an order substituting a different hour—an earlier hour—for closing, for the hour which your Lordships will find contained in the later statute to which I have referred. They have done that, not for the whole burgh in point of form, but for a portion of the burgh so far as regards metes and bounds. But the portion of the burgh, for which their order has been made is admitted to contain all the hotels and inns and public houses which exist in the burgh, and therefore, though in form the order does not extend to every square yard of the burgh for the purposes of licensing, it really does comprise the whole of the burgh, because it comprises the whole of the hotels and public-houses in the burgh. Indeed, my Lords, it was not denied at the bar, it was very properly assumed to be an order which practically did affect, and, what is more important, which was meant to affect, the whole of the houses within the burgh which were to be licensed. Now, bearing that in mind, let me direct your Lordships' attention to

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the provisions contained in the later statute, the 25 & 26 Vict. That later statute in place of the one and only form of certificate, which had been contained in the schedule of the 16 & 17 Vict., provides I think three forms of certificates in the schedule. Each of these forms contains a condition that the house to which a certificate is to be granted shall not be opened earlier in the morning than eight o'clock, or later in the evening than eleven o'clock. Those hours therefore are taken by the Legislature to be the hours which as a general rule are to be applied to all licensed houses. The second section of the Act provides that these forms of certificates to which I have referred shall come in place of the forms of certificates provided by the earlier Acts, and that it shall be lawful for the justices "where they shall deem it inexpedient to grant to any person a certificate in the form applied for, to grant him a certificate in any other of the forms contained in the schedule." And then come these words, "provided always that in any particular locality within any county or district or burgh requiring other hours for opening and closing inns and hotels and public-houses than those specified in the forms of certificates in said schedule applicable thereto, it shall be lawful for such justices or magistrates respectively to insert in such certificates such other hours, not being earlier than six of the clock or later than eight of the clock in the morning for opening, or earlier than nine of the clock or later than eleven of the clock in the evening for closing the same as they shall think fit." Now, if your Lordships take those words in the proviso as they are to be literally interpreted, it appears to me to be beyond all doubt that they point to a discretion reposed in the magistrates which is to be exercised not with reference to the whole county, district, or burgh within their jurisdiction, but as the words expressly are with reference to a particular locality within (that is inside) the county or district or burgh, and I think your Lordships will easily see how reasonable and intelligible this provision of the Legislature was. The subject of the general hours for opening and closing public houses is a matter, and has always been treated as being a matter, of great and imperial public moment. It has been treated as a matter to be reserved for, and determined by, the consideration of the Imperial Parliament. It has accordingly been a subject upon which Parliament has in this Act expressed its opinion with regard to what should be the general rule by the certificate to which I have referred prescribing the hours mentioned in the certificate. But then the Act takes notice that in any particular district over which the licensing authority shall exercise its power, there may be some reason why a portion of the district or locality within the district, should have applied to it a different rule from that which is to be the rule of the district at large; in other words, that there should be a power of making an exception from that which is to be the general rule. But that is to be the form in which the discretion is to be exercised. There is to be a general rule, and there may be an exception; but if the exception is to swallow up the rule it ceases of course to be an exception at all, and that which might fairly have been an exercise of discretion becomes no exercise of the kind of discretion mentioned in this Act of Parliament, which is to be a discretion to select a portion of the whole district, and apply to it a rule different from the rule which is to

apply to the whole district. That, my Lords, appeared to me to be the obvious and literal meaning of the words, and in truth the only way in which the literal meaning of the words was attempted to be met in the very clear argument which we heard upon the subject, was by the Lord Advocate, who pressed this upon us. The Lord Advocate said—"Here is a power, a discretion, given to the magistrates to take a particular locality within their district; that is a discretion which they may exercise not only once but again and again. They may first take one locality and they may afterwards take another locality, and in that way they may traverse the whole of their district, and, in fine, by taking a number of localities, they may ultimately take the whole district. Why, therefore, should they not take the whole of their district at once? Now, my Lords, I will assume, though it is not for your Lordships now to decide, as the question has not arisen, that this may be a discretion which may be exercised more than once. That may be so, and upon that I express no opinion, but of this I am quite certain, that neither your Lordships nor any other court, if they found that magistrates had, under the guise of exercising a discretion, taken portion after portion of their district, not with reference to the view of the particular wants or requirements of each portion they selected, but in order, by degrees, to take possession of the whole of their district, and under the pretence of exercising a discretion for each portion, virtually to subvert and change the general rule laid down by the Legislature; if, I say, your Lordships were to find, which I cannot imagine or suppose you ever would find, magistrates adopting that course for the purpose of doing what I must describe as evading an Act of Parliament, your Lordships would not be prepared to sanction, but would discountenance and prevent the exercise of a power which was used in that way. That, however, has not been done by the magistrates in this case. They have done that which they believed was within their power. They have, once for all, attempted with regard to all the public-houses in their district, to change the rule laid down by the Act of Parliament. That, in my opinion, is a power which has not been entrusted to them by the Legislature; and I, therefore, submit to your Lordships that the view taken by the Court of Session was correct in reducing the order which was thus made by the magistrates. I therefore propose to your Lordships that the interlocutors appealed against, should be affirmed, and the appeal dismissed with costs.

Lord CHELMSFORD—My Lords, I am entirely of the same opinion. If this case depended upon the 16 & 17 Vict., there might be some difficulty in determining the exact meaning of the word "locality" in the 11th section of the Act; but I should have had very little hesitation in coming to the conclusion that it could not have been intended to apply to the whole of a county, city, or burgh within the jurisdiction of the licensing magistrates, for these reasons:—The 11th section prescribes the form of certificate for inns and public-houses, and it expressly enacts that it shall not be lawful for the magistrates of any burgh in Scotland to grant any certificates in any other form than those contained in the schedule; and by the 12th section it is enacted that any certificate granted contrary to the provisions of the Act

"shall be null and void to all intents and purposes." Now if the word "locality" applied to the whole of the district under the jurisdiction of the magistrates, the very section which makes it unlawful for the magistrates to grant certificates in any other than the prescribed forms would enable them to supersede the provision expressed in the most peremptory terms, and virtually to repeal it; and if this might be done in one county, city, and burgh, why not, as was observed in the course of the argument, in every one throughout Scotland. But whatever may be the proper construction of the 16 & 17 Vict., we have nothing to do with it, except as introductory to and in some respects explanatory of the Act of the 25 & 26 Vict. It seems probable that the alternative meaning of the word "locality" mentioned by the Lord President, might have suggested the necessity of more clearly expressing the intention of the Legislature; and accordingly in the 25 & 26 Vict., the matter is made perfectly plain by the introduction of these words, "any particular locality within any county or district or burgh." Upon these words, there can be no doubt that even if the word "locality" in the 16 & 17 Vict., had the construction which was contended for, it has been altogether superseded by the later statute, and that the magistrates have not, as was contended for by the Lord Advocate, power of licensing under the 16 & 17 Vict., and also under the 25 & 26 Vict. The magistrates have to deal with the latter statute only, and the particular localities within their jurisdiction requiring other hours for opening and closing public-houses than those specified in the forms of certificates contained in the Act, that is, where, from some peculiar circumstance connected with some particular locality, in the judgment of the magistrates it is requisite that other hours should be inserted in the licences. Now it must be conceded that this is a matter for the discretion of the magistrates in the proper exercise of their statutory powers; but, upon this occasion, instead of confining themselves to a part of the burgh, they have endeavoured to apply their power to every part of the burgh—at all events to the part of the burgh containing all the public-houses to which their licensing powers extend, and therefore practically to the whole of the burgh. This appears to me to be contrary not only to the spirit but to the very letter of the Act, because it is impossible to say that the limits which they have defined, which virtually comprehend the whole of the burgh, can be called "a particular locality within any county, or district, or burgh:" and I must say it appears to me something very like an attempt to evade the provisions of the Act of Parliament. Now, the law will not allow that to be done indirectly which cannot lawfully be done directly, and therefore I have no doubt whatever that this was *ultra vires* of the magistrates of the burgh. I do not know whether it is at all important to consider the objection that the discretion of the magistrates can be exercised only when other hours than those named in the certificates are required for opening as well as closing public-houses. The words "opening and closing" give the power as to morning and evening both; and it may well be that a change as to opening might, from particular circumstances, be requisite, and not as to closing, or *vice versa*. And although the times for the opening and closing mentioned in the certificates comprehend a period of 15 hours, there is nothing

to indicate that in any change to be made those should be the exact number of hours for which publicans are to be allowed to keep open their houses. I therefore agree with my noble and learned friend that the interlocutors ought to be affirmed and the appeal dismissed with costs.

LORD SELBORNE—My Lords, I am entirely of the same opinion, and I will add but little to what has been already said by those of your Lordships who have addressed the House. With respect to the reasons on which the learned Lord Ordinary, who took a different view, seems to have proceeded, and with which Lord Ardmillan appears to have been disposed to agree, though yielding to the authority of the majority of the judges in the Inner House, they appear to me, my Lords, to turn upon a view which I think it would be somewhat dangerous to encourage at all, in dealing with Acts of Parliament of this description. Because, in the letter of the magistrates' order, less than the whole of the burgh is comprehended in point of territorial limits, their Lordships seem to have been inclined to think that the strict language of the Act of Parliament was satisfied, and that the court, under those circumstances, ought not to interfere with the discretion of the magistrates. Now, I cannot but think that in that view their Lordships lost sight of a distinction which exists between what is called an evasion of an Act of Parliament where the Act is in derogation, if I may so say, or in restriction of the legal rights and liberties of the subject, and where the Act confers for public purposes, powers which would not otherwise exist. It has been said in this House, and elsewhere, that with regard to such statutes as the Mortmain Act, and others of that kind which restrict previously existing legal powers, a man is at liberty to evade them if that means no more than to keep outside of them; but if you keep outside of an Act which creates for public purposes, licensing powers in magistrates, it is manifest that you do not execute the power at all. Now, in this case, without at all meaning to deny that it is confided to the discretion of the magistrates to determine what particular localities within their jurisdiction require other hours for opening and closing than those specified, yet it is quite obvious that such discretion as they have is not an arbitrary discretion to define, with or without reasons apparent to themselves, any localities they please, but they must be such localities as they consider in the honest and *bonâ fide* exercise of their own judgment, to require a difference to be made. The participle "requiring" is connected with the substantive "locality" and therefore it must be a requirement arising out of the particular circumstances of the place. The magistrates must, in the exercise of an honest and *bonâ fide* judgment, be of opinion that the "particular locality" (I must use the language of the Act of Parliament, though it does not seem to me to be the best English in the world) which they except from the ordinary rule is one which, from its own particular circumstances, requires the difference to be made. It is quite evident that the magistrates have not proceeded upon that ground in the present case, and, therefore, without saying absolutely that no case could possibly be conceived in which there happened to be only one or two public-houses within the district, and those really so situated that a good reason could be given for applying the exception to them, without saying that such a case

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would be impossible, it is enough to say that it is perfectly clear, and on all hands conceded, that that case does not exist here.

Interlocutor affirmed, and appeal dismissed, with costs.

Solicitors for the appellants, *Simson, Wakeford, and Simson* for J. and A. Peddie, Edinburgh.

Solicitors for the respondents, *Grahames and Wardlaw*, for A. Kirk Mackie, Edinburgh.

COURT OF QUEEN'S BENCH.

Reported by J. SHURT and M. W. MCKELLAR, Esqrs.,
Barristers-at-Law.

April 18 and 29, 1874.

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Trial at bar for perjury—Motion for new trial, or in arrest of judgment—Remarks by judge in summing up—Competency of court in banc to re-hear points of law—Venus upon removal from Central Criminal Court—Appointment of days for trial—Adjournment—Nisi Prius sittings in Westminster Hall—Penal servitude for perjury before a Chancery commissioner—Repetition of sentence—Sentence out of term.

Upon a motion for a new trial, or a venire de novo, or in arrest of judgment, after a trial at bar of an indictment for perjury, the court held as follows:—

Remarks of great severity upon the conduct of defendant's counsel, made by a judge in summing up to a jury, although calculated to influence them unfavourably to the defendant, do not constitute an undue influence, if intended to counteract the evil effect which what the judge considers to be the improper conduct of the counsel might have upon the jury.

The court expressed no opinion as to their competency to re-hear and re-consider points of law already decided by the same court when sitting at bar.

The effect of 9 & 10 Vict. c. 24, s. 3, is to give the Court of Queen's Bench discretion to name, in a certiorari for removal of an indictment from the Central Criminal Court, the county or jurisdiction in which the trial is to take place, and to provide that the jurors shall be summoned from that jurisdiction.

Sect. 7 of 11 Geo. 4 & 1 Will. 4, c. 70, gives a court the most absolute discretion to appoint such days as they think fit for a trial at bar, either on several occasions or at once through and beyond succeeding vacations.

The Court of Queen's Bench sitting at bar may for sufficient reason adjourn a trial either in or out of term.

Since the enactment of 33 Vict. c. 6, s. 5, whatever was the law before, sittings at Nisi Prius in Middlesex need not be held within Westminster Hall.

2 Geo. 2, c. 25, which imposed the sentence of transportation (now penal servitude) for perjury, applies equally to an oath taken before a commissioner in Chancery, appointed under 15 & 16 Vict. c. 78, or an oath taken before any court of common law.

In the case of an irregular sentence upon a person convicted at bar, the Court of Queen's Bench may cure the irregularity by sentencing the defendant again.

It is competent for a court at bar to deliver sentence

out of term at the time of a conviction, notwithstanding the dicta of the judges and the House of Lords in O'Connell v. The Queen (11 Cl. & F. 155).

THIS was the celebrated trial at bar held before Cockburn, C.J., Mellor and Lush, JJ., and a special jury, upon an indictment for perjury committed by the claimant in his evidence in an ejectment, *Tichborne v. Lushington*, before Bovill, C.J., and also in an affidavit sworn within the City of London in a Chancery suit. The ejectment was in fact the trial of the issue as to the claimant's identity with Sir R. C. D. Tichborne, Bart., which was directed to be tried at law in the Chancery suit. The indictment, which contained two counts, each alleging similar assignments of perjury, had been removed by *certiorari* from the Central Criminal Court; the trial commenced on the 23rd April 1873, and was continued with intervals until the 28th Feb. 1874, when the jury found a verdict of guilty upon both counts and all the assignments, and the court immediately sentenced the defendant to fourteen years penal servitude.

It was proved in the trial at bar that the trial of the ejectment was commenced in the Court of Common Pleas, at Westminster Hall, and after the hearing had lasted several days, it was adjourned with the consent of the parties to the Westminster Sessions House, where the claimant was called as a witness, and was sworn. Part of his evidence was given at the Sessions House and part in the Court of Queen's Bench, at Westminster Hall, to which place the trial by consent was further adjourned. No consent for either of these adjournments was entered upon the record of the ejectment, and the indictment alleged the perjury to have been committed "at Westminster," without reference to the particular building or any adjournment by consent.

Formal appointments were made by the Court of Queen's Bench during the trial at bar, for sittings throughout the vacations, under 11 Geo. 4 & 1 Will. 4, c. 70, s. 7.

The first appointment was made in Easter Term 1873, to enable the court at bar to sit up to and on Saturday, the 1st Nov. On the 31st Oct., that court, on the application of the prosecution and against the protest of the defendant, adjourned to the 17th Nov., for the purpose of enabling the prosecution to obtain witnesses in reply to certain evidence given for the defence. On the 6th Nov. the prosecution applied to the Court of Queen's Bench, sitting in banc, for a further appointment of sittings. The defendant objected to this application, but the court overruled the objection. On the 17th Nov., the court at bar further adjourned the trial until the 1st Dec., and again against the defendant's protest.

Kenealy, Q.C. (with him *McMahon and Wyld*), for the defendant, now moved for a rule nisi for a new trial, or a *venire de novo*, or in arrest of judgment.—As to the first count of the indictment, which alleged perjury in the ejectment at Westminster, Bovill, C.J., had no jurisdiction to hold this trial at Nisi Prius in any other place than Westminster Hall. By 18 Eliz., c. 12, after reciting that theretofore all issues joined in any of the courts of record at Westminster triable in the county of Middlesex, had been usually tried at the bars in the said courts in Westminster, it was enacted *inter alia* that from thenceforth the Chief Justice of the Common

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Pleas for the time being upon issues joined or to be joined in the Court of Common Pleas, and certain other judges of the several courts, "shall or may at their discretions, within the said Hall, called Westminster Hall, in Westminster, or in the place where the Court of Exchequer is commonly kept in the said county of Middlesex, as justices of Nisi Prius for the said county of Middlesex, within the term time, or within four days next after the end of every or any term severally try all manner of issues joined or to be joined in any of the said several courts, which by the ordinary course of the laws of the realm ought to be tried in any of the said courts by an inquest of the said county of Middlesex." Although this enactment was amended in various ways by subsequent statutes, no jurisdiction has ever been given to a Judge of the Common Pleas to try issues at any other place in Westminster except Westminster Hall. The express authority to a Judge of the Queen's Bench to try all issues, wherein the trial ought to be in the county of Middlesex, "either in the said Hall or in any other fit place in the city of Westminster," in such manner as the same "might be tried by the said Chief Justice in the said Hall, called Westminster Hall" (1 Geo. 4, c. 21, s. 1), is a ground for continuing the previous limitation of place which applied to the Common Pleas. If this be so, no consent of the parties could cure the want of jurisdiction, at all events unless entered on the record. In Viner's Abr., title "Trial," it is stated (s. a. 2) that "consent cannot take away the natural and essential visne." In the case of *Crow v. Edwards*, there mentioned, it was resolved by the Exchequer Chamber, that because it did not appear upon the record that the trial was by consent in a foreign county it was erroneous, notwithstanding the party had in a manner confessed it by demurrer. [COCKBURN, C.J.—You must contend then that if the Claimant had recovered, the whole ejectment would have been invalid.] Certainly. It has also been held in modern cases that consent cannot give jurisdiction. In *Vansittart v. Taylor* (4 E. & B. 910), in the Exchequer Chamber, with reference to appeal upon a point reserved at the trial before the Common Law Procedure Act, Jervis, C.J., said at p. 912, "We are all agreed that jurisdiction cannot be given by the conduct of the parties, if we have none independent of it." So *Lawrence v. Wilcock* (11 A. & E. 941). That at all events this consent, to create jurisdiction, must have been entered upon the record, appears from Co. Litt. 125 b. (p.) "If a *venire fac.* be awarded to the coroners where it ought to be to the sherife, or the visne commeth out of a wrong place, yet if it be *per assensum partium*, and so entered of record, it shall stand, for *omnis consensus tollit errorem*." Upon this authority, the conviction might have been supported if the indictment had alleged that the oath was administered by consent at the Westminster Sessions House, and so entered of record: and the wrong description of the place is another objection to the first count. [LUSH, J.—"Westminster" is the word used in the Common Law Procedure Act, 1854, sect. 2, which gives the judges power to try causes in the same court at the same time.] This was not a trial under the Common Law Procedure Act. [BLACKBURN, J.—Not if there was a second Nisi Prius Court sitting at the same time? QUAIN, J.—If the oath had been administered in one of these courts

it could not have been said to have been in Westminster Hall; these courts are outside the Hall itself, and ever since they have been built, which was in the reign of George IV., the jurisdiction could not have literally depended upon 18 Eliz. c. 12.] Further, as to the second count of the indictment, which alleged perjuries within the city of London, the ancient charters of the city show a right of trial in the city, and by a jury of citizens, for all offences committed and causes of action arising within its boundaries; (2 Str. 857; 2 Salk 644): but it is not necessary to go further back than the Central Criminal Court Act 1834 (4 & 5 Will. 4, c. 36), which provides for the trial of all offences within the district defined by a mixed jury from all the counties comprised in the district. By a subsequent Act, 9 & 10 Vict. c. 24, s. 3, it is "enacted that every writ of *certiorari* for removing an indictment from the said Central Criminal Court shall specify the county or jurisdiction in which the same shall be tried; and a jury shall be summoned and the trial proceed in the same manner in all respects as if the indictment had been originally preferred in that county or jurisdiction." This section gives no power to the person who draws the *certiorari* to alter the county in which the indictment shall be tried from that in which the offence was committed. [BLACKBURN, J.—It is however a power to the court for that purpose.] The words do not express such a power, and the case of *Reg v. Mitchell* (2 Q. B. 636), is an authority that a *certiorari* cannot alter the county in which an offence ought to be tried. The adoption of the county in the *certiorari* must be at the peril of the prosecution, and here the second count was tried by a wrong jury. [See report of this point as argued at bar, 28 L. T. Rep. N.S. 342.] As to the trial, 11 Geo. 4 & 1 Will. 4, c. 70, s. 7, enacts that only twenty-four days shall be appropriated after each term for trial of issues of fact, "Provided that if any trial at bar shall be directed by any of the said courts, it shall be competent to the judges of such court to appoint such day or days for the trial thereof as they shall think fit; and the time so appointed, if in vacation, shall for the purpose of such trial be deemed and taken to be a part of the preceding term." This section authorises only one appointment for a trial at bar beyond the twenty-four days after the term in which the appointment is made, and the proceedings therefore after the Long Vacation were invalid. [BLACKBURN, J.—That point has already been argued before us, and decided.] Next as to the discontinuance of the trial against the protest of the defendant;—for the purpose required, an adjournment in a criminal trial has never before been granted, and moreover there could be no power to adjourn over the time of the original appointment. [COCKBURN, C.J.—This was an exceptional case, and we established a new precedent to meet it. BLACKBURN, J.—No appointment was necessary for sittings during term.] Further the sentence clearly ought not to have been pronounced during the vacation: it should have been postponed to the beginning of this term. *O'Connell and others v. The Queen* (11 Cl. & F. 155), was a trial at bar under an Irish Act, 1 & 2 Will. 4, c. 31, containing a provision exactly similar to this 7th section of 11 Geo. 4 & 1 Will. 4, c. 70; Tindal, C.J., referring to the words of it in his written opinion of all the

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judges, said, at p. 250, "It was to be a day in term for the trial, not a day in term for the giving of judgment, or any other purpose." And Lyndhurst, L. C., at p. 325, expresses the unanimous concurrence of the law lords in the opinion of the judges upon the subordinate questions raised in the case. [BLACKBURN, J.—What is there in the words of the statute to support this dictum of the judges? COCKBURN, C. J.—They seem to have overlooked the section of the Act which gives power to a judge at Nisi Prius to pronounce sentence during sittings.] There might be a miscarriage of justice, and if sentence were pronounced immediately, no remedy, which is limited to a motion in term, could be obtained till it was partly, if not entirely carried out. The counsel for the prosecution, at p. 220, seem to admit that sentence could be pronounced only in term; and it does not follow that because express power to sentence immediately is given to a judge at Nisi Prius, it should necessarily belong to a court sitting at bar. [COCKBURN, C. J.—Except for that authority, it never would have occurred to me that the words "for the purpose of such trial" did not include the sentence, which seems to me to be part of the trial. BLACKBURN, J.—That point was not before the judges in the *O'Connell* case, and was not material to their decision. At all events the defendant might now be brought up and sentenced again, if there were sufficient doubt about the propriety of a sentence in vacation.] That is so. [BLACKBURN, J.—For myself, I have no doubt about it, notwithstanding the dictum of Tindal, C. J.] Another point concerning the sentence is that the oath upon affidavit was not one which could found the crime of perjury. The Act 16 & 17 Vict. c. 78, which enables commissioners to take affidavits in Chancery, makes no provision for false swearing. [BLACKBURN, J.—The words creating the crime of perjury in 5 Eliz. c. 9 s. 6, are, if any persons "by their own act, consent, or agreement wilfully and corruptly commit any manner of wilful perjury, by his or their deposition, in any of the courts before mentioned." The affidavit was part of a judicial proceeding in the Court of Chancery.] The 2 Geo. 2, c. 25, which makes transportation a punishment for perjury, cannot relate to an oath taken before a commissioner appointed under 15 & 16 Vict. c. 78. Besides these legal points, I move for a new trial on the grounds that the Lord Chief Justice in his summing up brought undue influence to bear upon the jury; that the court gave evidence to the jury which was not upon oath; and that the verdict was against the weight of the evidence.

Nothing was said by the defendant's counsel in support of the last two grounds for a new trial; but as to the undue influence of the Lord Chief Justice, the following passages in his summing up, which related to the conduct of the defendant's counsel at the trial were cited; and it was contended that they unduly influenced the jury against the defendant, and improperly induced them to find a verdict against him. "But, gentlemen," he said, "our position was rendered painful also from the fact that we had again and again to interfere with the address of the learned counsel in order to correct misstatements and misrepresentations which could not be allowed to pass without such interference on our part. When witnesses are misrepresented, when

evidence is misstated, when facts are perverted—and that not for the purpose of argument in the cause, but in order to lay the foundation of foul imputations and unjust accusations against parties and witnesses—when one unceasing torrent of invective and foul slander is sent forth wherewith to blacken the character of men whose reputations have been hitherto without reproach—then it is impossible for judges to remain silent. It is not enough to say that the learned counsel should be allowed to go on with his address to the end, and that the judge should wait until it is his turn to speak, and then to set right matters which have been misrepresented and distorted. And especially is it not so in a case like this, where weeks and months might elapse before the judge would have an opportunity of expressing his opinion; for in the meanwhile what might happen? A temporary impression—perhaps that is all that it was hoped to achieve—might have gone forth fatal to the honour and the character of the person assailed; wounds might have been inflicted which possibly never could have been healed. Therefore it was we felt it to be our duty to interpose and check the torrent of undisguised and unlimited abuse in which the learned counsel for the defendant thought proper to indulge. And in what way, gentlemen, were our remonstrances met? In an ordinary case, if in the heat of argument, in the fervour of oratory, in the zeal with which the counsel engages in a case, in the examination or cross-examination of a witness, the strict bounds of propriety may sometimes, and not unnaturally, be overstepped—but this, I say for the honour of the Bar of England, happens very rarely indeed—a word, nay, a hint, from the judge is sufficient to restrain the overflowing zeal within its proper and legitimate limits. But we were met by contumely and disrespect, by insult, by covert allusions to Scroggs and Jeffries—judges of infamous repute—as if in days when such a spirit as theirs animated the administration of justice the learned counsel would not have been quickly laid by the heels and put to silence." Also, "Gentlemen, I will undertake to say that no three judges ever sat upon this bench or any other to whom the liberties of the Bar were more dear or more sacred than they are to my learned colleagues and myself. We know too well that the freedom of the Bar is essential to the administration of justice. We know that it would be an ill day indeed for this country if the freedom of the Bar were ever interfered with. It may be that it was here abused, but this is a rare, a singular exception, which perhaps only proves the rule. We did not interfere with the privileges of the Bar. We wished to check the licence of unscrupulous abuse—to restrain that which, instead of being fair, legitimate argument, amounted to misstatement, misrepresentation, and slander." Again: "There never was in the history of jurisprudence a case in which such an amount of imputation and invective had been used before, and I sincerely hope there never will be another. Although the prosecution has been instituted by her Majesty's Government and carried on on behalf of the Crown, you have been told that every one connected with it, from the highest to the lowest, counsel, solicitors, clerks, detectives—everybody is engaged in a foul conspiracy—has resorted to the most abominable means in order to corrupt witnesses, against whom I should imagine that nothing was to be said, except this, that they

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might have been mistaken in the evidence they gave—have been charged with taking bribes and committing perjury. Imputations of this kind are thrown out right and left. One man is called a felon, against whom there is no more reason for bringing such a charge than against any of us." His lordship also said: "Who could conceive it possible that such vile imputations could have been brought forward in a court of justice?" and added, "I once, on a particular occasion referred to by the learned counsel, attempted to draw a distinction between that which was legitimate and that which was forbidden in advocacy, and I illustrated the distinction between the *fas* and the *nefas* of advocacy by referring to the difference between the sword of the warrior and the dagger of the assassin." His lordship went on to say: "That the learned counsel for the defendant should begin by citing with approbation that expression of my opinion, and end by exhibiting all, nay much more than all, the *nefas* of advocacy, I must say surprised and astonished me beyond measure." Another passage was,—“The authorities of Stonyhurst are accused upon no ground of any sort or kind with not teaching morality to their students, and, with the design of corrupting their minds, they are said to have adopted a system under which youths are brought up to be men with the minds of women, with a covered hint at abominations half revealed, but from which one recoils and shudders, and all this with no more foundation than if the imputation had been brought against the authorities of Eton, Westminster, or any other of our great schools.” Then the Lord Chief Justice went on to say, “The dead are served in the same way. Lady Doughty is charged with hypocrisy, because, as it is alleged, having discovered that her nephew had attempted the honour of her daughter, and had succeeded in that attempt, she showed him to the door with bland smiles and with honeyed words.”

BLACKBURN, J.—As to this latter part of the case we can give judgment at once. As to the other part of it, although none of us entertain any doubt as to the grounds upon which alone it would be proper to grant a rule, yet, as they may be of general importance in future cases, we will give our judgment on a future day in words more concise than we could use on the spur of the moment. As to the last point, however, I entertain no doubt at all. It is said that the conduct of the trial was such as to render the verdict unsatisfactory. The ground put principally by defendant's counsel was this: He said, and no doubt truly, that remarks of great severity were made by the judge upon the conduct of the counsel, which were calculated to influence the jury unfavourably to the defendant; but those remarks were intended to counteract the evil effect which, what the court considered to be the improper conduct of counsel might have upon the jury. It is quite true that when a judge animadverts on the conduct of counsel it has an effect damaging to the interests of his client; but it is not the exercise of an undue influence. The jury, who have heard all the evidence, are able to judge for themselves. Perhaps they cannot help connecting the conduct of counsel with the case he represents; but a client must suffer to some extent if he employs an injudicious or improper counsel. This is no ground for a new trial. I did not read all that was reported in the newspapers about the trial, but, as far as I know the facts, what fell from

the judge was not only well deserved, but rightly said, and although it might be damaging to the defendant, yet I cannot think it had an undue or improper effect upon the jury. It is quite clear that on this ground no rule can be granted.

QUAIN, J.—I am quite of the same opinion. On the last point no grounds have been shown for a new trial. I am one of those who did not read the Tichborne trial, neither the speeches, nor the summing up. I could not help hearing of the case, but I had no judicial knowledge of it from beginning to end. I therefore decide exclusively on what Dr. Kenely has laid before the court. He says imputations on himself personally were so strong and exaggerated that they had an undue influence on his client; but we have heard that the other two judges are of opinion that the observations of the Lord Chief Justice were deserved by the line of conduct which he adopted, and we must remember that the jury not only heard the language but witnessed the demeanour of the learned counsel. I agree with my brother Blackburn that the verdict cannot be set aside on this ground.

LUSH, J.—I entirely concur with my learned brothers. I think that the language of the Lord Chief Justice was not stronger than the occasion required. I had reason myself several times during the trial to make appeals to the defendant's counsel and I felt, as the Lord Chief Justice did, that a censure with regard to him was demanded from the bench, and the jury could not have been unduly influenced by such censure. Not only is there not a single observation of his lordship which I did not adopt, but I regretted he did not say more, and I adhere to the same opinion still.

COCKBURN, C.J.—I only wish to add the expression of my sincere regret that I should have had to state anything which should appear to have been harsh or ungenerous or unkind to the learned counsel. I will not add anything now that would savour at all of that character. I only hope that this is the last time we shall ever have any difference or dispute between the Bench and the Bar.

Cur. adv. vult.

April 29.—BLACKBURN, J., delivered the judgment of the court. (Cockburn, C. J., Blackburn, Lush and Quain, JJ.)—In this case an indictment was found by the grand jury in the Central Criminal Court for perjury, committed within the jurisdiction of the Central Criminal Court. It was removed into this court by a writ of *certiorari*, which, as required by stat. 9 & 10 Vict. c. 24, s. 3, specified Middlesex as the county in which it should be tried. On the application of the Attorney-General, it was ordered that the trial should be at bar. This court in Hilary Term, under stat. 11 Geo. 4 & 1 Will. 4, c. 70, s. 7, appointed the case to be tried on the 23rd April 1873 (being a day in Easter Term), and every day up to and inclusive of the 1st Nov. 1873, being the day before the first day of Michaelmas Term; and further ordered that in case the trial should not terminate on or before the 1st Nov. the further trial should be adjourned till Michaelmas Term next, and be thereafter continued at such times as the court should then direct. The jury was taken from the county of Middlesex, and the trial at bar commenced. The court did not sit continuously, but adjourned not only over Sundays and holidays, but also over days included in this period on which it might have sat. And, in particular, there was

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an adjournment from the 31st Oct. 1873, to the 17th Nov. 1873, which was a day in Michaelmas Term. To this last adjournment the defendant's counsel objected, and the court adjourned without any consent. The trial having been protracted, this court in Michaelmas Term, 1873, made a second order, appointing every day up to Michaelmas Term, 1874, for the trial. The trial proceeded, and on the 28th February, 1874, a day in the vacation before this Term, the defendant was found guilty, and the court then passed sentence on him of penal servitude on each count. Within the first four days of this Term the counsel for the defendant moved for a rule nisi for a new trial, or to arrest judgment, or for a *venire de novo*, on grounds which will be presently noticed, most of the objections having been taken and disposed of during the trial at bar. It must not be supposed that by entertaining the motion for a new trial we express any opinion as to the competency of the court to re-hear and reconsider points of law already decided by the same court when sitting at bar. It will be time to decide this point when it becomes necessary to do so, but we are desirous of guarding ourselves against any interference in favour of such a proposition from the fact of our having heard this application. We are all of opinion that no ground whatever has been shown for doubting that the proceedings, from first to last, have been perfectly regular, that the verdict was properly obtained, and is quite satisfactory, and that the sentence was properly passed by the court sitting in banco on a day which, by 7 Geo. 4 & 1 Will. 4, c. 70, s. 7, was for the purposes of this trial at bar to be taken to be part of the preceding term, viz., Hilary Term, 1874. We pronounced at once our reasons for saying that there was no colour for the motion for a new trial on the ground that the verdict was unsatisfactory on account of the way in which it was obtained. On the other grounds we postponed giving our reasons, not from any doubt entertained by any member of the court, but because, this being in some respects a new case, we were desirous of expressing our reasons precisely, so as to be an assistance to our successors if a similar case should occur again. We now proceed to deal with the applicant's objections, made as they arose in order of date, without regard to the order in which the counsel put them forward. The indictment, as already stated, was preferred in the Central Criminal Court, a new court created by statute 4 & 5 Will. 4, c. 36, with a jurisdiction including the City of London, the county of Middlesex, and parts of the counties of Essex, Kent, and Surrey. The grand jury in that court had jurisdiction to find a bill for offences committed within any part of their jurisdiction. Trials in the Central Criminal Court are by the 4th section to be by juries "taken wholly from the said city or the said counties, or taken indiscriminately from the said city and the said counties." The *certiorari* is not taken away, and therefore an indictment found in the Central Criminal Court may be removed into the Court of Queen's Bench, and may be there tried, but the original Act does not contain any express provision as to the manner in which the jury are to be summoned in the Queen's Bench. As the issue to be tried is whether the offence charged by the indictment was committed within the jurisdiction of the Central Criminal Court, it may on the trial of any

indictment appear that the offence was committed in any one of the five counties out of which that district is formed; and it did, in fact, appear in the trial of the case now before us that the perjuries assigned in one count were in respect of an oath taken in Chancery within the City of London, and that the perjuries assigned in the other count were in respect of an oath taken in the Court of Common Pleas in Middlesex. On this it was contended that the *venire* summoning a jury from Middlesex was originally wrong; or, at least, that when it appeared that one of the offences charged took place in London, the court should have ruled that the Middlesex juries could not try that offence. But the Legislature has, by a subsequent enactment, foreseen and provided for this difficulty. Statute 9 & 10 Vict. c. 24, s. 3, is as follows:—"And whereas doubts have been raised as to the proper place of trial, where indictments have been removed by writ of *certiorari* from the Central Criminal Court into the Court of Queen's Bench, be it enacted that no writ of *certiorari* for removing an indictment from the said Central Criminal Court shall specify the county or jurisdiction in which the cause shall be tried, and a jury shall be summoned and the trial proceed in the same manner in all respects as if the indictment had been originally prepared in that county or jurisdiction." We cannot doubt that the true construction of the statute is that the Court of Queen's Bench shall have discretion to name in the *certiorari* the county or jurisdiction in which the trial is to take place, and that by the jurors from the jurisdiction named, the same issues shall be tried that would have been tried in the Central Criminal Court, had the indictment not been removed. These objections therefore fail. The next objection relates to the order of the court made in Hilary Term, 1873, directing that a number of days should be appointed for the trial extending beyond the then next term, and the long period then appointed having proved too short, a second order was made in Michaelmas Term, 1873, appointing further days. It was contended that a trial at Bar, if it could be protracted beyond the first vacation after it began, must necessarily fail. It is a sufficient answer to cite the words of the stat. 11 Geo. 4 & 1 Will. 4, c. 70, s. 7:—"If a trial at bar should be directed by any of the said courts, it shall be competent for the judges of such courts to appoint such day or days for the trial thereof as they shall think fit; and the time so appointed, if in vacation, shall, for the purposes of such trial, be deemed, and taken to be, a part of the preceding term." It is impossible, to use words more clearly declaring that the court should have the most absolute discretion to appoint such days as they should think fit for trial; and there is nothing either in the object of the enactment, or the language used, to require either that this power should be exercised once for all, or that it should be limited to an appointment of days in the vacation next succeeding the term in which the order was made. It was then contended that the adjournment of the court vitiated the whole proceedings. It is scarcely possible to suppose that this objection was seriously made. The court was sitting on a day which, for the purpose of the trial, was to be taken as part of the then preceding Term. It is incident to a trial that the court may, for sufficient reason, adjourn it, and

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and should pay the remainder of such sum of one hundred and forty pounds to and for the use of the said John Whittaker, and the jurors aforesaid upon their oath aforesaid do further present that the said Thomas Cooper having on the day and year aforesaid, received from the said Martha Taylor, the said sum of one hundred and forty pounds, on the deed and valuable security above mentioned unlawfully, fraudulently, in violation of good faith, and contrary to the purpose, intent, and object with which such valuable security had been so intrusted to him as aforesaid, did convert to his own use and benefit a certain part of the proceeds thereof, to wit the sum of eighty pounds, against the form of the statute, &c.

The facts so far as they are material to the questions submitted to the Court were these:

A Mr. John Whittaker had before 1867 obtained a loan of 50*l.* from a Mr. Dewsbury on a deposit of title-deeds to some leasehold property. In consequence of Whittaker's wish for a further loan, the defendant in 1867 obtained 140*l.* from a Miss Taylor, and prepared and handed to her brother-in-law, who acted for her, a mortgage-deed, securing the 140*l.* Out of the money which defendant was to receive he was to pay off Dewsbury and pay the balance to Whittaker. He did not pay Dewsbury, and he only paid Whittaker 60*l.*, on which Whittaker paid him interest, while he, defendant, without Whittaker's knowledge paid the mortgagees' interest on the 140*l.*, Whittaker, being also ignorant, at all events for some years, that defendant had obtained so much as 140*l.* Allowing 10*l.* for the preparation of the mortgage-deed, which defendant's brother and former partner said was a fair sum, the defendant would have 70*l.* of Whittaker's in his possession, less the difference of interest which he paid without authority.

Defendant's counsel contended that there was another 30*l.* paid to Whittaker which would reduce the sum to 40*l.*, but the evidence preponderated greatly against this.

A good many letters were put in to show the defendant's conduct in the matter, but with these the Court need not be troubled.

After reading to them the material parts of the evidence, I told the jury that if they were satisfied without reasonable doubt, that the defendant received the 140*l.* from Whittaker, and in violation of good faith, and fraudulently converted to his own use a substantial part of the money which they considered he should have paid to Whittaker, and to Dewsbury for him, they should find him guilty; otherwise not.

The jury found a verdict of guilty.

It must be taken by the court: 1st, that there were no directions in writing to the defendant to apply the money or any part of the proceeds of the deed to any purpose; 2nd, that defendant was entrusted with the mortgage deed with authority to hand it over to the mortgagee or her agent on receipt of the mortgage-money which was to be paid to Dewsbury and Whittaker, less costs of preparing deed; 3rd, that defendant received 140*l.* for Whittaker's use, and in violation of good faith and contrary to the purpose for which such deed and money were entrusted to him, converted a substantial part of the money to his own use.

I respited the judgment and allowed the defendant to go out on bail (to be fixed by magistrates) to appear for judgment if required.

The question for the Court is—does the offence committed by the defendant come within either or both the sections above named, viz., the 75th and 76th sections.

If within both or either of them, the conviction to be affirmed, if not within either a verdict of not guilty to be entered.

13th April, 1874. (Signed) W. R. GROVE.

Bowen, Q.C. (*E. J. Dunn* with him) for the prisoner.—The conviction cannot be sustained. The case is not within the language of either section of the statute. [He was then stopped by the court.]

Torr, Q.C., in support of the conviction.—The first count of the indictment is framed upon the 76th section of the 24 & 25 Vict. c. 76, which enacts that "whosoever, being a banker, merchant, broker, attorney, or agent, and being entrusted with the property of any other person for safe custody, shall, with intent to defraud, sell, negotiate, transfer, pledge, or in any manner convert or appropriate the same or any part thereof to or for his own use or benefit, &c., shall be guilty of a misdemeanor." Here the defendant got the money from Miss Taylor to hold safely until he had fulfilled her injunctions to pay off Dewsbury, and pay the balance to Whittaker. [BLACKBURN, J.—The defendant did not fraudulently dispose of the mortgage security. Lord COLERIDGE, C.J.—And it cannot be said that the money was entrusted to him for safe custody.] The second count is framed upon the 75th section, which enacts that "whosoever having been entrusted as a banker, merchant, broker, attorney, or other agent with any money or security for the payment of money with any direction in writing to apply, pay, or deliver such money or security or any part thereof, or the proceeds or any part of the proceeds of such security for any purpose or to any person specified in such direction, shall in violation of good faith, and contrary to the terms of such direction, convert to his own use or benefit, or the use, &c., such money, security, or proceeds, or any part thereof respectively; and whosoever, having been entrusted as banker, merchant, broker, attorney, or other agent, with any chattel or valuable security, or any power of attorney for the sale or transfer of any share or interest in any public stock or fund, &c., for safe custody or for any special purpose, without any authority to sell, negotiate, transfer, or pledge, shall in violation of good faith, and contrary to the object or purpose for which such chattel, security, or power of attorney shall have been intrusted to him to sell, negotiate, transfer, pledge, or in any manner convert to his own use or benefit, &c., such chattel or security, or the proceeds of the same, or any part thereof, or the share or interest in the stock or fund to which such power of attorney shall relate, or any part thereof, shall be guilty of a misdemeanor." The defendant is brought within that provision by the facts, for he was intrusted with the mortgage deed to hand it over to Miss Taylor on receipt of the mortgage money which was to be paid to Dewsbury and Whittaker. [Lord COLERIDGE, C. J.—He was not intrusted with the proceeds of an improperly pledged mortgage deed.] The case falls within the second part of the enactment in sect. 75. [PIGOTT B.—No. The foundation of the offence is that the defendant must have without authority improperly transferred or pledged a chattel or security intrusted to him for

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safe custody or some special purpose. If he had been indicted under sect. 3 for converting to his own use property bailed to him, I am inclined to think he might have been convicted. BLACKBURN J.—This money was not the proceeds of a chattel converted contrary to good faith.]

LORD COLERIDGE, C.J.—I am of opinion that the conviction should be quashed. The indictment is framed under two sections of the 24 & 25 Vict. c. 96, and consists of two counts, the first framed upon the 76th section, and the second upon the 75th section. The first count upon the 76th section is out of the question, because the defendant has not improperly dealt with any property entrusted to him for safe custody within the meaning of that section. Then the second count is framed upon the 75th section, which seems to consist of two parts: the first part relates to the case of a banker, merchant, broker, attorney, or other agent entrusted with any money or security for the payment of money with any direction in writing to apply, pay, or deliver such money or security, or any part thereof, for any purpose or to any person specified in such direction who shall in violation of good faith and contrary to the terms of such direction, convert the same to his own use or benefit. Now this case is not within that part of the section, for here there is no direction in writing to apply, pay, or deliver the money and security. Then is the case within the second part of the section? This is, "Whosoever having been intrusted as banker, merchant, broker, attorney, or other agent with any chattel or valuable security or any power of attorney for the sale or transfer of any share or interest in any public stock or fund for safe custody, or for any special purpose, without any authority to sell, negotiate, transfer or pledge, shall in violation of good faith and contrary to the object or purpose for which such chattel, security, or power of attorney shall have been intrusted, sell, negotiate, &c., or in any manner convert to his own use or benefit, such chattel or security or the proceeds of the same, &c." Now these are the facts: the defendant, as attorney for Whitaker, had obtained from Miss Taylor a sum of money advanced by her on mortgage with which to pay off Dewsbury's prior advance, and to pay over the balance to Whitaker. The mortgage deed was Miss Taylor's, and the moneys in a certain sense the moneys of Dewsbury and Whitaker. The mortgage deed was properly drawn and delivered to Miss Taylor, but the defendant misappropriated part of the monies advanced by Miss Taylor on the mortgage. But those monies were not the proceeds of the mortgage improperly converted within the meaning of this enactment, which means shall convert either a security or money intrusted to him for safe custody or for any special purpose. The defendant therefore is not brought within the words of the enactment, and the conviction must be quashed.

The rest of the Court concurring.

Conviction quashed.

Attorney for the Prosecutor, *Nordm*, Liverpool.

Attorney for the Defendant, *Sherratt*, Kidsgrave.

HOUSE OF LORDS.

Reported by C. E. MALDEN, Esq., Barrister-at-Law.

April 16 and 17, 1874.

(Before the LORD CHANCELLOR (Cairns), Lord CHELMSFORD, and Lord SELBORNE.)

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ON APPEAL FROM THE FIRST DIVISION OF THE COURT OF SESSION IN SCOTLAND.

Licensing Acts (Scotland)—16 & 17 Vict. c. 67, s. 11—25 & 26 Vict. c. 35, s. 2—"Particular locality within any county, district, or burgh"—Hours of closing.

The Act 25 & 26 Vict. c. 35, fixes the hours for opening and closing licensed houses in Scotland at eight in the morning and eleven at night; and by sect. 2, gives power to the licensing magistrates, at their discretion, to vary those hours "in any particular locality within any county, district, or burgh requiring other hours for opening or closing."

The magistrates of B. defined by metes and bounds a certain part of their burgh, which in fact included all the licensed houses therein, and passed a resolution to the effect that the particular locality so defined required that the licensed houses in it should be closed at ten at night, and inserted that hour in the certificates which they granted:

Held, that the resolution was ultra vires, and an evasion of the statute, for the Act gave them a discretion to select a portion of the whole district, and it was contrary both to the spirit and letter to apply an exceptional rule to what was virtually the whole burgh.

THIS was an appeal from a decision of the first division of the Court of Session in Scotland (the Lord President Inglis, Lord Deas, and Lord Jerviswoode; Lord Ardmillan *dubitante*), delivered on the 20th June 1873, in favour of the respondents, reversing the decision of the Lord Ordinary (Lord Gifford) in favour of the appellants.

The appellants were the magistrates of the burgh of Rothesay; the respondents were the four principal hotelkeepers in that town; and the question raised in the action was, whether the appellants, in resolving at their meeting for granting and renewing publicans' certificates, held on the 15th April 1872, "that in the particular locality within the burgh, situated within the following limits (specifying them), other hours are required for closing inns and hotels and public-houses than those specified in the forms of certificate in schedule A annexed to the Act (25 & 26 Vict. c. 35), applicable thereto," and in granting certain certificates, in the terms of this resolution, had gone beyond the powers conferred upon them by the Public-houses Acts.

The Acts which regulate public-houses and the granting of publicans' certificates in Scotland, are the Acts 9 Geo. 4, c. 58, 16 & 17 Vict. c. 67, and 25 & 26 Vict. c. 35.

The only provision as to the hours for keeping open public-houses, in 9 Geo. 4, c. 58, is contained in the form of certificate, which provides that the hotel, inn, or public-house shall not be kept open during the hours of service on Sundays, nor "at unseasonable hours" on other days.

Sect. 11 of 16 & 17 Vict. c. 67, provides, "that in localities requiring other hours for opening and closing public-houses, inns, and hotels, than those

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was passed. The counsel for the defendants assigned thirty-three grounds of error, some of which were very serious, and on one of which the judgment was reversed. But many were frivolous, and among those were the 20th objection "that there was not any proper continuance from the time when the verdict was given to the following Term when the judgment was pronounced." The House of Lords had to determine for the first time whether this objection was good, and whatever might have been the judgment if there had been a long series of precedents, determining that the absence of a formal entry was fatal, it is obvious that there could be but one decision when it was a case of the first impression. The House thought fit to ask the judges, amongst other questions, whether this was a good ground for reversing the judgment. The unanimous answer of the judges, delivered by Chief Justice Tindal, was that it was not, and the judgment of the House was that it was not. But in delivering the reason for that judgment, Chief Justice Tindal does undoubtedly, at page 250 of the report, state as the ground of his judgment that the day appointed was a day in term for the purpose of the trial, which no one doubts, but he assumes that the trial means in the statute the taking of the

verdict and nothing more. He gives no reasons for this assumption; it had not been argued at the bar of the House, and it evidently was not much considered. If this was part of the *ratio decidendi* of the Lords in that case, we should be obliged to submit to it. But the opinions of judges rendered to the House are but advice to assist the House, as was strongly shown in that very case where the Lords by a majority of one gave judgment contrary to the opinions of a great majority of the judges. But, though not binding on us, the opinion of such an eminent lawyer as Lord Chief Justice Tindal is to be treated with great respect, and the more so as all the other judges subscribed to his opinion, giving this as a reason. We should not, therefore, presume to dissent from that opinion if it were not that we find this point was not argued, and the opinion seems to have been hastily adopted without considering the reasons which we think would have brought those learned persons to an opposite opinion, and which certainly lead us without any doubt to hold that the sentence was in this case properly pronounced. These are all the objections that were made, and we think that none of them are tenable.

Rule refused.

Attorney for defendant, B. Harcourt.



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